

# European Union Treaties

A Commentary

von

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gated to implement the decision. However, the abstaining State accepts that the decision is binding for the Union. It may not impede Union action implementing the decision. The other Member States, however, must respect the abstaining State's position.

In this way the Member State concerned may avoid being bound by the decision without having to block it by a vote against it. However, even in this procedure the **decision will not come about** if at least **one third of the Council members** abstains in this way and if these abstaining members represent States **comprising one third of the Union population**.

### III. Qualified majority

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#### 1. Basic rule

In the **cases named in para. 2** the Council is authorized to adopt decisions by qualified majority in derogation of para. 1.<sup>1</sup> The qualified majority in the transitional period until 31 October 2014 is defined in Article 3 para. 3 of the Protocol (No 36) on transitional provisions.<sup>2</sup>

Voting by qualified majority is **allowed in the following four instances:**

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- decisions on defining a Union action or position (Articles 28, 29 TEU) which are based on a decision of the European Council concerning the Union's strategic interests and objectives (Article 22 para. 2 TEU);
- decisions on defining a Union action or position adopted on the proposal of the High Representative following a specific request of the European Council, and made on the European Council's own initiative or that of the High Representative;
- decisions implementing an action or a position of the Union; or
- appointing of a special representative (Article 33 TEU).

For supplementing purposes a **specific bridging clause ('passerelle')** was introduced by the Treaty of Lisbon (2007) in para. 3. Now the European Council may unanimously authorize the Council to adopt decisions by qualified majority also in other cases.

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#### 2. Right to veto

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A vote by qualified majority will not be taken, if a Council member declares that it will oppose the decision for **vital reasons of national policy**. These reasons must be stated.

The High Representative will then consult the opposing Member State and search for an acceptable solution. If these endeavours remain unsuccessful, the Council may by qualified majority refer the matter to the European Council. The European Council may then deal with the matter and eventually take a decision by unanimity (para. 2 subpara. 2). This approach complies with the basic idea of the 'Luxembourg compromise' of 1966 (see Art. 16 TEU mn. 31 et seq).

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#### 3. Exclusion of military or defence implications

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A decision cannot be adopted by qualified majority if the matter touches on military or defence issues (para. 4). In such a case **unanimity** is requested without any exception. The rules on (simple or constructive) abstention, however, can be applied also in these matters.

<sup>1</sup> See Article 16 TEU mn. 24 et seq.

<sup>2</sup> See Article 16 TEU mn. 27.

## IV. Simple majority

In procedural questions the Council decides by a simple majority. This requires the assent of the majority of its members (compare Article 238 para. 2 TFEU).

*Article 32 [Member States' cooperation in the Council]*  
(ex Article 16 TEU)

Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.

When the European Council or the Council has defined a common approach of the Union within the meaning of the first paragraph, the High Representative of the Union for Foreign Affairs and Security Policy and the Ministers for Foreign Affairs of the Member States shall coordinate their activities within the Council.

The diplomatic missions of the Member States and the Union delegations in third countries and at international organisations shall cooperate and shall contribute to formulating and implementing the common approach.

- 1 Correspondingly to Article 25 lit. c TEU the Treaty in Article 32 establishes the Member States' **obligation to consult each other** regarding any matter of foreign and security policy of general interest in order to determine a common approach.
- 2 The Lisbon Treaty (2007) has specified this obligation in Article 32 TEU. The **mutual consultation and cooperation** takes place in the **European Council and the Council**. This should ensure that the overall political position of the Union is strengthened by the Member States' convergent and concerted action. Accordingly every Member State is obliged to **consult** the other Member States, if its actions on the international level might touch the Union's interests. In practice it is considered very important that also the smaller Member States are included.<sup>1</sup> The Member States also have to guarantee by **convergent action**, that the Union may assert its interests (Articles 22, 26 TEU) and values (Articles 2, 21 para. 2 lit. a TEU) on the international scene. And the Member States owe each other **solidarity** (compare Article 24 para. 3 TEU). All these obligations are of **fundamental importance** for the Union; their fulfilment is necessary for enabling the Union to seriously conduct a Common Foreign and Security Policy as it is expected according to the Treaty.
- 3 The European Council or the Council may define a common approach of the Union in this spirit. According to that decision the **High Representative** and the Member States' **Ministers for Foreign Affairs** coordinate their activities within the Council. As is already provided for in Article 26 para. 2 subpara. 2 TEU, the Council and the High Representative bear a special responsibility for the unity, consistency and effectiveness of action by the Union.

<sup>1</sup> Streinz/Regelsberger/Kunzelmann, Article 32 mn. 10.

The obligation to cooperate continues with the **delegations** in international organiza- 4  
tions and at international conferences as well as with the activities of **diplomatic and  
consular representations**. This is emphasized by para. 3. These obligations are further  
specified in Articles 34 and 35 TEU.

**Article 33 [Special representative]**  
(ex Article 18 TEU)

The Council may, on a proposal from the High Representative of the Union for  
Foreign Affairs and Security Policy, appoint a special representative with a mandate  
in relation to particular policy issues. The special representative shall carry out his  
mandate under the authority of the High Representative.

The Council may appoint a **special representative** for particular policy issues. Its de- 1  
cision is adopted on a proposal from the High Representative, whereby as a rule the vote  
is taken by a qualified majority (Article 31 para. 2 TEU, 4th indent).

The **task** of the special representative consists of **assisting the High Representative** in 2  
effectively approaching particular EU policy issues in the relevant countries or regions.  
The special representative should be recognized as the 'voice' and 'face' of the EU. Activi-  
ties within the framework of the CFSP are politically accompanied by the CFSP on-site.

**In practice** there were special representatives in June 2013 working on issues related to 3  
Afghanistan, the African Union, Bosnia and Herzegovina, Central Asia, the Horn of  
Africa, Kosovo, the Middle East Peace Process, the South Caucasus and Georgia, the  
Southern Mediterranean region as well as Sudan and South Sudan. Some of these special  
representatives bear a 'double hat'. They are e.g. simultaneously responsible for the EU  
representation at the place in question.

Within the framework of his general competences the High Representative may also 4  
appoint '**special envoys**'. This has happened e.g. in December 2007 when the former Ital-  
ian minister of justice *Fassino* became special envoy for Birma/Myanmar.

**Article 34 [Coordination on international level]**  
(ex Article 19 TEU)

1. Member States shall coordinate their action in international organisations and  
at international conferences. They shall uphold the Union's positions in such forums.  
The High Representative of the Union for Foreign Affairs and Security Policy shall  
organise this coordination.

In international organisations and at international conferences where not all the  
Member States participate, those which do take part shall uphold the Union's positions.

2. In accordance with Article 24(3), Member States represented in international  
organisations or international conferences where not all the Member States partici-  
pate shall keep the other Member States and the High Representative informed of any  
matter of common interest.

Member States which are also members of the United Nations Security Council will  
concert and keep the other Member States and the High Representative fully  
informed. Member States which are members of the Security Council will, in the  
execution of their functions, defend the positions and the interests of the Union,  
without prejudice to their responsibilities under the provisions of the United Nations  
Charter.

TEU Article 34

Chapter 2. Specific provisions on CFSP

When the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union’s position.

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I. General coordination at the international level

Para. 1 provides an **obligation of the Member States** in the sense of a general duty of loyalty to coordinate their activities in international organizations and at international conferences.<sup>1</sup> They have to uphold the Union’s positions in these fora. The term ‘position’ used here must be understood in a more general way compared to how it is used in describing the decision mentioned in Article 15 TEU.<sup>2</sup> The provision as understood in para. 1 is concerned with explaining any standpoint of the Union and advocating its interests, as it is also the task of the High Representative according to Article 27 para. 2 TEU. The High Representative is responsible for organizing this coordination (see sub-para. 1 in para. 1). A more detailed description of the Union’s relations to international organizations is presented in Articles 220, 221 TFEU.

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II. Not all Member States represented

1. General duty

If not all the Member States are represented in an international organisation or at an international conference, this does not cause a reduction of the Member States’ duties. The Member States represented in such a forum are still obliged to **coordinate their actions** and advocate the **Union’s political goals**.

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2. Mutual information

Since there is a general obligation of the Member States to coordinate their actions in international fora, those represented there also must keep the other Member States and the High Representative informed about **any matter of common interest**. Moreover their duty to coordinate their actions with all the Member States remains untouched. Para. 2 refers explicitly to Article 24 para. 3 TEU and consequently to the duty to support the Union’s external and security policy in a spirit of loyalty and mutual solidarity. Further commitments may arise from legally binding decisions on operative actions and on political positions of the Union and their implementation (compare Article 31 para. 2, 3<sup>rd</sup> indent TEU).

<sup>1</sup> See already Article 32 TEU and Articles 220, 221 TFEU; comp. *Sucharipa*, Die Gemeinsame Außen- und Sicherheitspolitik (GASP) der Europäischen Union im Rahmen der Vereinten Nationen, in: Die Vereinten Nationen vor globalen Herausforderungen, (2011), 351–369.

<sup>2</sup> Comp. GHN/*Kaufmann-Bühler*, EUV Article 34 mn. 4.

**3. UN Security Council matters** 4

Membership in the UN Security Council represents a special case of an only partial representation of the EU Member States in an international institution<sup>3</sup>. In so far it is emphasized in para. 2 subpara. 2 that the EU members who simultaneously are members of the Security Council have an **obligation to concert** and keep the other members and the High Representative fully informed. Whether there is a more far-reaching duty to coordinate their positions may be doubtful according to the wording of the provision. The answer, however, must be positive. Although subpara. 2 of para. 2 does not expressly refer to para. 1, neither the general obligation of the EU members of the Security Council to coordinate their actions nor their duty to uphold the Union's positions has been limited,<sup>4</sup> albeit 'without prejudice to their responsibilities under the provisions of the United Nations Charter'.

This is **also true for France and the United Kingdom** as permanent members of the Security Council. The Lisbon reform has abandoned any specific reference to the **permanent members**. Their former obligation to ensure the defence of the positions and the interests of the Union in the execution of their functions 'without prejudice to their responsibilities under the provisions of the United Nations Charter' has been extended by the Lisbon Treaty (2007) to all EU members of the Security Council. If one accepts that the permanent members of the Security Council still have an enhanced responsibility as they are able to prevent a decision by using their 'veto' right it might be possible that in the execution of their special functions they enjoy a 'certain freedom of maneuvering'.<sup>5</sup> 5

If the Union has defined its position (Article 29 TEU) on an issue which is on the Security Council's agenda, the EU members represented in the Security Council are obliged to **request that the High Representative be invited** to present the Union's position (para. 2 subpara. 3). In practice, more often this task is assumed by a member of the EU delegation to the UN. Such invitations are issued according to Rule 39 of the Security Council's Rules of Procedure. 6

**Article 35 [Cooperation on diplomatic and consular level]**  
(ex Article 20 TEU)

**The diplomatic and consular missions of the Member States and the Union delegations in third countries and international conferences, and their representations to international organisations, shall cooperate in ensuring that decisions defining Union positions and actions adopted pursuant to this Chapter are complied with and implemented.**

**They shall step up cooperation by exchanging information and carrying out joint assessments.**

**They shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries as referred to in Article 20(2)(c) of the Treaty on the Functioning of the European Union and of the measures adopted pursuant to Article 23 of that Treaty.**

<sup>3</sup> Marchesi, The EU common foreign and security policy in the UN Security Council, 15 E.F.A. Rev. (2010), 97–114; Mayr-Singer/Villotti, Die EU als neuer 'Big Player' in den Vereinten Nationen?, VN 2012, 154–158.

<sup>4</sup> CR/Cremer, Article 19 mn. 3.

<sup>5</sup> GHN/Kaufmann-Bühler, EUV Article 34 mn. 15.

TEU Article 36

Chapter 2. Specific provisions on CFSP

- 1
- By this provision the duty to cooperate in matters of the CFSP ‘in a spirit of loyalty and mutual solidarity’ is extended to the **diplomatic and consular missions** of the Member States and to the Union’s delegations and the corresponding representations at international organizations (Article 24 para. 3 subpara. 1 TEU; compare also Article 32 para. 3 TEU and Article 221 TFEU). The representatives are obliged to mutually inform each other and to coordinate their activities in order to also ensure on the spot the adherence to and implementation of the positions (Article 29 TEU) and actions (Article 28 TEU) defined by the Council.
- 2
- Para. 2 describes as **tools of cooperation** the exchange of information and the carrying out of joint assessments. Moreover one also has to think of acts showing external coherence in guest countries, such as common statements towards that country’s government (*démarches*) or addressing the public.<sup>1</sup>
- 3
- In addition para. 3 refers to extending **diplomatic and consular protection in third countries to Union citizens**<sup>2</sup>, whose home country does not have a representation in the state of residence. In so far Articles 20 para. 2 lit. c and Article 23 TFEU include detailed provisions.

Article 36 [Participation of the European Parliament]

(ex Article 21 TEU)

The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament.

The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.

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1

I. General remarks

The position of the European Parliament in the area of the CFSP was slightly strengthened by the Lisbon Treaty (2007)<sup>1\*</sup>. However, in view of the **largely executive character of the foreign and security policy** the European Parliament still is not included in the procedures leading to the decisions listed in Article 25 TEU.

<sup>1</sup> Comp. GHN/Kaufmann-Bühler, EUV Article 35 mn. 10.

<sup>2</sup> Ianniello Saliceti, The protection of EU citizens abroad, 17 E. P.L. (2011), 1, 91–109.

<sup>1\*</sup> Comelli, The democratic accountability of the CSDP and the role of the European Parliament, in: Comelli, EU crisis management, (2010), 79–99.

II. Information and consultation 2

Article 36 TEU confers to the **European Parliament** the right to be consulted in relation to the main aspects and the basic choices of the CFSP. It has a **right of information about the development of the policy in this area**. Informing and consulting the European Parliament is the responsibility of the High Representative, who can also use the special representatives (Article 33 TEU) in briefing the European Parliament. Since the provision was reformed by the Treaty of Lisbon (2007) it is expressly emphasized that the rights of the Parliament also include the Common Security and Defence Policy (CSDP) (para. 2 s. 2).

The views of the European Parliament must be duly taken into consideration in the procedures leading to decisions. The High Representative must take care that this actually happens (para 1 s. 2).

The European Parliament may on its own initiative **address questions or make recommendations** to the Council or the High Representative. Twice a year (not only once as it was the rule before the Lisbon reform) it **holds a debate** on the progress in implementing the CFSP, including the CSDP (para 2).

III. Budget procedures 5

A **more intensive influence** of the European Parliament on the CFSP is to be expected **by its budgetary functions**. This is due to the fact that not only the administrative expenditures, but – since the Treaty of Amsterdam (1997) – as a rule also the operating expenditures of the CFSP are charged to the EU budget; in the latter case, however, except for the costs caused by measures with military or defence implications or where the Council unanimously decides otherwise (Article 41 paras 1 and 2 TEU). To the extent the EU budget is affected, the European Parliament decides in principle on an equal footing together with the Council.<sup>2</sup>

Article 37 [International agreements]  
(ex Article 24 TEU)

**The Union may conclude agreements with one or more States or international organisations in areas covered by this Chapter.**

This Article is concerned with concluding agreements with third States or international organisations on CFSP issues. The size of the provision's content was reduced by the Lisbon Treaty (2007) from six paragraphs to only one. This was due to the fact that international legal personality was conferred from the former European Community to the European Union (Article 47 TEU). Thus the Union became capable to enter international treaties in the CFSP areas. The procedure of concluding agreements is governed by Article 218 TFEU.

<sup>2</sup> Comp. Article 314 TFEU and Interinstitutional Agreement between the EP, the Council and the Commission on budgetary discipline and sound financial management (2006/C 139/01) para. 42.



Article 38 [Political and Security Committee]  
(ex Article 25 TEU)

Without prejudice to Article 240 of the Treaty on the Functioning of the European Union, a Political and Security Committee shall monitor the international situation in the areas covered by the common foreign and security policy and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or of the High Representative of the Union for Foreign Affairs and Security Policy or on its own initiative. It shall also monitor the implementation of agreed policies, without prejudice to the powers of the High Representative.

Within the scope of this Chapter, the Political and Security Committee shall exercise, under the responsibility of the Council and of the High Representative, the political control and strategic direction of the crisis management operations referred to in Article 43.

The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation.

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1

I. General overview

Originally the TEU provided for a Political Committee which consisted of the political directors of the Member States’ foreign offices.<sup>1</sup> This Committee, serving within the framework of the Common Security and Defence Policy<sup>2</sup>, was converted by the Amsterdam Treaty (1997) into a **Political and Security Committee (PSC)**. On 22 January 2001 the Council adopted the Decision 2001/78/CFSP on the establishment of the PSC. The Committee is meant to function as the **‘engine’ of the CFSP and particularly of the CSDP**. It is supposed to play a central role in defining the EU’s reaction to a crisis and assisting in its implementation. The PSC meets on two levels: as a main body on the level of the political directors of the Member States’ foreign affairs ministries, and periodically as the body of deputies on the level of the Member States’ ambassadors at Brussels. It is chaired by a member of the European External Action Service (EEAS).

2

II. Tasks

The main task of the PSC has been the **monitoring of the international situation** in the CFSP areas. It also contributes to defining policies by delivering opinions to the Council. This is done at the request of the Council, of the High Representative or on its own initiative.

<sup>1</sup> Comp. in detail GHN/Kaufmann-Bühler/Meyer-Landrut, EUV Article 38 mn. 1 et seq.

<sup>2</sup> Article 42 TEU mn. 2 and 3.