

Walter Hallstein-Institut
for European Constitutional Law
Humboldt Universität zu Berlin

WHI-PAPER 12/2019
Reforming the European Foreign Policy

Kalojan Hoffmeister¹

¹ Kalojan Hoffmeister is a student research assistant at Humboldt University Berlin and the Walter Hallstein-Institut for European Constitutional Law.

Table of content

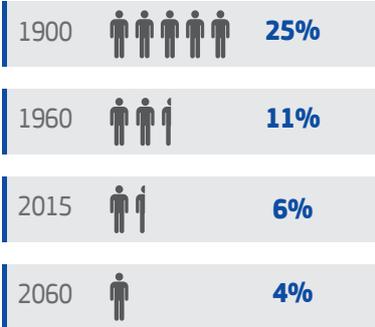
REFORMING THE EUROPEAN FOREIGN POLICY	3
A. INTRODUCTION	3
B. EVOLUTION OF EUROPEAN FOREIGN POLICY	4
C. REFORM PROPOSALS	5
I. ABOLISH UNANIMITY VOTING IN FOREIGN POLICY FIELDS	5
1. <i>Current legal framework and its effects</i>	5
2. <i>Constructive Abstention</i>	6
3. <i>Permanent structured cooperation - PESCO</i>	6
4. <i>Abolishing Unanimity</i>	7
II. LEGAL FRAMEWORK / IMPLICATIONS	8
1. <i>Passerelle clause</i>	8
2. <i>Ordinary treaty revision procedure, Art. 48 TEU</i>	8
III. FOREIGN POLICY AS AN EXCLUSIVE EU COMPETENCE?.....	8
IV. STRENGTHEN THE HIGH REPRESENTATIVE OF THE EUROPEAN UNION FOR FOREIGN AFFAIRS	9
V. ONE EUROPEAN SEAT AT THE UN SECURITY COUNCIL	10
D. CONCLUSION	10

Reforming the European Foreign Policy

A. Introduction

After the fall of the Soviet Empire, the United States established for almost twenty years a certain hegemony in the world. The United States were the only super-power left on the globe and were able to effectively secure their national interest around the world, even if this meant intervening elsewhere. But with the awakening of the Dragon in the east, China, and the more ambitious Russian Federation under Vladimir Putin, this US-American hegemony has increasingly been challenged in the 21st century. The rise of international terrorism and the resurrection of nationalism mainly in Europe have threatened our freedom and democratic understanding. This all seems to have culminated in the election of Donald J. Trump as the US President in November 2016. Since then the Trump administration seems to have chosen a clear path: Leave international institutions, close its borders and fall back into protectionism of all sorts. The *pax americana* has eventually come to an end. A vacuum has been left behind that the new global players are trying to fill. Where does that leave the European continent? The European Union? In such a challenging new international set-up it is clear that the tactics of the last centuries whereby European nation states alone could effectively protect their citizens interest cannot be applied anymore. The international weight even of historically strong nations like France, Germany, the United Kingdom or Italy is crumbling faster and faster. Europe's place in the world is shrinking, diplomatically and demographically, as other parts of the world grow.² In 1900, Europeans accounted for around 25 % of global population. By 2060 they will account for less than 5 %. No single Member State will have more than 1% of the world population by then.³

Europe represents a falling share of the world population



Source: UN Statistical Division and Eurostat, EU27

Figure 1- taken from the White paper on the future of Europe of the European Commission

These are just some examples of the ever and faster changing world we live in. It becomes clear, that European nation states are not suited anymore to deal with the challenges we are facing. It is only by acting together as Europeans that our continent has more influence on the world stage and can protect its citizens interests. After all, defending the European interest ultimately serves national interest as well. Only if Europe as a whole is independent, only then the nation states are too. Only if the European Union is sovereign, European nations remain sovereign.

Against this background this paper shortly reviews Europes foreign policy and submits some reform proposals so that the European Union is better equipped for the future.

² European Commission, White paper on the future of Europe and the way forward.

³ European Commission, White paper on the future of Europe and the way forward.

B. Evolution of European Foreign Policy

Historically, we have seen some slow changes in the field of European foreign policy. With the importance of European supranational trade policy on the global stage, Member States realised that a common foreign policy is inevitable. First came the European political cooperation (EPC) in the 1970s followed by the Common Foreign and Security Policy (CFSP) in the Maastricht treaty (November 1993). These were first steps towards a common European approach to foreign politics. However, their nature was and still is to a large extent profoundly intergovernmental. We saw the incapability to act as one multiple times: During the Yugoslavian war (from 1991 to 1995) the then European Community could not find a lasting common position on the conflict. The genocide in Srebrenica took place on Bosnian territory and European nation states were unable to stop these atrocities. One had to wait until the US government decided to intervene within the framework of NATO which ended the war with the Dayton Accords.

The same goes for the US led war in Iraq in 2003. European governments did not find a common approach. Whilst many European countries supported the invasion and some like the UK and Poland participated in it, others like France, Germany or Greece opposed it. Similarly, during the Arab spring in 2011 the European reactions were characterized by multiple dissonances so that a common approach to Libya, Syria and others was doomed to fail. Member States did not want to give up their *grandeur* for the greater good. The Lisbon treaty (2009) tried to fix this. It introduced the post of the High Representative of the European Union for foreign affairs and tried hereby to foster the coordination of Member States. The High Representative became a Vice President of the supranational European Commission and at the same time received the task of chairing the meetings of EU foreign ministers in the Council. In recent years we have had some good examples of a coordinated, common approach to Foreign Policy issues under the leadership of Federica Mogherini. One of her main successes is without any doubt the Nuclear deal with Iran. The High Representative of the European Union, representing the EU as a whole, played a significant role in getting this agreement done. A perfect example of how a unison European voice can influence the world for the better. However, in the case of Ukraine, the analysis is a bit different. It is true that Member States collectively condemned the Russian aggression on Ukraine's sovereign territory. They agreed on a non-recognition policy and imposed economic sanctions on the Russian Federation. Meanwhile, it was not the High Representative that was given the mandate to represent the Union in the Minsk talks. On the contrary, an unusual "Normandy format" was formed. Germany and France were sitting at the table together with the Presidents of Russia and Ukraine trying to act as the legitimate representatives of the European interest. It was there again the "big" countries that were fostering their solo career and trying to profile themselves internationally. The result is clear: True, Minsk I and II were brokered, but the conflict is still ongoing and hasn't been solved yet. Crimea's annexation is a fact. International law was broken, and the European reaction was weak. Similarly, the European Union failed to take a clear stance on the South China Sea dispute,⁴⁵ due to opposition of several Member States, including Greece and Hungary. The EU thus was unable to adopt a statement in clear support of the Permanent Court of Arbitration ruling of July 2016 stating that China's claims to 85 % of the South China Sea violates the economic and sovereign rights of the Philippines under the 1982 UN Convention on the Law of the Sea. The blocking by the above-mentioned Member States came out of fear of China disinvesting from their economies.⁶ With regards to China, the EU also failed for the first time ever in

⁴ Watered down and delayed statement by the EU in the case brought by the Philippines before the Permanent court of Arbitration - European Council Press releases. (2016, 03 11). Retrieved from <https://www.consilium.europa.eu/en/press/press-releases/2016/03/11/hr-declaration-on-bealf-of-eu-recent-developments-south-china-sea/>

⁵ EU's statement on South China Sea reflects divisions. (2016, July 15). Retrieved from Reuters: <https://www.reuters.com/article/southchinasea-ruling-eu-idUSL8N1A130Y>

⁶ European Commission Fact Sheet; Rising to the global challenge – the case for qualified majority voting in common foreign and security policy.

June 2017 to make any statement at the United Nations Human Rights Council, after Greece again blocked a common statement that would have criticized China's human rights record.⁷

But besides tensions internationally, a missing European way of doing foreign politics can also contribute to tensions within the Union. When some countries try to profile themselves whilst others are sitting at the back benches without much of a say in these matters, not being taken seriously, condemned to follow, tensions inevitably arise. These tensions can potentially lead to greater divisions in other areas and ultimately lead to the disfunction of the Union in other important matters.

We need a strong European voice in the world that can actually make a difference. But in order to achieve this profound and radical reforms are necessary.

C. Reform Proposals

I. Abolish Unanimity voting in Foreign Policy fields

1. Current legal framework and its effects

The Common Foreign and Security Policy (CFSP) is enshrined in a special chapter of the treaties “is subject to specific rules and procedures” (Art. 24 (1) TEU) and remains at its core an intergovernmental mechanism rather than a community tool.

According to Art. 31 (1) TEU Foreign Policy decisions “shall be taken [...] by the European Council and the Council acting unanimously”.

The European Heads of States and Governments (European Council) are responsible to define the “fundamental” questions, namely to lay out the strategic interests and objectives of the Union (Art. 22 (1) TEU). They may also determine specific Union positions and request their Ministers to implement them (Art. 31 (2) 2nd indent TEU). If a foreign policy question is not dealt with at the top level, the Ministers themselves in the Council may establish the Union position in all other fields, however also subject to unanimity (Art. 31 (1)). It follows from this system, that the unanimity requirement governs basically all CFSP acts.

The only exceptions are stated in Art. 31 (2) TEU, namely when the Council is asked to “implement” EU positions (which have been previously decided unanimously by either the European Council or the Council itself). This helps the Union to carry out action, once it has agreed about the main issues. However, it does not help if there is a disagreement in the first place. But even in this case a member of the Council can declare that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority. Then, the Council may, acting by qualified majority, request that the matter be referred to the European Council for decision by unanimity (Art. 31 II subparagraph 3 TEU). The possibility of a blocking veto thus remains.

This inflexibility undermines Europe’s effectiveness in responding rapidly and credibly to new arising challenges. The unanimity method requires time to agree on a minimum consensus and often leads to no joint position at all. The biggest obstacle to the CFSP remains the Member States’ unwillingness to negotiate viable compromises and to permit the CFSP and the High Representative to encroach on national prerogatives.⁸ This leads to a situation where the EU as a collective actor is missing in a number

⁷ Greece blocks EU statement on China human rights at U.N. (2017, June 18). Retrieved August 13, 2019, from Reuters: <https://www.reuters.com/article/us-eu-un-rights/greece-blocks-eu-statement-on-china-human-rights-at-u-n-idUSKBN1990FP>

⁸ Qualified Majority Voting and Flexible integration for a More Effective CFSP? (2018, June). Retrieved from SWP-Berlin: https://www.swp-berlin.org/fileadmin/contents/products/comments/2018C25_bdk_kmp_orz.pdf

of important international conflicts, as stated above. The Council has tried to solve this problem and as a matter of fact the treaties provide a number of legal possibilities for closer cooperation.

The Enhanced Cooperation instrument allows a group of at least nine Member States to implement measures if all Member States fail to reach an agreement. Other EU countries keep the right to join when they want. The procedure is designed to overcome paralysis, where a proposal is blocked by an individual country or a small group of countries that do not wish to be part of the initiative.⁹ This tool was first introduced in 1999 with the Treaty of Amsterdam and later expanded in the Lisbon treaty. Enhanced cooperation is already used in a couple of fields such as for the European Unitary Patent, Divorce Law and is about to be put in place for projects like the European Public Prosecutors office and discussed with respect to a European financial transaction tax. So indeed, the enhanced cooperation way seems to be a way considering, at first sight. However, according to Art. 329 (2) TEU when it comes to CFSP, enhanced cooperation requires there again unanimity. As a result, it can be vetoed by a single Member State, which does not solve the problem.

2. Constructive Abstention

Another option to overcome this institutional deadlock is the possibility of constructive abstention. A Member State is given the possibility to abstain in order not to block a decision taken by the other Member States. The decision taken would not oblige the respective Member State, but it will still have to accept that the decision commits the Union.¹⁰ One could imagine this becoming a general rule in CFSP fields. Yet, such a constructive abstention in CFSP fields has only once been used, namely in 2008 by Cyprus in the vote on the EUs EULEX mission to Kosovo.

3. Permanent structured cooperation - PESCO

The third more prominently known legal tool in the area of security and defense is known under the acronym of PESCO – permanent structured cooperation – outlined in Articles 42 (6) and 46 TEU as well as Protocol 10. As stated by the European External Action Service (EEAS) “*PESCO is a Treaty-based framework and process to deepen defense cooperation amongst EU Member States that are capable and willing to do so. The aim is to jointly develop defense capabilities and make them available for EU military operations. This will thus enhance the EU’s capacity as an international security actor, contribute to the protection of EU citizens and maximise the effectiveness of defense spending.*”¹¹ This provision sounds very good and indeed PESCO has delivered some very tangible results in fields of common training, in operational domains and in joint procurement. (see Figure 2).

⁹ Enhanced Cooperation Already a reality in the EU, Retrieved from European Commission, https://ec.europa.eu/commission/sites/beta-political/files/enhanced_cooperation_already_a_reality_in_the_eu_1.pdf

¹⁰ Constructive Abstention, Retrieved from EUR-Lex Glossary, <https://eur-lex.europa.eu/summary/glossary/abstention.html>

¹¹ Permanent Structured Cooperation (PESCO) factsheet. (n.d.). Retrieved from EEAS homepage: https://eeas.europa.eu/headquarters/headquarters-homepage/34226/permanent-structured-cooperation-pesco-factsheet_en



Figure 2- modified graphic taken from EEAS site

However, the permanent structured cooperation cannot and should not be seen as the final institutional solution to Europe's Foreign Policy approach. PESCO only operates in the security and defense area and can only be seen as a temporary solution. It is only used punctually and does not involve all Member States, which harbours the risk of further division within the Union. Besides, PESCO does by far not fully guarantee strategic autonomy of the EU. The need of further and deeper reforms is evident.

4. Abolishing Unanimity

In the end the real way to overcome the problem and to give our European continent a stronger common voice would be to abolish the unanimity rule in the field of CFSP. Prominent voices have been calling for such a step to be taken. Guy Verhofstadt, Wolfgang Ischinger (chairman of the Munich Security Conference),¹² German Foreign Minister Heiko Maas,¹³ Commission President Juncker¹⁴. The latter stated that he would like to “broaden the scope of Qualified Majority Voting in Common Foreign and Security Policy [...]” especially with regards to positions on human rights issues in international fora, decisions to establish sanctions regimes, decisions on civilian Common Foreign and Security Policy missions.¹⁵ Last but not least even the leaders of Germany and France – Angela Merkel and Emmanuel Macron - would like to “*explore possibilities of using majority vote in the field of the Common Foreign*

¹² Qualified Majority Voting and Flexible integration for a More Effective CFSP? (2018, June). Retrieved from SWP-Berlin: https://www.swp-berlin.org/fileadmin/contents/products/comments/2018C25_bdk_kmp_orz.pdf

¹³ Maas will Einstimmigkeit in der EU-Außenpolitik. (2018, September 02). Retrieved from Welt: <https://www.welt.de/newsticker/news2/article181392684/Diplomatie-Maas-will-Einstimmigkeit-in-der-EU-Aussenpolitik-abschaffen.html>

¹⁴ Juncker bei Münchner Sicherheitskonferenz: „Wir müssen weltpolitikfähig werden“. (2018, February 19). Retrieved from Europäische Kommission Vertretung in Deutschland: https://ec.europa.eu/germany/news/20180219-juncker-sicherheitskonferenz_de

¹⁵ State of the Union 2018: Making the EU a stronger global actor – European Commission proposes more efficient decision-making in Common Foreign and Security Policy. (2018, September 12). Retrieved from European Commission Press releases: https://europa.eu/rapid/press-release_IP-18-5683_en.htm

and Security Policy” according to the Meseberg declaration (June 2018)¹⁶. The need of majority voting in the field of CFSP becomes more and more evident. It is a step that must be taken.

II. Legal framework / implications

1. Passerelle clause

Qualified majority voting (QMV) in the CFSP could be introduced by means of a simplified revision procedure. Article 31 (3) TEU explicitly provides that “The European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority”. This seems to be a *lex specialis* provision to Article 48 (7) TEU with the consequence that neither a national parliament could object nor that the European Parliament would have to give its consent. In any case decisions with military and defense implications are excluded (Art. 31 (4)). While the passerelle clause therefore seems more actionable just one national leader could still block the activation of qualified majority voting. Therefore, the only way forward would probably be a treaty change by the ordinary treaty revision procedure (Art. 48 TEU).

2. Ordinary treaty revision procedure, Art. 48 TEU

A change from unanimity to QMV under the ordinary treaty revision procedure will need a convention approval by Member States and the ratification in national parliaments. In the case of Germany especially, the Bundesverfassungsgericht, Germany’s federal constitutional court, is an additional obstacle. In its Lisbon ruling it laid out that the use of the military is an exclusive national prerogative. Even if there was the political will for such a treaty change, one will face a number of other legal obstacles. However, the importance of such a step is clear. If the Member States want to be strong global actors, they can achieve this only within the framework of the European Union. The need of a competent and sovereign European Union vis a vis the transatlantic tensions, Putin’s Russia and an expansive China is more clear than ever.

III. Foreign Policy as an exclusive EU competence?

Just like the Union has the exclusive competence in fields of competition rules for the internal market, the customs union and common trade policy (Art. 3 TFEU) it could be given the exclusive competence in the Foreign Policy as well. This would once and for all end the internal pit fights between Member States over who and how European foreign policy should be conducted.

At the same time, Europe also benefits from the expertise and personnel of its 28 foreign ministries. A middle way could be taken to better coordinate at European level, but to also allow separate Member State action in areas where there is no common interest and hence no EU position is needed. Such a policy is already carried out in the area of development and humanitarian aid, where both levels have “parallel competence” and should complement each other (Arts. 211-214 TFEU).

In the long term, a real European government, democratically legitimised by a strong European Parliament, with a European Minister for Foreign Affairs is needed. Internal decision-making would still lie in the hands of the Council upon a proposal from the European Minister who will be supported by affected Member States - that have a strong strategic interest in the particular case and which have been given a mandate by the Council - thus making the European voice more vocal on the international stage.

¹⁶Meseberg Declaration . (2018, June 19). Retrieved from France Diplomatie: <https://www.diplomatie.gouv.fr/en/country-files/germany/events/article/europe-franco-german-declaration-19-06-18>

Such a profound reform will show the world that the continent is truly united and ready to stand together. It will give Europe as a whole a strong voice, make the EU a heavy weight on the international scene and ultimately contribute to a stronger international cooperation and peace. If our continent takes this step it will not only benefit Europeans but the world. We will make an example of how standing together makes us stronger and give incentives for others to follow our approach.

IV. Strengthen the High Representative of the European Union for Foreign Affairs

The Lisbon treaty created the position of the High representative of the European Union for foreign affairs (HRep) in order to strengthen European coordination on Foreign Policy. Art. 18 TEU states: *“The High Representative shall conduct the Union's common foreign and security policy. He (She) shall contribute by his (her) proposals to the development of that policy, which he (she) shall carry out as mandated by the Council. [...] He (she) shall ensure the consistency of the Union's external action. He (She) shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action.”*

One will certainly have to acknowledge that an appointment of a common High Representative led, to some extent, to better coordination within the Council. The example of how Mrs. Mogherini managed the crises in Iran on behalf of the Union is without any doubt a fruit of this. She had a strong mandate because Member States gave her one. However, in the case of Syria Member States seemed to be too far apart. In the end neither Member States nor the EEAS played any substantial role in the resolution of the conflict. To prevent something similar in the future and give the EU as a whole an even more robust voice, the High Representative must be institutionally strengthened.

Firstly, let's call a cat a cat. The High Representative was designed to be a Union Minister for Foreign Affairs. The Treaty establishing a Constitution for Europe (TCE) foresaw such a position in Art. I-28 TCE. However, with the failure of the Treaty in 2004, Member States tried to stay away from any symbolic formulations and so turned the Union Minister for Foreign Affairs into the High Representative. This is silly and does not make it easier for European citizens to understand the European Union they live in. Therefore, let's call a cat and finally start calling the High Representative what she really is and should be: a European Foreign minister.

A second step that can be discussed is to integrate the EUs neighbourhood policy, currently under the leadership of commissioner Hahn, into the EEAS. This would permit for greater consistency and coordination of Europe's foreign relationships with neighbouring partners. Neighbourhood policy is doubtlessly part of the external relations of the European Union. Therefore, it seems only logical to integrate it into the EEAS, which for its part should be under the leadership of a European foreign minister part of a European government.

To further strengthen the High Representative Role in the institutional framework of the Union one could think of integrating the EUs Special Representatives (EUSpR) fully into the EEAS. Hereby the HRep could nominate by herself the EUSpR without the need of consent by Member States. This would lead to further and better coherence within the Union and with regards to the common external action. Also, the fact that there is no deputy HRep seems odd. The High Representative has a very intense and challenging job. A deputy High Representative (deputy Foreign Minister) would be of much needed help.

V. One European seat at the UN security Council

The debate over a single European seat at the UN security Council is not new. However, lately in his speech about Europe at the Humboldt University in Berlin, vice chancellor Olaf Scholz has once again mentioned this idea. In his speech Mr. Scholz called on France to turn its seat at the UN security Council into a joint EU seat.¹⁷ The French response was quick: "non, merci".

Yet, a joint EU seat at the UN security Council would be a major step forward. It will for one contribute to a greater cohesion of the external representation of European interests and thus make the EUs voice stronger on the world stage. And secondly, it would also have an immense symbolic contribution. By converting France's seat into a joint European one we would show the world and our citizens that we have truly overcome the past centuries world order and created a stronger, more peaceful, supranational entity that is indeed speaking with one voice in the world.

D. Conclusion

The only way by which the European Union and its citizens can face the growing number of challenges is by uniting and acting even stronger together. While national politicians, administrations and governments are still keen on keeping their *prestige*, the geopolitical order is changing very fast. Politicians must understand that by weakening the European Union they are also weakening their nation states and citizens. In a globalized world and especially in a world full of tensions as we see them nowadays, there will be no strong nation state if there is no strong European Union. Let's finally have the courage to take the next big leap forward, the next big step forward by creating an effective, democratic and strong new way of doing European Foreign policy!

Kalojan Hoffmeister

kalojan.hoffmeister@rewi.hu-berlin.de

¹⁷ Olaf Scholz Speech: "It is in our own interest to ensure that Europe ist sotrong, sovereign and fair" (2018, November 28). Retrieved from Federal Ministry of Finance: <https://www.bundesfinanzministerium.de/Content/EN/Reden/2018/2018-11-28-Europe-speech-HU-Berlin.html>