The Treaty Amendment Procedures and the Relationship between Article 31(3) TEU and the General Bridging Clause of Article 48(7) TEU

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Introduction

The Treaty of Lisbon has led to profound changes in the constitutional structure of the European Union, including the abolition of the pillar structure and unification of the formerly separate (EU/EC) Treaties into a monolithic organisational structure with a binary Treaty structure.[1] The Treaty on European Union as a constituent framework Treaty[2] lays down the fundamental principles and structures of the Union, including the provisions on the revision of the Treaties, which are supplemented by special amendment provisions with limited scope. However, the amendment rules are not free of discrepancies. Namely, there seems to be a contradiction between the general revision procedure contained in Article 48 TEU and the sector-specific revision procedure for the Common Foreign and Security Policy included in Article 31 TEU. While referring to the same part of the Treaty, they make different procedural arrangements. The aim of this contribution is to take a look at the general framework of Treaty revisions and answer some unresolved questions. The article will also analyse the relationship between the general and the Common Foreign and Security Policy bridging clause and try to resolve the alleged contradiction between these two provisions. To this end, the article will first consider the current Treaty revision procedures, especially the simplified revision procedure under Article 48(7) TEU, before examining the relationship between the general bridging clause of Article 48(7) TEU and the bridging clause in the area of the Common Foreign and Security Policy.

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[1] H.-J. Blanke, 'Article 1 TEU', in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on European Union (TEU) – A Commentary* (Springer 2013) para. 63.

[2] Blanke, *supra* n. 1, at para. 62.

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The Current Treaty Revision Procedures of Article 48 TEU

Like its predecessors, the current Treaty on European Union contains rules on the amendment of primary law. The central provision is Article 48 TEU, which elaborates the procedures to be followed for the revision of the Treaties. Apart from any specific provisions (e.g. in the course of an accession, Article 49 TEU[3], or a withdrawal, Article 50 TEU[4]), primary law can only be modified by means of the amendment procedures carried out in accordance with Article 48 TEU.[5] This includes generally not only the Treaty on European Union and the Treaty on the Functioning of the European Union ('the Treaties' as mentioned by Article 1 TEU), but more comprehensively all primary law, including the Protocols (Article 51 TEU[6]), the Charter of Fundamental Rights (Article 6(1) TEU), the Euratom Treaty (by virtue of Article 106a(1) of said Treaty[7]) as well as the accession Treaties, unless these provide for specific amendment rules.[8]

Ordinary Treaty revision

The Treaties have always provided for their own amendment.[9] Before the reform Treaty of Lisbon, only the governments of the Member States or the Commission could submit a proposal for the amendment of the Treaties. The Council could then decide to convene a conference of representatives of the governments of the Member States. The outcome of that conference, the proposed amendments to the Treaties, then had to be ratified by all Member States before entering into force.

De constitutione lata, the general structure of this amendment procedure has been maintained, but the Treaty of Lisbon has brought about some profound changes to the existing Treaty revision procedure (now called the 'ordinary' revision procedure). Under the ordinary revision procedure, the directly elected European Parliament has been included among the actors who can initiate the procedure. Furthermore, before convening a conference of government

[3] S. Peers, 'The Future of EU Treaty Amendments', 31 *Yearbook of European Law* (2012) p. 17 at p. 47 ff.

[4] Peers, *supra* n. 3, at p. 53 ff.

[5] ECJ 8 April 1976, Case 43/75, *Defrenne*, para. 58.

[6] While the simplified revision procedures of Art. 48 TEU shall not apply to amendments of Protocols, there are a number of provisions that provide for simplified revision of the Protocols; *see* Peers, *supra* n. 3, at p. 66.

[7] Only the ordinary revision procedure of the TEU (Art. 48, paras. 2-5) shall apply to the Euratom Treaty.

[8] On the latter, *see* C. Hillion, 'The European Union is dead. Long live the European Union … A Commentary on the Accession Treaty 2003', 29 *European Law Review* (2004) p. 583 at p. 587; C. Ohler, 'Artikel 48 EUV', in E. Grabitz et al. (eds.), *Das Recht der Europäischen Union: EUV/AEUV* (C.H. Beck 2011) para. 22.

[9] *See also* Peers, *supra* n. 3, at p. 19 ff.

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representatives that decides on the proposed amendments, a convention is convened by the European Council. The participants to this convention include not only government representatives, but also representatives of the national parliaments, the European Parliament and the Commission, i.e. representatives from the executive and the legislative branch at the national and the European level.[10] This inclusion of other actors enhances transparency and makes Treaty revisions less of a diplomatic negotiation between governments,[11] but rather a truly supranational procedure.[12] Furthermore, fundamental change to the Treaties can only be made through this convention method, as it confers a higher degree of democratic legitimacy.[13] One element, however, remains and is reminiscent of the Union's origin in public international law and of its being a treaty-based creation among sovereign states: every amendment to the Treaties has to be ratified by all Member States in accordance with their national procedures before entering into force. With a growing number of Member States, this may turn out to be an extremely relevant obstacle.[14] Nonetheless, since the entry into force of the Lisbon Treaty, two amendments have been made through the ordinary revision procedure.[15]

Simplified Treaty Revision I: amendments without an Intergovernmental Conference

Apart from the ordinary revision procedure, two more 'simplified' revision procedures have been implemented. In accordance with Article 48(6) TEU[16] the first of the two simplified revision procedures can be applied for minor

[10] L. Jimena Quesada, 'The Revision Procedures of the Treaty', in Blanke and Mangiameli, *supra* n. 1, p. 323 at p. 326.

[11] G. Busia, 'Revisione del Trattato, ammissione di nuovi Stati e recess dall'Unione', in F. Bassanini and G. Tiberi (eds.), *Le nuove istituzioni europee* [*The new European institutions*] (il Mulino 2010) p. 401 at p. 405.

[12] *Cf.* Ohler, *supra* n. 8, at para. 29.

[13] German Federal Constitutional Court, BVerfGE 123, 267 (385); J.P. Terhechte, 'Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag?', *Europarecht* (2008) p. 143 at p. 169; K. Granat, 'Interparliamentary Cooperation and the Simplified Revision Procedures', in N. Lupo and C. Fasone (eds.), *Interparliamentary Cooperation in the Composite European Constitution* (Hart 2016) p. 73 at p. 73.

[14] Cf. Busia, *supra* n. 11, p. 404.

[15] Namely, an amendment to the Protocol on transitional provisions and the addition of the Protocol on the concerns of the Irish people.

[16] The Treaties contain other provisions which are worded in analogy to Art. 48(6) TEU but which are restricted to a specific area. These include the introduction of a common defence (Art. 42(2) TEU), the extension of the list of Union citizens' rights (Art. 25(2) TFEU), the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 218(8)(1) second sentence TFEU), the introduction of a uniform electoral procedure for European Parliament elections (Art. 223(1) TFEU), the creation of jurisdiction for European intellectual property rights (Art. 262 TFEU) and the determination of the Union's own resources (Art. 311(3) TFEU).

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amendments to the Treaties. Again, any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising the Treaties. The European Council may then, acting unanimously, adopt an amending decision after consulting the European Parliament and the Commission (as well as the European Central Bank, if necessary). Here, again, the European Council decision (and with it the proposed amendments) shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. As opposed to the ordinary revision procedure, national parliaments only participate in the final stage of the revision procedure and are not directly involved in the examination of the amendments in a convention.[17]

This simplified procedure, however, is subject to two restricting conditions. First, amendments under this procedure can only be made to the provisions of Part Three of the TFEU (Articles 26-197). This does not imply that those policy areas are somewhat less important. On the contrary, Part Three contains nearly half of the TFEU, including important areas such as the internal market, the Economic and Monetary Union, justice and home affairs and a whole range of other policy areas.[18] A simplified procedure applies, as these areas are more likely to be subject to political changes and thus require a higher degree of flexibility.[19] Second, the amendments shall not increase the competences conferred on the Union by the Treaties. As this would imply profound changes in the constitutional setting of the Union, such changes can only be made using the ordinary revision procedure.

Aside from Treaty amendments through accession Treaties, namely through the accession to the Union of Croatia as of July 2013,[20] the procedure of Article 48(6) TEU was the first amendment to the Treaties using one of the simplified procedures of Article 48 TEU.[21] In May 2013, in order to provide for a solid constitutional basis for the new European Stability Mechanism, the European Council adopted a decision that added a new paragraph 3 to Article 136 TFEU, authorising the Member States to implement such a mechanism among themselves.[22] This amendment has been approved by both the German Federal Constitutional Court[23] and the European Court of Justice.[24] This shows that,

[17] Granat, *supra* n. 13, at p. 77.

[18] Peers, *supra* n. 3, at p. 32-33.

[19] Ohler, *supra* n. 8, at para. 43.

[20] *See* Art. 9 ff of the Act of Accession of Croatia, O.J. L 122/21 (2012).

[21] *See* in detail Peers, *supra* n. 3, at p. 33 ff.

[22] Decision 2011/199/EU, O.J. L 91/1 (2011).

[23] German Federal Constitutional Court, 2 BvR 1390/12, Judgment of 18 March 2014 (BVerfGE 135, 317) – *ESM/Fiscal Compact*.

[24] ECJ 27 November 2012, Case C-370/12, *Pringle*. The ECJ finds that the amendment simply 'confirms that Member States have the power to establish a stability mechanism' (at para. 72). The amendment is thus of merely declaratory nature.

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while the content of the decision changes primary law, the amendment is itself an act of secondary law whose legality is reviewable by the Court of Justice.[25]

Simplified Treaty Revision II: The General Bridging Clause(s) of Article 48(7) TEU

Subject matter of Article 48(7) TEU

Under Article 48(7) TEU, the second simplified procedure can be used for building a so-called 'passerelle', i.e. a bridge or passage from unanimity to qualified majority voting, or from a special to the ordinary legislative procedure, in a given area or case. As such, the bridging clauses serve to bypass the national procedures of approval of Treaty amendments.[26]

Historically, the EC Treaty already contained a sector-specific *passerelle* clause in Article 67(2), second indent. According to that provision, the Council, acting unanimously after consulting the European Parliament, could take a decision with a view to providing for all or parts of the areas covered by the title on visa, asylum, migration and other policies related to free movement of persons (Article 61 ff EC Treaty) to be governed by the codecision procedure (Article 251 EC Treaty). The Council has made use of this option.[27]

Article 48(7) TEU actually contains two separate aspects or procedures. The first subparagraph rules that where the TFEU or Title V of the TEU provide for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence. Any other modification to 'the arrangements for exercising the Union's competences' (Article 2(6) TFEU) can only be made through the other revision procedures (ordinary revision procedure and Article 48(6) TEU).[28]

Under the Treaty of Lisbon, qualified majority voting has become the default voting rule in the Council except where the Treaties provide otherwise (Article 16(3) TEU). With the exception of some transitional arrangements in effect until 31 March 2017,[29] a qualified majority shall be defined in accordance with Article 16(4) TEU as at least 55% of the members of the Council,

[25] *See* ECJ 27 November 2012, Case C-370/12, *Pringle*, para. 33; *see also* M. Nettesheim, 'Normenhierarchien im EU-Recht', *Europarecht* (2006) p. 737 at p. 742.

[26] L. Grard, 'Article IV-444', in L. Burgorgue-Larsen et al. (eds.), *Traité établissant une Constitution pour l'Europe, Partie I et IV* (Bruylant 2007) at para. 2.

[27] Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, O.J. 2004 L 396/45.

[28] *See* Peers, *supra* n. 3, at p. 41-42.

[29] *See* Art. 16 (5) TEU in conjunction with Art. 3 of the Protocol (No. 36) on transitional provisions.

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comprising at least 15 of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. The threshold rises to 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union, for cases in which the Council does not act upon a proposal from the Commission or the High Representative (Article 238(2) TFEU).[30]

The second subparagraph of Article 48(7) TEU is concerned with the adoption of legislative acts. It says that where the TFEU provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure of Articles 289(1), 294 TFEU. The second subparagraph does not apply to the Common Foreign and Security Policy, as the adoption of legislative acts shall be excluded in that area (Articles 24(1), 31(1) TEU). In contrast, most special legislative procedures in the TFEU provide that a decision shall be taken by the Council, in most cases by unanimity, after consulting or obtaining the consent of the European Parliament. Making use of the *passerelle* contained in the second subparagraph of Article 48(7) TEU thus means that: (1) the European Parliament shall be involved as co-legislator; and (2) the Council shall decide by qualified majority.[31]

Exemptions

Broadly speaking, the *passerelle* of Article 48(7) TEU applies to all cases of decision-making in the Treaties.[32] According to Article 353 TFEU, there are, however, a number of cases in which the general bridging clauses of Article 48(7) TEU shall not apply. This means that in those cases, the European Parliament will not be able to act as a co-legislator and is only consulted or shall give its consent and that the Council cannot go from unanimity to qualified majority voting in the cases in which unanimity is required without a formal Treaty amendment under the ordinary revision procedure.

The first exemption applies to the third and fourth paragraphs of Article 311 TFEU. According to Article 311(3) TFEU, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament adopt a decision laying down the provisions relating to the

[30] V. Edjaharian, 'Article 16 TEU', in Blanke and Mangiameli, *supra* n. 1, para. 88 ff.

[31] Note that even if the bridging clause is applied and the Council could decide by qualified majority, Art. 293 TFEU still applies, according to which the Council can amend a Commission proposal only unanimously. On that, *see* R. Böttner, 'Ein scharfes Schwert der Kommission? Überlegungen zu Artikel 293 AEUV', *Europarecht* (2016) p. 105 at p. 113.

[32] The clause on moving to the ordinary legislative procedure does not apply to the TEU. However, the TEU does not provide for the adoption of legislative acts anyway.

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system of own resources of the Union. In accordance with Article 311(4) TFEU, the Council, acting in accordance with a special legislative procedure, shall, after obtaining the consent of the European Parliament, lay down implementing measures for the Union's own resources system. The own resources decision of paragraph 3 shall enter into force after approval by all Member States in accordance with their respective constitutional requirements. This shows the reservations over national sovereignty and explains the exemption from Article 48(7) TEU.[33]

The second exemption is related to the first subparagraph of Article 312(2) TFEU. Under this provision, the Council, acting in accordance with a special legislative procedure by unanimous decision and after obtaining the consent of the European Parliament (which shall be given by a majority of its component members), shall adopt a regulation laying down the multiannual financial framework. The exemption to Article 48(7) TEU under Article 353 TFEU prevents moving any decision from the special to the ordinary legislative procedure. However, the second subparagraph of Article 312(2) TFEU contains a special bridging clause, according to which the European Council may, unanimously, adopt a decision authorising the Council to act by a qualified majority when adopting the regulation referred to in the first subparagraph. The meaning of this special bridging clause is twofold. In the first place, the European Council can make use of this *passerelle* without the participation of the national parliaments as foreseen by the third subparagraph of Article 48(7) TEU, and thus without the possibility of their vetoing that decision. Secondly, while the quorum in the Council can be shifted from unanimity to a qualified majority, the European Parliament will still decide by a majority of its component members and not by a simple majority (majority of the votes cast) as foreseen by the default voting rule of Article 231 TFEU, which would apply under the ordinary legislative procedure.

Furthermore, the bridging clauses of Article 48(7) TEU shall not apply to Article 352 TFEU. Article 352 TFEU, the lacuna-filling competence of the Union or the so called 'flexibility clause', provides that if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. As this provision is an important and potentially far-reaching derogation from the principle of conferral in Article 5(2) TEU, Member States wanted to prevent the Union from making use of this provision for gaining further competences without the explicit consent

[33] D. Winkler, 'Artikel 353 AEUV', in Grabitz et al., *supra* n. 8, para. 11.

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of all Member States. It results from the scope and content of Article 48 TEU that only the ordinary revision procedure may be used to increase the competences conferred on the Union in the Treaties (*cf.* third subparagraph of Article 48(6) TEU), while the flexibility clause only serves to fill gaps in existing competences. However, the distinction between 'extension of competences' (which would be subject to a Treaty revision) and 'lacuna filling' (under Article 352 TFEU) may be hard to discern.

Lastly, Article 48(7) TEU shall not apply to the voting requirements laid down in Article 354 TFEU for the Article 7 procedure, which is concerned with the suspension of voting rights due to the serious and persistent breach by a Member State of the values referred to in Article 2 TEU. However, neither Article 354 TFEU nor Article 7 TEU refer to any decision to be taken by the Council unanimously or in accordance with a special legislative procedure. Therefore, the reference to Article 354 TFEU in Article 353 TFEU, and thus the exemption from the general bridging clauses of Article 48(7) TEU, is obsolete.

If none of these exemptions to Article 48(7) TEU, which are laid down in Article 353 TFEU and which have been briefly outlined here, apply, the general bridging clauses can be used. Their scope and the procedure to be followed are explained in the following sections.

Procedure for the passerelle *clauses*

Regardless of which one of the two specific *passerelles* is used (concerning the voting rules or the legislative procedure), a common procedure which is specified in subparagraph 3 of Article 48(7) TEU applies. The European Council can decide, upon its own initiative, to initiate the procedure under said article and has to notify the national parliaments of any initiative taken under one of the two subparagraphs of Article 48(7) TEU, which, as Article 12(d) TEU underlines, 'contribute actively to the good functioning of the Union […] by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty'. National parliaments can, during a six-month window, make their opposition to the initiative known. The six-month period will not start until the notification of the initiative has been made in all official languages of the Union.[34] The Treaty does not make any substantial requirements for a refusal by a national parliament nor does it provide for a threshold of vetoes.[35] Thus, any national parliament has the right to veto an Article 48(7) initiative without any necessity to

[34] This argument is derived by analogy from Art. 6 of Protocol No. 2 on the principles of subsidiarity and proportionality, according to which the eight-week period for scrutiny of draft EU legislative acts by national parliaments will not start until the draft has been transmitted to the national parliaments in all official EU languages.

[35] The threshold, similar to the subsidiarity review in Protocol No. 2, was foreseen in the early stage of the Convention; *see* Grard, *supra* n. 26, at para. 8.

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state reasons. As Article 6 in combination with Article 8 of Protocol No. 1 on the role of national parliaments specify, in Member States that do not have a unicameral parliamentary system, each of the component chambers has to be informed separately. While the Treaty is silent on that issue, however, it can be concluded that they can cast their vote only uniformly as one 'national parliament' without each chamber having a separate vote (as opposed to the subsidiarity control mechanism of Protocol No. 2).[36] It is a matter of national (constitutional) law to determine how the two chambers shall cooperate to this end.[37] If, within

[36] One could argue that the subsidiarity control mechanism is concerned with the *exercise* of Union competences with regard to subsidiarity and that second chambers in bicameral systems, which usually represent the subnational level (and are hence also affected by subsidiarity concerns), should have an individual say in the subsidiarity check (Arts. 6 and 7 of Protocol No. 2). Art. 48(7) TEU, on the other hand, does not contain any such specification with regard to bicameral systems. Furthermore, the provision deals with procedural simplifications, following which a Member State can be outvoted (when decision-making moves from unanimity to qualified majority in the Council). In addition, the Art. 48 procedure, as opposed to the subsidiarity review, does not contain any threshold (foreseen by the original proposal; CIG 52/03 ADD 1 of 25 November 2003, p. 38) so that one single veto would cause the procedure to cease; increasing the number of veto players by granting each chamber a separate vote would make this procedure virtually impossible to achieve. Therefore, the Member State should cast a uniform vote when deciding on the use of the *passerelle*. *See also* on this issue P.G. Casalena, 'Article 6 of Protocol (No. 1)', in Blanke and Mangiameli, *supra* n. 1, p. 1576 at para. 95 ff. With a differing view *see* Peers, *supra* n. 3, at p. 78, who argues that the absence of any provision on bicameral parliaments in the context of Art. 48(7) TEU means that it is open for the Member States to decide.

[37] *See*, for example, Section 23i(2) of the Austrian Federal Constitutional Law (*Bundesverfassungs-Gesetz*): 'To the extent the law of the European Union for the National Parliaments provides the possibility of the refusal of an initiative or a proposal concerning: 1. the change from unanimity to a qualified majority or 2. the change from a special legislation procedure to the regular legislation procedure, the National Council, *with the approval of the Federal Council*, may refuse such initiative or proposal within the terms provided by the law of the European Union' (emphasis added). The same applies in France according to Art. 88-7 of the Constitution: 'Par le vote d'une motion *adoptée en termes identiques par l'Assemblée nationale et le Sénat*, le Parlement peut s'opposer à une modification des règles d'adoption d'actes de l'Union européenne dans les cas prévus, au titre de la révision simplifiée des traités ou de la coopération judiciaire civile, par le traité sur l'Union européenne et le traité sur le fonctionnement de l'Union européenne, tels qu'ils résultent du traité signé à Lisbonne le 13 décembre 2007' (emphasis added). Internal cooperation is also foreseen by Art. 11(5) of the Italian Law No. 234/2012 of 24 December 2012: 'Nei casi di cui all'articolo 48, paragrafo 7, del Trattato sull'Unione europea e all'articolo 81, paragrafo 3, del Trattato sul funzionamento dell'Unione europea, la deliberazione delle Camere e' resa entro il termine di sei mesi dalla trasmissione dell'atto dell'Unione europea alle Camere da parte delle competenti istituzioni dell'Unione stessa. *In caso di deliberazione negativa di entrambe le Camere*, esse ne danno immediata comunicazione a tali istituzioni, informando contestualmente il Governo' (emphasis added).

In Germany, however, Section 10(1) of the Responsibility for Integration Act provides that 'The following provisions shall apply to the rejection of a European Council initiative within the meaning of Article 48(7), third subparagraph, of the Treaty on European Union: 1. If an initiative

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the six-month period, no national parliament has voiced its opposition (*nihil obstat*), the European Council is deemed authorised to proceed with the initiative under Article 48(7) TEU (*Genehmigungsfiktion*), i.e. from the point of view of EU law, national parliaments do not have to positively authorise the European Council if there are no concerns.

Moreover, the Treaty only takes vetoes from a national parliament into account. In some Member States, Treaty amendments may be subject to a referendum, which is an issue of national (constitutional) law. The outcome of a referendum has no direct effect on the Treaty revision procedure at EU level. It is entirely a matter of domestic law to translate a negative vote expressed in a referendum into opposition voiced by the national parliament.[38]

Before the European Council may take the decision, it also has to obtain the consent of the European Parliament. The European Parliament shall act by absolute majority (majority of its component members) and not, as according to the default voting rule (Article 231 TFEU), by simple majority (majority of votes cast). As there is no provision to the contrary, the European Council may notify the European Parliament at the same time that it notifies the national parliaments so that deliberations in the European Parliament and in the national parliaments can take place simultaneously, which may encourage interparliamentary exchange of views and information, e.g. via the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union, which shall 'promote the exchange of information and best practice between national Parliaments and the European Parliament' (Article 10 of Protocol No. 1).[39]

The European Parliament must take a vote and cannot pocket veto the initiative through mere inaction. However, the Treaty does not specify any deadline for the European Parliament, which it does for the national parliaments. Nonetheless, the European Parliament should be given at least the same amount of time before the European Council could proceed anyway or initiate an action for failure to act. If no national parliament has vetoed the initiative and the European Parliament has given its consent, the European Council may proceed to vote on the initiative. For the adoption of the decision, the European Council shall act by unanimity, which, taking the veto option by any national parliament into

relates primarily to an area in which exclusive legislative competence lies with the Federation, the *Bundestag* may decide that the initiative is to be rejected. 2. In all other cases, *the Bundestag or the Bundesrat* may decide that the initiative is to be rejected' (emphasis added). Similarly, Poland seems to follow the approach that each parliamentary chamber may oppose an Article 48(7) initiative on its own: *see* Art. 148ca of the Sejm's Rules of Procedure and Art. 75f and 75g of the Senate's Rules of Procedure.

[38] With the same view *see* Peers, *supra* n. 3, at p. 78.

[39] *See* Granat, *supra* n. 13, at p. 84 ff.

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account, amounts to a sort of 'double unanimity'. The European Court of Justice can review the legality of the decision.[40]

It is worth mentioning that the two *passerelles* in Article 48(7) TEU do not have a *lex specialis* relationship. This means that, given the European Parliament's and national parliaments' consent, the European Council can, in cases where the Treaties provide for a special legislative procedure (in which the Council must vote by unanimity), adopt a decision stipulating that qualified majority voting in the Council shall apply without extending the ordinary legislative procedure to that situation.[41] This means that the Council could benefit from a voting facilitation while the European Parliament would not benefit from enhanced participation, i.e. qualified majority voting without co-decision by the European Parliament.

The relationship between Article 31(3) and Article 48(7) TEU

As outlined above, the first subparagraph of Article 48(7) dictates that where the TFEU or Title V (Articles 21-46) of the TEU provide for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by qualified majority in that area or in that case, following the procedure specified in the third subparagraph. Article 31(3) TEU, on the other hand, provides that decisions under that Chapter (i.e. Articles 23-46 TEU)[42] can be subject to qualified majority voting if the *passerelle* is used. The procedure, however, is different from the procedure in Article 48(7) TEU.

In the following section I would like to clarify the relationship between Article 31(3) and Article 48(7) TEU, as these two provisions seem to contradict one another. In general, there is conflict between treaty provisions when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. This incompatibility in particular is regarded as essential to the existence of conflict; there has to be a deviation with regard to the same subject matter (*in pari materia*).[43]

[40] *See supra* at n. 25.

[41] Peers, *supra* n. 3, at p. 46.

[42] *See* on the one hand Art. 48(7): 'Where […] Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case.'; and on the other Art. 31(1): 'Decisions under this Chapter shall be taken by […] the Council acting unanimously, except where this Chapter provides otherwise' in combination with Art. 31(3): 'The European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2'.

Title V contains two chapters. Chapter 1 (Arts. 21-22), however, does not contain any provision in which the Council is authorised to take a decision. Therefore, the reference in Art. 48(7) TEU to 'Title V' and the reference in Art. 31 TEU to 'this Chapter' cover the same provisions.

[43] W. Karl, 'Treaties, conflicts between', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV (North-Holland 2000) p. 935 at p. 936; Blanke, *supra* n. 1, at para. 71.

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While there are some *passerelle* clauses that are true *leges speciales* and thus derogate from the general bridging clauses of Article 48(7) TEU, this does not hold true for Article 31(3) TEU.

Special Bridging Clauses as Leges Speciales *to Article 48(7) TEU*

According to the conflict-of-law rule, *lex specialis derogat legi generali*, a more specific norm prevails over a general norm, i.e. the more general norm is subsidiary to the specific one. A law governing specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*). However, ensuring the consistency of the Treaties calls for an interpretation pursuant to the principle of the unity of the constitution. Hence, allegedly conflicting norms should be balanced and systematically interpreted so that both will gain their optimum effect (the principle of practical concordance – *praktische Konkordanz*).[44]

Aside from the general bridging clause of Article 48(7) TEU, the TFEU contains a number of special bridging clauses. These include Article 81(3), 2nd subparagraph on family law with cross-border implications, Article 153(2), 4th subparagraph on certain matters of social policy, Article 192(2), 2nd subparagraph on certain matters of employment policy, Article 312(2), 2nd subparagraph on the multiannual financial framework and Article 333 regarding enhanced cooperation.

The bridging clauses are special in nature insofar as they refer to individual policy areas and closely limited cases in which the *passerelle* can be applied. Furthermore, the unanimous decision to make use of the *passerelle* is taken by the Council, not the European Council (except for Article 312 TFEU) on the basis of a proposal from the European Commission. According to the criteria stated above, these provisions cover the same subject matter as the general bridging clause, i.e. cases in which the TFEU provides for the Council to act by unanimity or in accordance with a special legislative procedure. They are specific in that they cover certain narrowly-defined areas. As such, they form *leges speciales* to the general bridging clause of Article 48(7) TEU. Therefore, in cases where a true *lex specialis* in the form of a special bringing clause exists, the procedure of Article 48(7) TEU does not apply. This means, for example, that under the special bridging clauses, except for Article 81(3) TFEU, national parliaments are not involved and have no veto power, and the European Parliament is merely consulted. Member States may, however, at any time install procedures in their domestic legal order that allow national parliaments to exercise a form of veto power vis-à-vis their national Council representative by making his vote to make use of the *passerelle* dependent on the consent of the national parliament.[45]

[44] Blanke, *supra* n. 1, at para. 72.

[45] B.I. Bonafè, 'Art. 31', in A. Tizzano (ed.), *Trattati dell'Unione Europea*, 2nd edn. (Giuffrè 2014) p. 266 at p. 272. This is the case, for example, in the United Kingdom, Germany and Austria.

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Article 31(3) as a Special Bridging Clause for the Common Foreign and Security Policy?

Apart from the exceptions to the unanimity laid down in Article 31(2) TEU, Article 31(3) TEU introduces a more general legal basis for the use of qualified majority voting: a decision by the European Council authorising action by qualified majority where unanimity would normally be required according to the Treaty. This opens the way to more cases of qualified majority voting in the Common Foreign and Security Policy without formal Treaty amendment. This new possibility of qualified majority voting potentially allows for an expedited process in the Council, once the European Council has agreed on it. It may be assumed that this situation relates to more structural issues, as the possibility to use qualified majority voting, once a Council decision is based on a decision by the European Council, is mentioned separately. This would mean that the European Council has been given the competence to extend the list of the four (current) exceptions to the unanimity rule as mentioned in Article 31(2) TEU.

The most important question regarding Article 31(3) TEU is its relationship to the general bridging clause of subparagraph 1 of Article 48(7) TEU, since the latter – in conjunction with its third and fourth subparagraphs and Protocol No. 1 – foresees participation of the European Parliament and of national parliaments in the application of the *passerelle*. As both provisions are hierarchically and chronologically of equal status, the conflict-of-law rules of *lex superior derogat legi inferiori* (superior general norms prevail over inferior particular norms) and *lex posterior derogat legi priori* (later norms prevail over earlier norms) cannot be applied.[46]

Under the Constitutional Treaty, the situation was quite clear. Article IV-444(1) of the Constitutional Treaty (which corresponds to the first subparagraph of Article 48(7) TEU) provided that where Part III (which contained the internal policies and the provisions on the Common Foreign and Security Policy) provided for the Council to act by unanimity in a given area or case, the European Council might adopt a European decision authorising the Council to act by a qualified majority in that area or in that case. Article III-300(3) contained the *passerelle* now found in Article 31(3) TEU), *with the addition* that the decision had to be taken in accordance with Article I-40(7) of the Constitutional Treaty. This provision, entitled 'Specific provisions relating to the common foreign and security policy' stipulated that the European Council could, unanimously, adopt a European decision authorising the Council to act by a qualified majority in cases other than those referred to in Part III. In this case, by way of reference in the relevant provisions and following the Treaty structure and systematics, Article III-300(3)

[46] Blanke, *supra* n. 1, at para. 74.

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of the Constitutional Treaty (Article 31(3) TEU) was a true *lex specialis* to Article IV-444(1) of said Treaty (Article 48(7) TEU). One could argue that it was the intention to preserve this situation under the Treaty of Lisbon, and that the current situation is merely the result of an editorial error. However, this error would be too gross and significant to be neglected.

Despite this, some argue that Article 31(3) TEU is nonetheless still a *lex specialis* to Article 48(7) TEU, and thus prevails over the latter.[47] The German Federal Constitutional Court, in its well-known judgment on the Treaty of Lisbon, has, among others, also scrutinised the bridging clauses introduced with the Lisbon Treaty. The starting point of the Court's analysis is the 'responsibility for integration' (*Integrationsverantwortung*), which means that insofar as the Member States elaborate treaty law in such a way as to allow treaty amendment without a national ratification procedure, whilst preserving the application of the principle of conferral, a special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany has to comply internally with the requirements under Article 23(1) of the Basic Law.[48] Any transfer of sovereign powers, including amendments of the Treaties which amend or supplement the content of the Basic Law or which make such amendments or supplements possible, requires the approval of two-thirds of the members of the German *Bundestag* and two thirds of the votes of the *Bundesrat* (Article 23(1) third sentence in conjunction with Article 79(2) of the Basic Law).[49]

The transition from unanimity to qualified majority voting in the Council or from a special to the ordinary legislative procedure (which, in the majority of cases, also means that the Council decision is no longer adopted by unanimity but

[47] Some authors argue without further reasoning that Art. 31 (3) is *lex specialis*. *See* W. Wessels and F. Bopp, 'The Institutional Architecture of Common Foreign and Security Policy after the Lisbon Treaty – Constitutional breakthrough or challenges ahead?', *CHALLENGE Research Paper No. 10* (2008), www.ceps.eu/system/files/book/1677.pdf, visited 1 October 2016, p. 24; Peers, *supra* n. 3, at p. 65; H.-H. Herrnfeld, 'Artikel 48 EUV', in J. Schwarze (ed.), *EU-Verträge*, 3rd edn. (Nomos 2012) para. 18; W. Meng, 'Artikel 48 EUV', in H. von der Groeben et al. (eds.), *Europäisches Unionsrecht*, 7th edn. (Nomos 2015) para. 24; W. Hummer, 'Artikel 31 EUV', in C. Vedder and W. Heintschel von Heinegg (eds.), *Europäisches Unionsrecht: EUV, AEUV, Grundrechte-Charta; Handkommentar* (Nomos 2012) para. 10; D. Booß, 'Artikel 48 EUV', in C.O. Lenz and K.-D. Borchardt (eds.), *EU-Verträge: Kommentar nach dem Vertrag von Lissabon*, 5th edn. (Bundesanzeiger 2010) para. 5. *See also* J. Wouters et al., 'The European Union's External Relations after the Lisbon Treaty', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) p. 143 at p. 163.

[48] German Federal Constitutional Court, 2 BvE 2/08 and others, Judgment of 30 June 2009 (BVerfGE 123, 267), headnote 2a – *Lisbon*.

[49] German Federal Constitutional Court, 2 BvR 2134, 2159/92, Judgment of 12 October 1993 (BVerfGE 89, 155) at p. 199 – *Maastricht*, and BVerfGE 123, 267, *supra* n. 48, at para. 312.

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by a qualified majority) entail a loss of influence of the German representative in the Council, as he will lose his veto power. The Bundesverfassungsgericht then goes on to point out that the general and the special bridging clauses, unlike the simplified revision procedure pursuant to Article 48(6) TEU, make treaty amendments possible only with a view to the two procedural provisions (change to qualified majority voting or to the ordinary legislative procedure). Therefore, as qualified majority voting in the Council and the ordinary legislative procedure are the normal procedures for law-making (Article 16(3) TEU, Article 289(1) in conjunction with Article 294 TFEU), the total extent to which the influence will be reduced by the introduction of qualified majority voting can at least be ascertained in a general manner.[50] However, the responsibility for integration requires that the loss of German influence in the Council which accompanies the exercise of the bridging clauses must be predictable also in individual cases at the time of the ratification of the Treaty of Lisbon by the German legislature in order for the approval given in advance by a Member State to a later treaty amendment to be sufficiently democratically legitimised. The Court holds that the requirement of unanimity in the Council or the European Council for activating the bridging clauses is not sufficient, because it may not always be sufficiently ascertainable for the national representatives to what extent the Member States' possibility of veto in the Council is thereby waived for future cases.[51] In the Court's view, the provisional safeguard under Article 48(7)(3) TEU that any national parliament can make its opposition known, is not a sufficient equivalent of the requirement of ratification and, therefore, the German legislative bodies can exercise their responsibility for integration in a given case and also decide whether the level of democratic legitimation is still high enough to accept the majority decision only if they pass a law within the meaning of Article 23(1) of the Basic Law.[52]

This holds true for the general bridging clauses of Article 48(7) TEU because, even though the cases of its application can be determined by the Treaties, the implications of its use from the point of view of national constitutional law are vast and hardly predictable. On the other hand, the special bridging clauses are limited to subject areas which are already sufficiently defined by the Treaty of Lisbon and therefore do not require a law within the meaning of Article 23(1) of the Basic Law. However, the lack of participation by national parliaments in the procedure for the special bridging clauses is not at all harmless from the point of view of European law (except for Article 81(3) TFEU). On the contrary, in such cases, it is incumbent on the *Bundestag* (and, as the case may be, on the *Bundesrat*) to assert its responsibility for integration in another appropriate manner. The Court names the special

[50] BVerfGE 123, 267, *supra* n. 48, at para. 317.
[51] BVerfGE 123, 267, *supra* n. 48, at para. 318.
[52] BVerfGE 123, 267, *supra* n. 48, at para. 319.

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bridging clauses to which this line of argumentation applies; among them is Article 31(3) TEU.[53] Yet the Court does not provide any explanation as to why Article 31(3) TEU should be a true *lex specialis* to the general bridging clause. Apparently, it draws inspiration from the fact that Common Foreign and Security Policy, despite the abolishment of the pillar structure, is still a special area of competence.

Accordingly, in its effort to conform to the 'responsibility for integration' that the Court regarded necessary, the German legislator has treated both provisions separately. The 'Responsibility for Integration Act' (*Integrationsverantwortungsgesetz*[54] – IntVG) provides, in its section 4.1, that the use of the general bridging clause (Article 48(7) TEU) requires a law pursuant to Article 23(1) of the Basic Law, whereas an Article 31(3) TEU decision merely requires approval by Parliament due to the provision's limited scope of application.

It appears that a number of authors have uncritically followed the German Constitutional Court and the German legislator in this assessment[55] while a few give detailed explanations on their position. According to Cremer, Article 31(3) TEU only requires a unanimous European Council decision without further participation of other institutions. He holds that Article 31(3) TEU as *lex specialis* suppresses the application of Article 48(7) TEU for the Common Foreign and Security Policy, because Common Foreign and Security Policy, despite the supranational approaches, is still a mechanism for the coordination of national foreign policy, and thus it is not convincing to require parliamentary participation. This is justified by the European Parliament's limited role in Common Foreign and Security Policy (sentence 5 of the second subparagraph of Article 24(1) and Article 36 TEU). However, in his view, the latter provision shall be applicable for Article 42(4) TEU insofar as decisions on Common Security and Defence Policy do not have military or defence implications and for Article 41 TEU on the financing of the Common Foreign and Security Policy. This is based on the grounds that, according to Article 31(1) TEU, decisions under that Chapter shall be taken by the European Council and the Council acting unanimously, *except where this Chapter provides otherwise*, and the aforementioned provisions contain rules on Council votes. Moreover, in his view, participation of the parliaments in accordance with Article 48(7) is justified for Article 41 TEU as changes to decision-making in the budgetary law require the consent of the majority of the Members of the European

[53] BVerfGE 123, 267, *supra* n. 48, at para. 320.

[54] Act on the exercise of the responsibility for Integration of Bundestag and Bundesrat in matters of the European Union of 22 September 2009, BGBl. I, p. 3022, as amended by Art. 1 of the Act of 1 December 2009, BGBl. I, p. 3822; English version available at www.bundestag.de/htdocs_e/bundestag/committees/a21/legalbasis/intvg.html, visited 1 October 2016.

[55] Ohler, *supra* n. 8, at para. 54; W. Kaufmann-Bühler, 'Artikel 42 EUV', in Grabitz et al., *supra* n. 8, paras. 74 and 77; E. Regelsberger and D. Kugelmann, 'Artikel 31 EUV', in R. Streinz (ed.), *EUV/AEUV*, 2nd edn. (C.H. Beck 2012) at para. 14.

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Parliament. However, Cremer admits that this construction is not very consistent and rather unfortunate as it would be detrimental to the intended enhancement of democratic legitimation of the Union by the Treaty of Lisbon, especially with regard to national parliaments (Article 2, Article 10, Article 12(d) TEU).[56]

In fact, even though the Treaty of Lisbon has formally abolished the former pillar structure of the EC/EU, Common Foreign and Security maintains a peculiar nature that is different from the supranational policies and remains a *sui generis* category of competence.[57] Due to its special nature, the Common Foreign and Security Policy is subject to specific rules and procedures. According to Article 24(1) and Article 31(1) TEU this includes unanimity in the Council as *lex specialis* to the default voting rule of qualified majority (Article 16(3) TEU),[58] the exclusion of legislative acts[59] and specific roles for the European Parliament, the Commission and the Court of Justice of the European Union.[60] In the words of van Elsuwege: 'Rather than focusing on the sometimes artificial debate about more or less supranationalism/ intergovernmentalism in EU external relations, it appears more accurate to explain the place of Common Foreign and Security Policy in the EU legal order on the basis of the executive dominance over foreign affairs, as it exists in the constitutional traditions of many countries in the world. […] The strategic character of foreign policy and the inherent importance of confidentiality and flexibility in its decision-making all explain why this area is considered a prerogative of the executive power.'[61]

It is held that, due to the specific nature of Common Foreign and Security Policy, the participation of the European Parliament – especially due to its limited

[56] H.-J. Cremer, 'Artikel 31 EUV para. 18 and Artikel 48 EUV para. 16', in C. Calliess and M. Ruffert (eds.), *EUV/AEUV. Kommentar*, 5th edn. (C.H. Beck 2016).

[57] M.F. Orzan, 'Article 31', in C. Curti Gialdino, *Codice dell'Unione Europea* [*Code of the European Union*] (Simone 2012) p. 331 at p. 333.

[58] On unanimity voting in international organisations in general, *see* R. Böttner and R.A. Wessel, 'Article 31 TEU', in Blanke and Mangiameli, *supra* n. 1, para. 7.

[59] F. Terpan, 'Article 24 TEU', in Blanke and Mangiameli, *supra* n. 1, para. 16 ff; Böttner and Wessel, *supra* n. 58, at paras. 13-15; Eeckhout suggests a fundamentally different interpretation of the notion of the exclusion of legislative acts. According to him, the 'straightforward reading' of this provision, as it is held also in this comment, 'is difficult to justify in the light of the principle of effective Treaty interpretation', as it would have been redundant to confirm – twice – that legislative acts should be excluded while it is clear from the TEU provisions already, that neither the ordinary nor a special legislative applies to Common Foreign and Security Policy. He therefore suggests that 'exclusion of legislative acts' should be read as meaning 'exclusion of normative action producing legal effects in relation to third parties', founding his criticism on two main arguments (*see* P. Eeckhout, *EU External Relations Law*, 2nd edn. (Oxford University Press 2011) at p. 478 ff).

[60] *See also* P. Eeckhout, 'The EU's Common Foreign and Security Policy after Lisbon', in A. Biondi et al. (eds.), *EU Law after Lisbon* (Oxford University Press 2012) p. 265 at p. 279 ff.

[61] P. van Elsuwege, 'EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency', 47(4) *CMLRev* (2011), p. 987 at p. 999. *See also* W. Kaufmann-Bühler and N. Meyer-Landrut, 'Artikel 31 EUV', in Grabitz et al., *supra* n. 8, para. 10.

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role as indicated by sentence 5 of the second subparagraph of Article 24(1) TEU[62] – and of national parliaments contradicts the (still) executive and intergovernmental character of Common Foreign and Security Policy. Under this interpretation, notifying the European Parliament (Article 36 TEU) would suffice. In this context, Declaration No. 14 states that provisions concerning Common Foreign and Security Policy shall not increase the role of the European Parliament. Systematic reasons and the *telos* of the voting rules in Common Foreign and Security Policy could therefore justify the application of Article 31(3) instead of Article 48(7) TEU as *passerelle* in the area of Common Foreign and Security Policy. In that respect, Article 31(3) TEU could be one of the 'specific rules and procedures' mentioned in Article 24(1) TEU for the Common Foreign and Security Policy. However, the *lex specialis* argument is rather weak and the mentioning of any 'rules and procedures' that are 'specific' to the still intergovernmentally designed area of foreign policy does not necessarily mean that *all* rules and procedures are of a particular nature. This finding is not contradicted by the 'membrane' between the supranational policies and Common Foreign and Security Policy as laid down in Article 40 TEU, as it simply states that the implementation of either policy shall not affect the other; it does not say anything about a complete separation between these two areas and procedural issues may apply for both areas (e.g. the qualified majority as defined in Article 16(3) TEU, which applies to both supranational policy and Common Foreign and Security Policy).

On the other hand, the extension of qualified majority voting (Article 31(2) TEU;[63] as long as these decisions do not have military or defence implications, Article 31(4) TEU[64]) and the possibility of constructive abstention[65] indicate that Common Foreign and Security Policy since Amsterdam is no longer a purely intergovernmental area.[66] Furthermore, both Article 31 and Article 48 TEU expressly[67] provide for their application to the area of Common Foreign and Security

[62] Terpan, *supra* n. 59, at para. 20.

[63] *See* in detail Böttner and Wessel, *supra* n. 58, at paras. 32-35. Qualified majority voting is also possible in a limited number of other cases, e.g. the establishment and financing of a start-up fund for military and defence operations (Art. 41.3(3) TEU), the establishment of the European Defence Agency (Art. 45(2) TEU) and some decisions in relation to the Permanent Structured Cooperation (Art. 46 TEU) in the Common Security and Defence Policy. As a counterweight to these exceptions, the Treaty maintained the 'emergency brake' (as a codification of the 1966 Luxembourg Compromise) for situations in which a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority voting (*see* Böttner and Wessel, *supra* n. 58, at paras. 38-41).

[64] Böttner and Wessel, *supra* n. 58, at paras. 50-53.

[65] *See* Böttner and Wessel, *supra* n. 58, at para. 16 ff.

[66] *Cf.* S. Marquardt and J.-C. Gaedtke, 'Artikel 31 EUV', in H. von der Groeben et al. (eds.), *Europäisches Unionsrecht*, 7th edn. (Nomos 2015) para. 2.

[67] *See supra* n. 42.

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Policy. The duplication of the *passerelle* clauses could thus be justified for systematic reasons and by the concept of the 'unity of the constitution':[68] Article 48 TEU lists the Treaty revisions procedures. In order to provide an exhaustive list in one place/provision, this article also lists the *passerelle* clause for the Common Foreign and Security Policy. Article 31 TEU, on the other hand, lists the voting procedures and especially the application of qualified majority voting within Common Foreign and Security Policy. The list in Article 31 TEU would be incomplete without at least providing a 'reminder' of the bridging clause, which is also applicable to these provisions. Thus, Article 31(3) TEU needs to be read and applied *in combination* with Article 48(7) TEU.[69] Article 48(7) TEU supplements Article 31(3) TEU in that it lays down the procedure to be followed,[70] including the veto right of national parliaments and the necessary consent of the European Parliament. Taking into account the peculiarities of Common Foreign and Security Policy, it seems valid to confer the power to initiate a decision under Article 31(3) TEU to the High Representative, who shall contribute by his proposals to the development of the Common Foreign and Security Policy (Article 18(2) and Article 27(1) TEU).[71]

In fact, the exclusion of legislative acts primarily has to do with the exclusion of the legislative *procedure* (Article 289(3) TFEU) and hence with the inapplicability of the role of the Commission and the European Parliament in this procedure (Article 24(1)(2), sentence 5 TEU)[72] as well as with the limited role of the European Court of Justice in deciding on the legality or the interpretation of a Common Foreign and Security Policy act (*cf.* Article 24(1)(2), sixth sentence TEU)[73]. However, while the European Parliament is not involved in the decision making in Common Foreign and Security Policy, i.e. in the adoption of legal acts that produce effects vis-à-vis third parties and that determine the Union's external action, this does not

[68] *See* n. 44 and accompanying text.

[69] For an application of Art. 48(7) TEU *see also* E. Regelsberger, 'Von Nizza nach Lissabon – das neue konstitutionelle Angebot für die Gemeinsame Außen- und Sicherheitspolitik der EU', *integration* (2008) p. 266 at p. 273; Marquardt and Gaedtke, *supra* n. 66, at para. 12. The argument made by H. Rathke, 'IntVG', in A. von Arnauld and U. Hufeld (eds.), *Systematischer Kommentar zu den Lissabon-Begleitgesetzen* (Nomos 2010) para. 81 (combination of the special bridging clauses and Art. 48(7) TEU) and para. 97 (national parliaments have no veto under Art. 31 TEU) is not quite clear.

[70] With the same view *see* K. Schmalenbach, 'Artikel 31 EUV', in H. Mayer and K. Stöger (eds.), *Kommentar zu EUV und AEUV* [*Short Commentary on the European Union Treaties*] (Manz 2013) para. 26; *see also* A. Lang, 'Articolo 31 TUE', in F. Pocar and M.C. Baruffi (eds.), *Commentario Breve ai Trattati dell'Unione Europea*, 2nd edn. (Cedam 2014) para. 4. W. Kaufmann-Bühler and N. Meyer-Landrut, 'Artikel 31 EUV', in Grabitz et al., *supra* n. 8, para. 37, who base the application of Art. 48(7) TEU on the fact that Art. 31(3) TEU does not give any further indications regarding the procedure for the use of the *passerelle* clause.

[71] Kaufmann-Bühler and Meyer-Landrut, *supra* n. 70, at para. 37.

[72] Terpan, *supra* n. 59, at paras. 19-21.

[73] Terpan, *supra* n. 59, at para. 22.

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necessarily mean that Parliament should be excluded from decisions on procedural rules. The rules on Common Foreign and Security Policy therefore do not preclude Parliament from being involved in the decision to make use of the *passerelle* under Article 31(3) TEU. Likewise, the Court, while not having jurisdiction over most of the substantive Common Foreign and Security Policy acts, is not barred from reviewing decisions with regard to their formal legality, including decisions on the bridging procedure. As the Czech Constitutional Tribunal correctly points out, such decisions are 'reviewable by the Court of Justice as regards their consistency with the Treaty itself, which proves that they are not amendments to the Treaties, but, on the contrary, the Treaties retain a higher legal force over these acts […] and so these acts must be consistent with the conditions that the Treaties set out for them'.[74]

Furthermore, both Article 48(7) and Article 31(3) TEU lead to changes in the primary law of the Union (the Treaties).[75] With regard to a more democratic legitimation of Union action in connection with a more supranational approach, even in Common Foreign and Security Policy matters after the Treaty of Lisbon, full application of the procedure foreseen in Article 48(7) TEU is justified. In this context, it needs to be recalled that democracy is one of the fundamental values of the EU, as mentioned in Article 2 TEU, which also applies to the Union's external action (*see* Articles 21 and 22 TEU). The involvement of national parliaments and the European Parliament, however, may constitute an insurmountable obstacle, leaving this *passerelle* unimplemented.

From the point of view of European law, the involvement of national parliaments under Article 31(3) in combination with Article 48(7) does not mean that the Union's primary law prohibits installing more rigid safeguards in national constitutional law, as the case of Germany and its 'Responsibility for Integration Act' shows. According to Section 4 of the Act, the German European Council representative needs the consent of both chambers in the form of a law according to Article 23(1) in conjunction with Article 79(2) and (3) of the Basic Law, i.e. carried by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat*. The United Kingdom has followed this model with its European Union Act 2011, which provides that a 'Minister of the Crown may not vote in favour of or otherwise support a decision [according to Articles 31(3) and 48(7) TEU] unless […] the draft decision is approved by Act of Parliament [and] the referendum condition is met' (Sections 6(1) and 7(3)).[76] In a similar fashion, in Austria,

[74] Czech Constitutional Court, Pl. US 19/08 (Decision of 26 November 2008) *Treaty of Lisbon I* para. 162 ff (English translation available online, www.usoud.cz/en/decisions/20081126-pl-us-1908-treaty-of-lisbon-i-1/, visited 15 October 2016).

[75] Rathke, *supra* n. 69, p. 229 at para. 92.

[76] J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) p. 262; *see also* E. Denza, 'Article 48 TEU', in Blanke and Mangiameli, *supra* n. 1, paras. 47-54 and P.G. Casalena, 'Protocol No. 1 (Article 6)', in Blanke and Mangiameli, *supra* n. 1, paras. 90-102.

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Section 23i(1) of the Federal Constitutional Law (*Bundesverfassungs-Gesetz*) provides that the Austrian member of the European Council may vote in favour of an initiative under Article 48(7) TEU only after having obtained authorisation from the National Council with the consent of the Federal Council. If the Austrian National Council does not take any decision, the European Council member must vote against the initiative, as abstention does not prevent unanimity.[77] By the same token, the Polish Parliament can instruct the European Council representative on the vote for the respective Article 48(7) decision according to Article 14 of the Act of 8 October 2010 on the cooperation of the Council of Ministers with the Sejm and the Senate in matters relating to the Republic of Poland's membership of the European Union.

Conclusion

When Faust, in Goethe's famous play, explains to his student that man is driven by two incompatible urges, he states: 'Two souls, alas, are dwelling in my breast / One separated from another: / One, with its crude love of life, just / Clings to the world, tenaciously, grips tight, / The other soars powerfully above the dust, / Into the far ancestral height.' Much like that, the two *passerelles* of Article 31(3) and Article 48(7) TEU seem to be in contradiction as they provide for different procedures for one and the same situation. Some aspects do indeed support the argument that Article 31(3) TEU serves as *lex specialis* to the general bridging clause, among them the drafting history of the (failed) Constitutional Treaty and the intergovernmental character of the Common Foreign and Security Policy, which generally excludes parliamentary participation. I hold, however, that these arguments are not convincing. The wording of the two provisions, i.e. the pre-conditions for their application, leave no room for the argument that Article 31(3) TEU is a more specific norm which prevails over the general bridging clause. Moreover, the extension of supranational elements to the Common Foreign and Security Policy justifies parliamentary participation in so fundamental a question as the change of the voting mode in the Council. Therefore, I suggest that these two provisions be reconciled by applying the procedure of Article 48(7) to Article 31(3) TEU. This means that, even in the Common Foreign and Security Policy, activating the *passerelle* is dependent on consent by the European Parliament as well as the absence of a veto by national parliaments.

[77] *Cf.* Schmalenbach, *supra* n. 70, at para. 27.

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