
VIRGINIA JOURNAL OF INTERNATIONAL LAW

Volume 50 — Issue 4 — Page 919



Article

Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon

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INTRODUCTION

The European Union's Treaty of Lisbon¹ entered into effect on December 1, 2009,² and this significant amendment to the European Union's foundational treaties³ marks yet another step in the "process of

1. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

2. See EUROPA, Treaty of Lisbon—Taking Europe into the 21st Century, http://europa.eu/lisbon_treaty/take/index_en.htm (last visited May 1, 2010).

3. The original versions of the European Union's foundational treaties are the Treaty Establishing the European Economic Community, Mar. 25, 1957, 1957 O.J. (C 340) 173 [hereinafter Treaty of Rome], and the Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter Maastricht Treaty]. At various points in the EU's history, these treaties have been amended. The most recent amendment prior to the Treaty of Lisbon was in 2006. See Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community, 2006 O.J. (C 321 E) 1. The Treaty of Lisbon changed the name of the Treaty Establishing the European Community to the "Treaty on the Functioning of the European Union" (TFEU). The Treaty on European Union retains its name after Lisbon, but will be referred to in this Article as the "Lisbon TEU," to distinguish it from earlier versions. The 2006 versions of the consolidated foundational treaties will be referred to respectively as the "Pre-Lisbon TEU" and the "EC Treaty," and collectively as the "Pre-Lisbon Treaties," while the TFEU and Lisbon TEU will be referred to collectively as the "Lisbon Treaties." The third foundational treaty of the European Union is the Treaty Establishing the European Atomic Energy Community (EURATOM), Mar. 25, 1957, 298 U.N.T.S. 259. The EURATOM treaty will remain in effect, as amended by the Lisbon

creating an ever closer union among the peoples of Europe.”⁴ Most prominently, the Lisbon Treaty provides for the merger of the European Community into the European Union,⁵ the elimination of the EU’s Third Pillar,⁶ a permanent president for the European Council,⁷ and treaty-like status for the Charter of Fundamental Rights.⁸ Somewhat less visibly, the Treaty of Lisbon provides new instances in which the EU’s senior legislative body, the Council, will make decisions by a qualified majority vote (QMV).⁹ Additional majority voting has been a feature of all major amendments to the treaties during the Union’s first half-century, but the extension of QMV into new fields has always aroused controversy. To its proponents, further use of majority voting provides necessary efficiencies in EU lawmaking. To its critics, the addition of majority decisions threatens the Member State sovereignty that unanimous voting would protect. Even more, skeptics view the extension of QMV as a key component of the Union’s movement toward supranationalism.

This Article will examine the ways in which qualified majority voting is extended by the Lisbon Treaty. To set the stage, Part 1 of the analysis describes the EU’s unique blend of intergovernmental and supranational features, while Part 2 addresses the role of majority voting within an intergovernmental organization. Part 3 then examines the evolving mechanics of determining a qualified majority on the Council. Parts 4 and 5 offer a detailed description of where the Lisbon Treaty replaces the unanimity requirement with QMV and where it extends qualified majority voting to new areas of EU activity. Parts 6 and 7 describe how the new treaty preserves unanimous voting in fields believed to be critical to national sovereignty. Part 8 considers whether the remaining unanimity requirements might be changed to QMV in the future. Part 9, which offers a final assessment of the Lisbon Treaty’s bal-

Treaty.

4. Consolidated Version of the Treaty on European Union pmbl., 2010 O.J. (C 83) 13 [hereinafter Lisbon TEU].

5. Lisbon TEU, *supra* note 4, art. 1.

6. *See* discussion *infra* Part 4.5.

7. Lisbon TEU, *supra* note 4, art. 15(5). Under the Lisbon Treaty, the European Council president is appointed for terms of two and a half years, whereas previously the president had been the head of state or government of the Member State holding the semiannually rotating presidency of the Council. Consolidated Version of the Treaty on European Union art. 4, 2006 O.J. (C 321 E) 5 [hereinafter Pre-Lisbon TEU].

8. Lisbon TEU, *supra* note 4, art. 6(1).

9. For an earlier analysis by the author of qualified majority voting under the Treaty of Lisbon, see STEPHEN C. SIEBERSON, DIVIDING LINES BETWEEN THE EUROPEAN UNION AND ITS MEMBER STATES—THE IMPACT OF THE TREATY OF LISBON 194–212 (2008).

ance between majoritarian decision-making and unanimity, concludes the analysis.

To begin, a brief note on citations: Because of the significant number of technical references in this Article, the analysis below will streamline all citations to the treaties. In addition, for ease of reference, most citations will be placed in the text rather than in footnotes. The following shorthand conventions will be employed:

- The 1957 Treaty Establishing the European Economic Community will be referred to as the “Treaty of Rome.”
- The 2006 consolidated version of the Treaty Establishing the European Community will be referred to as the “EC Treaty.”
- The EC Treaty’s post-Lisbon replacement, the 2007 Treaty on the Functioning of the European Union, will be referred to as the “TFEU.”
- The 1992 Treaty on European Union will be referred to as the “Maastricht Treaty.”
- The 2006 consolidated version of the Treaty on European Union will be referred to as the “Pre-Lisbon TEU.” As amended by the Lisbon Treaty, it will be called the “Lisbon TEU.”
- The EC Treaty and Pre-Lisbon TEU will be referred to collectively as the “Pre-Lisbon Treaties.”
- The TFEU and Lisbon TEU will be referred to collectively as the “Lisbon Treaties.”

Citations to the TFEU and Lisbon TEU will refer to the consolidated versions of those treaties, which fully incorporate the provisions of the Lisbon Treaty.

1. IGO OR SUPRANATIONAL FEDERATION—WHAT IS THE EU?

Any analysis of qualified majority voting must take place in the context of an ongoing discussion as to what type of entity the European Union is and what it should be. Some academics and politicians favor an intergovernmental form for the EU, a structure in which all critical decisions must be agreed to by each Member State. This approach would entail a substantial amount of unanimous voting on the Council. Other commentators urge a supranational federal arrangement in which the Union serves as an independent and powerful central government that stands above the national governments. The supranational model would involve, in most instances, the use of majority voting on the Council. Bridging these two schools of thought is the reality that the EU is a hy-

brid that contains both intergovernmental and supranational elements, and that voting on the Council takes place both by unanimity and by qualified majority.¹⁰

1.1. The EU as an Intergovernmental Organization

Like all intergovernmental organizations (IGOs), the European Union was created by treaties, and it exists today by virtue of successor treaties among its Member States. Structurally, the Union is an IGO that can add new Member States and suspend the voting rights of those that violate its core principles.¹¹ Furthermore, under the Lisbon Treaty, a Member State will be able to withdraw if it so chooses.¹² Member States have demonstrated the ability to opt out of certain key programs such as the common currency and the Schengen arrangements.¹³ The European Council, essentially a Member State summit meeting, is intergovernmental in that its decisions must be taken by consensus.¹⁴ The Union is distinctly intergovernmental whenever unanimous voting is required on the Council, and the requirement that all Member States approve a treaty amendment is the hallmark of any IGO.¹⁵ Peter Lindseth has referred to “considerable evidence of the Community’s continuing intergovernmental nature, notably at the levels of Treaty amendment and of major harmonisation legislation.”¹⁶ Andrew Moravcsik similarly observed in 2000 that the EU’s ability to act in areas such as “budget, defense, police, cultural, educational and social policies” is limited by unanimity requirements, and thus its actions in these fields, if any take place at all, “are hardly different from those of a classic international organization.”¹⁷ G.F. Mancini has described the EU structure as one in which

10. For additional analysis of the competing schools of thought described in this Part, see Stephen C. Sieberson, *The Proposed European Union Constitution—Will It Eliminate the EU’s Democratic Deficit?*, 10 COLUM. J. EUR. L. 173, 175–88 (2004).

11. For a detailed description of the EU’s intergovernmental elements, see the author’s earlier analysis in Stephen C. Sieberson, *Did Symbolism Sink the Constitution? Reflections on the European Union’s State-Like Attributes*, 14 U.C. DAVIS J. INT’L L. & POL’Y 1, 5–16 (2007). For a discussion of the EU’s flexible membership, see *id.* at 9–11. For a description of suspension of rights, see *id.* at 12–13.

12. *Id.* at 9–11.

13. *Id.* at 13–15.

14. *Id.* at 26–28. Note, however, that the European Council also plays a supranational role by setting legislative policy for the EU.

15. *Id.* at 5–9.

16. Peter Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 655 (1999).

17. Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT’L L. 291, 309 (2000).

“not only its foreign and security policies, which are openly carried out on an intergovernmental basis, but the very management of its supranational core, the single market, are entrusted . . . to diplomatic round tables.”¹⁸

More than merely recognizing the Union’s origins as an IGO, the true intergovernmentalist believes that the EU must remain as such, thus ensuring that the Member States retain their essential sovereignty.¹⁹ The British strongly identify with this position and are said to champion a “club of sovereign nation-states.”²⁰ Joseph Weiler has called this approach “Thatcherism” and sees its vision of the European Union as “an arrangement, elaborate and sophisticated, of achieving long-term maximisation of the national interest in an interdependent world.”²¹ This school of thought, according to Weiler, measures the EU’s value “ultimately and exclusively with the coin of national utility and not community solidarity.”²²

The difficulty with the intergovernmental ideal is that the EU has in fact moved beyond its roots. George Bermann asserts that the Union has “travelled further along the road away from ‘pure’ intergovernmentalism than virtually any other international governance régime.”²³ He adds that “[n]o other international governance régime can even plausibly present itself as governing a ‘polity’, especially a polity in the most

18. G.F. MANCINI, *DEMOCRACY AND CONSTITUTIONALISM IN THE EUROPEAN UNION: COLLECTED ESSAYS* 65 (2000).

19. Michael Newman identifies the insistence on Member State sovereignty with the “realist theory” of international relations. MICHAEL NEWMAN, *DEMOCRACY, SOVEREIGNTY AND THE EUROPEAN UNION* 17 (1996). Proponents of this theory, he writes, “have viewed states as the irreducible element in international politics.” *Id.* According to Newman:

The EU is therefore regarded as a means of managing potential conflict and competition so as to enhance security. But it could never transcend the Member States in the sense suggested by Federalists, for those states are basically using it to promote their own interests. Thus while Federalists might condemn governments for opposing the construction of a full political union, realists will argue that this is to be expected: states remain the ‘real’ actors which operate the international institutions that they establish.

Id. Newman groups the realist theory, which many analysts recognize to be “over-simplified,” with other schools of thought into a broader category he calls “international relations theories.” *Id.* at 20–21.

20. Christopher Dickey & Michael Meyer, *Is Europe Broken?*, *NEWSWEEK*, Aug. 12, 2002, at 14.

21. JOSEPH H.H. WEILER, *THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION* 93, 94 (1999).

22. *Id.* at 94.

23. George A. Bermann, *The European Union as a Constitutional Experiment*, 10 *EUR. L.J.* 363, 363 (2004).

day-to-day, operational, ‘business as usual’ sense of the term.”²⁴ These comments open the door to the competing supranational theory.

1.2. The EU as a Supranational Federal Entity

Despite its origins as an IGO, the European Union possesses a number of characteristics that are distinctly state-like, resembling those of a national government. Included among these is its status as a permanent entity that has legal personality, legal capacity, and privileges and immunities.²⁵ It has legislative, executive, and judicial institutions quite like those found in a national government.²⁶ It possesses its own budgetary resources, a right not enjoyed by most IGOs.²⁷ In addition to its internal activities, it engages in external relations with other countries.²⁸ Significantly—and the primary focus of this Article—many legislative decisions within the EU are made by majority vote.²⁹ Since these characteristics exist separately from their counterparts in the Member State governments, it is fair to describe them as supranational elements in a dual-level federal system. Underscoring the idea of the Union as the central government in a federal setup is the fact that the Union’s legal acts have primacy over Member State law.³⁰

One need not look far to find supranationalists in Europe—there are politicians and others who desire a system with a strong central government. According to Michael Newman, the supranationalist school of thought traces back to Altiero Spinelli and his 1941 Ventotene Manifesto, which argued that divesting the European nation states of their individual sovereignty would prevent future wars on the continent and solve a host of other vexing problems that would withstand an intergovernmental approach.³¹ Joseph Weiler comments that this “*unity* vision of the promised land sees then as its ‘ideal type’ a European polity, finally and decisively replacing its hitherto warring Member States with a political union of federal governance.”³² Arguably, these ideas are reflected in the “ever closer union” language of the Pre-Lisbon Treaties,³³ and

24. *Id.*

25. Sieberson, *supra* note 11, at 16–20.

26. *Id.* at 24–30.

27. *Id.* at 32–34.

28. *Id.* at 35–37.

29. *Id.* at 30–32.

30. *Id.* at 20–24.

31. NEWMAN, *supra* note 19, at 15–16.

32. WEILER, *supra* note 21, at 93.

33. Consolidated Version of the Treaty Establishing the European Community pmbL, 2006 O.J. (C 321 E) 37 [hereinafter EC Treaty]; Pre-Lisbon TEU, *supra* note 7, pmbL.

Newman asserts that this perspective “generally holds that the EU is in *the process of becoming a Federation . . . [and] that the old state-centered world has passed.*”³⁴

The European Commission, in its 2001 *White Paper on European Governance*, agreed that the EU is evolving.³⁵ While careful to avoid using the terms “federal” or “supranational,” the Commission asserted that “[i]t is time to recognise that the Union has moved from a diplomatic to a democratic process, with policies that reach deep into national societies and daily life.”³⁶ Weiler concurs that “the Community’s ‘operating system’ is no longer governed by general principles of public international law.”³⁷ He contends that “constitutionalization” and a new system of remedies within the EU have eliminated “the most central legal artifact of international law: the notion (and doctrinal apparatus) of exclusive state responsibility with its concomitant principles of reciprocity and counter-measures.”³⁸ Like the Commission, he stops short of saying that these changes have made the EU into a supranational entity or federal state, but he believes that “the Community truly becomes something ‘new.’”³⁹

34. NEWMAN, *supra* note 19, at 16–17. Weiler has described the current state of the EU as a “confederation.” He writes:

It is not an accident that some of the most successful federations which emerged from separate polities—the United States, Switzerland, Germany—enjoyed a period as a confederation prior to unification. This does not mean confederation is a prerequisite to federation. It simply suggests that in a federation created by integration, rather than by devolution, there must be an adjustment period in which the political boundaries of the new polity become socially accepted as appropriate for the larger democratic rules by which the minority will accept a new majority.

WEILER, *supra* note 21, at 83.

35. *Commission White Paper on European Governance*, at 11, COM (2001) 428 final (July 25, 2001), available at http://ec.europa.eu/governance/white_paper/en.pdf.

36. *Id.* at 30.

37. WEILER, *supra* note 21, at 12.

38. *Id.* at 29.

39. *Id.* By way of example, Weiler notes that in establishing the doctrine of “direct effect” of Community law on citizens of the EU, the European Court of Justice set aside the traditional right of a state to determine to what extent the state’s treaty obligations will impact its individual citizens. *Id.* at 19–20, 107–09. The seminal decision on direct effect was *van Gend & Loos*. Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1. In that case the European Court of Justice (ECJ) ruled that it had the competence to determine whether a Dutch company had standing under Community law to directly challenge a Dutch government tariff on certain imported products from Germany. *Id.* at 10–11. The Dutch government had argued that its national courts should have the exclusive jurisdiction to interpret the scope of the EC Treaty in this instance. *Id.* at 11. The ECJ declared:

The objective of the [Treaty of Rome], which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies

Other commentators are bolder in labeling or advocating a European federation with a strong central government. Armin von Bogdandy observes that the Union has taken on “classical state functions” and that it possesses significant coercive power over the Member States.⁴⁰ As a result, he contends that, in its spheres of activity, the EU “can hardly be distinguished from the central level of a federal state.”⁴¹ More proactively, G.F. Mancini has asserted that “the confederal set-up has given rise to contradictions . . . which only a leap towards federalism can hope to overcome.”⁴² Luís Lobo-Fernandes concurs that a “neo-federal modality” would make the EU far more effective.⁴³ Even more boldly, German Foreign Minister Joschka Fischer in 2000 called for “the transition from a union of states to full parliamentarization as a European Federation.”⁴⁴

European supranationalism does have its limits, however. Even its ardent proponents stop short of calling for an EU resembling the Ameri-

that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. . . . The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

Id. at 12.

40. Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 27, 33 (2000). Von Bogdandy further observes that the Maastricht and Amsterdam treaties “promulgate objectives and competencies for the creation and preservation of a unitary territory” and that the concept of EU citizenship is becoming more clearly defined and significant. *Id.* at 35–36. He asserts that in these developments “one finds clear federal dynamics in the sense that a government for a defined territory and a defined citizenship exists and the sovereign authority defines itself in these terms.” *Id.* at 36.

41. *Id.* at 33.

42. MANCINI, *supra* note 18, at 66. Youri Devuyt similarly argues for a “reinvigoration of the European integration process through the creation of a Federation of Nation States based on a coherent Constitutional system among those European countries willing to leave behind ancient notions of sovereignty.” Youri Devuyt, *The European Union’s Constitutional Order? Between Community Method and Ad Hoc Compromise*, 18 BERKELEY J. INT’L L. 1, 7 (2000). Further federal development, according to Devuyt, would “pursue the institutional logic behind the Rome Treaty.” *Id.* at 51.

43. Luís Lobo-Fernandes, *Por um Sistema Bicararário na UE*, EXPRESSO (Lisbon), June 7, 2003, at 30 (Lobo-Fernandes’ translation).

44. Joschka Fischer, *From Confederacy to Federation—Thoughts on the Finality of European Integration*, Speech at the Humboldt University in Berlin (May 12, 2000), available at <http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/reden/redene/r000512b-r1008e.pdf>.

can model with the central government possessing virtually unlimited powers.⁴⁵ The deeply entrenched national identities of the European people and their rich cultural (and often national) histories suggest that the EU must look “European.” G.F. Mancini speaks of the need to respect “the identity of the peoples of which [the EU] is composed.”⁴⁶ Joschka Fisher acknowledges that the idea of a new federal state that would replace the Member States as the new sovereign power “shows itself to be an artificial construct which ignores the established realities in Europe.”⁴⁷ More pointedly, Joseph Weiler asserts that it would be

more than ironic if a polity with its political process set up to counter the excesses of statism ended up coming round full circle and transforming itself into a (super)state . . . [and] equally ironic that an ethos that rejected the nationalism of the Member States gave birth to a new European nation and European nationalism.⁴⁸

In light of Europe’s “realities,” Fisher suggests that further integration of the EU will be workable only if it “takes the nation-states along with it into such a Federation, only if their institutions are not devalued or even made to disappear.”⁴⁹ In short, he admits that the successful completion of European integration must be based on “a division of sovereignty between Europe and the nation-state.”⁵⁰ In view of all of the historical, practical and political challenges to creation of a European superstate, Giandomenico Majone maintains that “[f]ully fledged federalism . . . does not enjoy widespread political support at present.”⁵¹ Michael Newman examines the supranationalist and intergovernmentalist schools of thought and comments that “most contemporary theorists fall somewhere between them.”⁵² These comments invite us to the middle ground.

45. Interestingly, the first draft of the ill-fated EU Constitution suggested that the Union might be called “the United States of Europe.” Treaty Establishing a Constitution for Europe, Preliminary Draft, Oct. 28, 2002, CONV 369/02. The draft also referred to the Union carrying out its activities “on a federal basis.” *Id.* art. 1. Neither proposal was included in the Constitution’s final draft. PETER NORMAN, *THE ACCIDENTAL CONSTITUTION: THE STORY OF THE EUROPEAN CONVENTION* 72, 192, 250 (2003). Neither is found in the Treaty of Lisbon.

46. MANCINI, *supra* note 18, at xxvi.

47. FISCHER, *supra* note 44.

48. WEILER, *supra* note 21, at 94.

49. FISCHER, *supra* note 44.

50. *Id.*

51. Giandomenico Majone, *Europe’s ‘Democratic Deficit’: The Question of Standards*, 4 *EUR. L.J.* 5, 27 (1998).

52. NEWMAN, *supra* note 19, at 18.

1.3. *Something in Between*

The reality of the EU is that it is a system containing both intergovernmental and supranational elements. Like an IGO, the Union is treaty-based and is characterized by voluntary membership and unanimity requirements for treaty amendments and other key decisions. Like a vertically stacked national federation, the EU has an independent and multi-institutional central government, its laws have primacy over Member State law, and many of its legislative enactments are approved by a form of majority vote. Given this blending of elements, what is the proper label for the EU?

Murray Forsyth has compared the European Community of the early 1980s to several confederal entities.⁵³ Lothar Funk has called the Union a “hybrid.”⁵⁴ Ian Ward has described it as a “post-modern polity,”⁵⁵ to which Jeremy Rabkin adds that it “twists and bends traditional attributes of statehood or national sovereignty.”⁵⁶ Kalypso Nicolaïdis describes the EU as a “third way.”⁵⁷ Pavlos Eleftheriadis refers to the Union’s “*sui generis*” nature.⁵⁸ Armin von Bogdandy describes the EU as a “functionally-oriented form of political and legal organization” rather than a “territorially-oriented one”⁵⁹ and sees its organizational structure as “characterized by polycentrism and fragmentation.”⁶⁰ Michael Newman cites a variety of integration theories such as “neo-

53. MURRAY FORSYTH, *UNIONS OF STATES: THE THEORY AND PRACTICE OF CONFEDERATION* 10–16, 160–87 (1981).

54. Lothar Funk, *A Legally Binding EU Charter of Fundamental Rights?*, 37 *INTERECONOMICS* 253, 262 (2002). Another commentator has called the EU a hybrid, an entity “exceeding the territory of international law, yet without the coherence of a federal state.” Jiří Příbáň, *European Union Constitution-Making, Political Identity and Central European Reflections*, 11 *EUR. L.J.* 135, 149 (2005).

55. Ian Ward, *Identity and Difference: The European Union and Postmodernism*, in *NEW LEGAL DYNAMICS OF EUROPEAN UNION* 15, 21–26 (Jo Shaw & Gillian More eds., 1995).

56. Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 *CHI. J. INT’L L.* 273, 275 (2000).

57. Kalypso Nicolaïdis, *The New Constitution as European Democracy?* 5 (Fed. Trust for Educ. & Research, Online Paper No. 38/03, 2003), available at http://www.fedtrust.co.uk/uploads/constitution/38_03.pdf.

58. Pavlos Eleftheriadis, *The European Constitution and Cosmopolitan Ideals*, 7 *COLUM. J. EUR. L.* 21, 28 (2001); see also Majone, *supra* note 51, at 8 (referring to the institutional architecture of the Community).

59. Von Bogdandy, *supra* note 40, at 32.

60. *Id.* at 28. Von Bogdandy also comments that the Treaty of Amsterdam has a substantial unifying potential. *Id.* at 38. However, even if this potential is fully realized, the Union will remain an organization that does not represent a societal and political unity in the sense of a nation. *Id.* Similarly, its political system is constitutively far more fragmented than political systems of a state. *Id.*

functionalism' . . . co-operative federalism, neo-federalism and also a non-specific form of economic determinism."⁶¹ Joseph Weiler refers to a "community vision" in which the Member States and the EU "continue their uneasy co-existence, although with an ever-increasing embrace."⁶² Perhaps the best description has been offered by the European Court of Justice in the *van Gend & Loos* decision.⁶³ The Court declared that "the Community constitutes a new legal order of international law" in which the Member States "have limited their sovereign rights, albeit within limited fields."⁶⁴ The "limited fields" are those areas in which the EU is specifically empowered to act, such as control over the internal market and its "four freedoms,"⁶⁵ the common currency, and border controls. By delegating to central management in Brussels, the Member States have given up the right to regulate these matters at the national level.

The debate about what to call the European Union may be of little practical consequence, but the balance between intergovernmental and supranational elements determines the influence of the Union's Member States within the system, and it does impact their national sovereignty. At the heart of this balancing act is the matter of majority voting. A nation that has agreed to majority rule has accepted the fact that it may find itself subject to legislation that it does not want. Its objections may be to no avail, and thus it will have yielded to outsiders its right as a sovereign nation to manage certain of its affairs.

61. NEWMAN, *supra* note 19, at 18–19.

62. WEILER, *supra* note 21, at 93.

63. Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1.

64. *Id.* at 12.

65. The "four freedoms" lie at the heart of a Union without internal borders. First and foremost of the four is the free movement of goods within the EU. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 28–37, 2010 O.J. (C 83) 47 [hereinafter TFEU]. This entails the prohibition of internal customs duties, quantitative restrictions, and "all measures having equivalent effect." *Id.* arts. 28, 30, 34–35. The second freedom is the free movement of persons, meaning workers. A citizen of one Member State may take up employment in any other Member State. *Id.* arts. 45–48. Third is the free movement of services and the related right of a citizen of one Member State to establish a business in another Member State. *See id.* arts. 49–55 (establishment), 56–62 (services). The fourth freedom relates to movement of capital among the Member States. *Id.* arts. 63–66, 75.

2. WHY SHOULD THE EU EMPLOY ANY FORM OF MAJORITY VOTING?

A foundational principle of international law is that all parties to a treaty must consent to its initial ratification and its subsequent amendment.⁶⁶ Likewise, when a group of nations has created an organization or entered into any other form of international arrangement, history indicates that they have expected operational decision-making to be unanimous. Stephen Zamora has observed:

Under traditional international law, as exemplified by early diplomatic conferences, two basic truths controlled the question of voting: every state had an equal voice in international proceedings (the doctrine of sovereign equality of states), and no state could be bound without its consent (the rule of unanimity). These rules were bound together, and were extensions of the general principle of the state's sovereign immunity from externally imposed legislation.⁶⁷

The general application of unanimity has a major flaw, however. It inhibits the actual achievement of results. Zamora adds:

The disadvantage of the rule of unanimity, of course, is that international agreement is impossible to obtain when any single participant can block a decision; to achieve unanimous consent, the strength of a decision must be diluted so as to please everyone. Either result is unsatisfactory for an effectively functioning international organization that is charged with making and implementing decisions to meet urgent, practical problems.⁶⁸

Andreas Føllesdal concurs. Referring to voting patterns within the European Union, he notes that the presence of “multiple veto points ensuring stability easily leads to stagnation, preventing common action even when required.”⁶⁹ Even worse than inaction, according to Føllesdal, is that a nation may threaten a veto to exact concessions in its favor: “Thus many hold that this safety valve has been abused by some Mem-

66. See Vienna Convention on the Law of Treaties arts. 24, 40, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

67. Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566, 571 (1980).

68. *Id.* at 574.

69. Andreas Føllesdal, *Achieving Stability? Forms and Arenas of Institutional and National Balances in the Draft Constitutional Treaty 5* (Fed. Trust for Educ. & Research, Online Paper No. 06/04, 2004), available at http://www.fedtrust.co.uk/uploads/constitution/06_04.pdf.

ber States to extort unfair benefits from cooperation.”⁷⁰ The EU Commission *White Paper on European Governance* echoed these concerns, noting that a consensus requirement “often holds policy-making hostage to national interests.”⁷¹

According to Youri Devuyst, the founders of the European Community were determined to avoid the shortcomings of previous international organizations. He quotes Community founding father Paul-Henri Spaak as having stated that “unanimity formulae are the formulae of impotence.”⁷² Devuyst describes Spaak as seeking to avoid the “unanimity trap” by urging the Community’s initial members “to leave ancient notions of sovereignty behind and accept the principle of majority voting.”⁷³ This proposal was not to be grounded in mere idealism, but in recognition that a successful Community would advance the “substantive political and economic preferences” of the Member States.⁷⁴ Historical evidence for Spaak’s beliefs could be found in a number of international technical organizations which had abandoned unanimous voting in the nineteenth and early twentieth century.⁷⁵ Examples of these “task-oriented, technical agencies” include the International Telegraphic Union, the Universal Postal Union, and the International Institute of Agriculture.⁷⁶ Furthermore, in the years immediately following World War II, IGOs such as the United Nations and the Bretton Woods institutions were being created with weighted majority voting and other alternatives to unanimous decision-making.⁷⁷ Nevertheless, despite these precedents and Spaak’s strongly held positions, unanimity was an ingrained feature of the European Community at its founding, and the unanimity requirement inhibited centralized action during the Community’s early years.

The usual illustration of the difficulties caused by the Council’s unanimous voting procedure is the period from 1966 to 1986. In 1965, France objected to the Treaty of Rome’s scheduled phase-in of more qualified majority voting in the fields of agriculture and the internal

70. *Id.*

71. *Commission White Paper on European Governance*, *supra* note 35, at 29.

72. Devuyst, *supra* note 42, at 30 (quoting Paul-Henri Spaak, *Document 52: Il n’y a plus un moment à perdre si nous voulons nous sauver (11 décembre 1951)*, in *LA PENSÉE EUROPÉENNE ET ATLANTIQUE DE PAUL-HENRI SPAAK (1942–1972)* 283 (Paul-F. Smets ed., 1980) (Devuyst’s translation)).

73. *Id.*

74. *Id.* at 8.

75. See Zamora, *supra* note 67, at 574–75.

76. *Id.* at 575.

77. *Id.* at 573, 576–77. For an extended analysis of international organizations utilizing various forms of majority voting, see generally *id.* at 571–88.

market.⁷⁸ The French protest took the form of a seven-month boycott of Council meetings—the period of the so-called “empty chair.”⁷⁹ Then, in early 1966, Community leaders struck a bargain to bring France back to the table. The Luxembourg Accord informally provided—in other words, without a treaty amendment—that a nation could forestall a qualified majority vote if its vital national interests were threatened.⁸⁰ If a Member State invoked its vital interests, the Council would forego a vote and negotiate further to achieve consensus. Although QMV was still technically permitted, few such votes were taken for twenty years. In 1986, the Accord was set aside by the Single European Act, which dramatically expanded QMV with regard to the Community’s internal market.⁸¹

The Luxembourg Accord is widely believed to have created a period of stagnation in the Community, which has been referred to as “Eurosclerosis”⁸² or the Community’s “dark ages.”⁸³ Paul Craig describes this period as “the prime example of negative intergovernmentalism.”⁸⁴ George Tsebelis and Geoffrey Garrett describe “legislative gridlock” in the Council, which in turn meant that the Commission’s right of legislative initiative was of little use and its opportunities to implement new policies were limited.⁸⁵ As a result, innovative and unchecked decisions by the European Court of Justice were “the primary force propelling European integration” during this time.⁸⁶ Joseph Weiler concurs that, in the Luxembourg period, “the Community became increasingly unable to respond to new challenges, that called for real policy choices.”⁸⁷ However, not all commentators accept the notion that this era brought Commu-

78. Youri Devuyt, *The European Union’s Institutional Balance After the Treaty of Lisbon: “Community Method” and “Democratic Deficit” Reassessed*, 39 GEO. J. INT’L L. 247, 284–86 (2008).

79. *Id.* at 284.

80. *Id.* at 285.

81. *Id.* at 286.

82. See, e.g., Martin Bangemann, *Le Vote Majoritaire pour l’Union Européenne Élargie*, REVUE DU MARCHÉ UNIQUE EUROPÉEN, 1-1995, at 175, translation available at http://www.ena.lu/martin_bangemann_majority_voting_enlarged_european_union_1995-020005607.html.

83. Jonathan Golub, *In the Shadow of the Vote? Decision Making in the European Community*, 53 INT’L ORG. 733, 735 (1999). For an extensive list of citations to commentators who subscribe to the stagnation theory, see *id.* at 735 n.7.

84. Paul Craig, *The Community Political Order*, 10 IND. J. GLOBAL LEGAL STUD. 79, 86 (2003).

85. George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INT’L ORG. 357, 358–59 (2001).

86. *Id.* at 359.

87. WEILER, *supra* note 21, at 66.

nity legislative activity to a standstill. Jonathan Golub has carried out extensive analyses of decision-making and legislative backlogs during the two Luxembourg decades, and he has concluded that Council activity was “highly efficient rather than paralyzed.”⁸⁸ He argues that “there is no indication that the Luxembourg Compromise had significant lasting effects or prevented majority voting from actually being used.”⁸⁹ Concurring with Golub, Peter Ludlow has asserted that the “radical expansion of the European Community’s agenda in the 1970s into such areas as environmental policy, regional policy and the [European Monetary System]” was accomplished despite the unanimous voting requirements of EC Treaty Article 308.⁹⁰

Notwithstanding the fact that unanimous voting requirements need not bring all EU activity to a standstill, most European leaders seem to have concluded that further integration demands the reinforcement and expansion of qualified majority voting on the Council. The Single European Act of 1986 reflected this attitude by significantly expanding the use of QMV, for the purpose of facilitating approval of a substantial number of directives that were necessary for completion of the internal market by the end of 1992.⁹¹ The treaties of Maastricht, Amsterdam, and Nice further extended QMV,⁹² and the Lisbon Treaty for the first time states that the Council “shall act by a qualified majority except where the Treaties provide otherwise.”⁹³

A further justification for QMV is that it does retain a significant role for the Member States within the EU system. Qualified majority voting is a step well short of full delegation of authority to the EU institutions. Andrew Moravcsik describes QMV as an example of “pooling” of sovereignty, as contrasted with the full delegation of sovereignty that takes place when Union institutions (the Commission being one example) are

88. Golub, *supra* note 83, at 742.

89. *Id.* Golub also offers research results to demonstrate that the Single European Act and the 1992 Maastricht Treaty did nothing to increase the Council’s legislative efficiency. *Id.* at 742–43.

90. Peter Ludlow, The Thessaloniki European Council, EuroComment Briefing Note, No. 2.3, July 3, 2003, at 28.

91. WEILER, *supra* note 21, at 232; Devuyt, *supra* note 78, at 285–86.

92. *Id.* at 286.

93. Lisbon TEU, *supra* note 4, art. 16(3). Interestingly, the EC Treaty had stated: “Save as otherwise provided in this Treaty, the Council shall act by a majority of its Members.” EC Treaty, *supra* note 33, art. 205(1). However, the default rule was not implemented except for certain procedural matters. See, e.g., Pre-Lisbon TEU, *supra* note 7, arts. 23(3), 34(4); EC Treaty, *supra* note 33, arts. 144, 207(3), 209. All substantive decisions of the Council under the Pre-Lisbon Treaties were specifically assigned to other requirements such as unanimity, QMV, or the standard legislative procedures that utilize QMV.

given the power to make and carry out law without consulting the Member States.⁹⁴

3. WHAT CONSTITUTES A QUALIFIED MAJORITY?

As its name implies, a qualified majority of the Council is something beyond a simple majority of the Member States. Voting power is determined by a Member State's population, although not on a strict mathematical formula. From the founding of the European Community through the European Union's most recent accession treaty, QMV has been based on a system of weighted voting where each Member State's votes are set forth in the treaties.

The Treaty of Rome allocated voting power on the Council as follows:⁹⁵

France	4	Italy	4	Netherlands	2
Germany	4	Belgium	2	Luxembourg	1

In matters based upon a Commission proposal, a qualified majority was twelve of the seventeen total votes. In matters not coming from the Commission, a qualified majority had two components: twelve votes that were required to be cast by at least four of the six Member States.⁹⁶

As new states joined the Community, their accession treaties contained provisions assigning voting power to the new Member States and adjusting the votes assigned to existing members. For example, the 1994 treaty governing the accession of Austria, Sweden, and Finland allocated voting power for the expanded Community in the following manner:⁹⁷

94. ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* 67 (1998).

95. Treaty of Rome, *supra* note 3, art. 148(2).

96. *Id.*

97. Treaty Concerning the Accession of Austria, Finland, and Sweden art. 13, 1994 O.J. (C 241) 7.

France	10	Belgium	5	Sweden (new member)	4
Germany	10	Greece	5	Denmark	3
Italy	10	Netherlands	5	Finland (new member)	3
United Kingdom	10	Portugal	5	Ireland	3
Spain	8	Austria (new member)	4	Luxembourg	2

The 1994 treaty required sixty-two votes (of eighty-seven total) to constitute a qualified majority on matters proposed by the Commission, and sixty-two votes representing ten of the fifteen Member States on all other matters.⁹⁸

The final allocation of votes prior to the Lisbon Treaty took place when Bulgaria and Romania joined the EU in 2007. An act relating to the accession treaty provided the following allocations:⁹⁹

France	29	Czech Republic	12	Ireland	7
Germany	29	Greece	12	Lithuania	7
Italy	29	Hungary	12	Slovakia	7
United Kingdom	29	Portugal	12	Cyprus	4
Poland	27	Austria	10	Estonia	4
Spain	27	Bulgaria (new member)	10	Latvia	4
Romania (new member)	14	Sweden	10	Luxembourg	4
Netherlands	13	Denmark	7	Slovenia	4
Belgium	12	Finland	7	Malta	3

In the Union of twenty-seven members and a total of 345 assigned votes, 255 votes were necessary for a qualified majority on any matter proposed by the Commission. For all other matters, a qualified majority required 255 votes cast by at least two-thirds of the Member States (for example, eighteen of twenty-seven).¹⁰⁰

98. Decision of the Council of the European Union of 1 January 1995 Adjusting the Instruments Concerning the Accession of New Member States to the European Union art. 8, 1995 O.J. (L1) 3.

99. Act Concerning the Conditions of Accession of the Republic of Bulgaria and Romania and the Adjustments to the Treaties on Which the European Union Is Founded art. 10, 2005 O.J. (L 157) 203.

100. *Id.*

As the above figures illustrate, a qualified majority vote is actually a supermajority of the allocated votes, and, in matters not proposed by the Commission, a supermajority of Member States must approve a Council decision. This state of affairs is no coincidence. The political reality is that, despite the expansion of qualified majority voting since 1986, the path has been marked with concessions aimed at preserving Member State sovereignty. Under the treaties, a qualified majority has always been defined in such a way as to provide extra voting power to the smallest states.¹⁰¹ In addition, there is a continuing attempt to reach consensus on the Council, even on matters for which a QMV decision may be taken. Edward Best describes these phenomena as follows:

[T]he ‘Founding Fathers’ of Europe explicitly rejected ‘objective’ keys and population, in favour of a distribution of votes reflecting a balancing act between states. This balance was conceived in terms of clusters of states and responded to a general principle of ‘degressive proportionality’ . . . by which the larger units are under-represented compared to the smaller ones. This in turn has loosely reflected the belief that, in such a diverse and sensitive union as the European Community, the pursuit of consensus and the protection of minorities are more important principles than simple majority rule.¹⁰²

Other concessions have included opt-outs, derogations, and transition periods for new policies.¹⁰³ As Volker Röben notes, “The trend to qualified majority voting in the Council of Ministers at the center is counterbalanced by the ever-increasing role on the periphery of the [consensus-driven] European Council.”¹⁰⁴ Finally, despite the expansion of QMV,

101. For example, under the Treaty of Rome, tiny Luxembourg had a voting power equal to one-fourth that of Germany, France, and Italy. Furthermore, under the latest pre-Lisbon formula, Malta is given three votes, compared with twenty-nine for Germany. If votes were allocated strictly by population, the ratio would be approximately 1:200, based on Malta’s current population of four-hundred thousand and Germany’s eighty-two million. These were rounded figures as of January 1, 2007. See EUROPA, Key Facts and Figures About Europe and the Europeans – Size and Population – How Many People Live in the EU?, http://europa.eu/abc/keyfigures/sizeandpopulation/howmany/index_en.htm#chart4 (last visited May 1, 2010).

102. Edward Best, *What is Really at Stake in the Debate over Votes?*, EIPASCOPE, 2004, at 14, 17, available at [http://www.eipa.nl/cms/repository/eipascope/Art_2\(2\).pdf](http://www.eipa.nl/cms/repository/eipascope/Art_2(2).pdf).

103. Devuyst, *supra* note 42, at 20–21.

104. Volker Röben, *Constitutionalism of the European Union After the Draft Constitutional Treaty: How Much Hierarchy?*, 10 COLUM. J. EUR. L. 339, 359 (2004). Smaller states carry disproportionate weight on the European Council, because the body acts as a summit meeting of the Member States where each state is represented by its head of state or government, and voting power is not weighted by population. Pre-Lisbon TEU, *supra* note 7, art. 4. For an analysis of the development of the European Council and the changes to this institution provided in the Lisbon

there remain many areas in which unanimity has been preserved, leaving room for any Member State to threaten a veto. Pavlos Eleftheriadis has described such threats as “discretionary state action.”¹⁰⁵

One of the more visible institutional changes brought about by the Lisbon Treaty is its revamping of the way in which a qualified majority on the Council is determined.¹⁰⁶ The new treaty abandons the EC Treaty’s vote allocations for determining a qualified majority in favor of a percentage calculation. The Lisbon approach was first proposed in the ill-fated EU Constitution,¹⁰⁷ and the formula defines a qualified majority as (1) the votes of fifty-five percent of the Member States, (2) representing at least fifteen states, and (3) representing sixty-five percent of the EU population.¹⁰⁸ A blocking minority must include at least four Member States.¹⁰⁹ The 2007 pre-Lisbon weighted voting requirements will remain in effect through October 31, 2014.¹¹⁰ The new Lisbon formula will take effect on November 1, 2014, although any member of the Council may require a vote on the basis of the pre-Lisbon requirements between that date and March 31, 2017.¹¹¹ As a further means of softening the impact of the new formula, from 2014 to 2017 special requests by groups of states that are not sufficient to form a

Treaty, see SIEBERSON, *supra* note 9, at 165–69. For an analysis of voting on the European Council, see Part 6.2(b) *infra*.

105. Eleftheriadis, *supra* note 58, at 39.

106. The Lisbon Treaty also declares QMV to be the ordinary decisional requirement for the Council: “The Council shall act by a qualified majority except where the Treaties provide otherwise.” Lisbon TEU, *supra* note 4, art. 16(3).

107. Treaty Establishing a Constitution for Europe art. I-25, Dec. 16, 2004, 2004 O.J. (C 310) 1.

108. Lisbon TEU, *supra* note 4, art. 16(4). The original voting scheme proposed for the Constitution by the Convention was that a qualified majority would consist of a majority of the Member States representing three-fifths of the EU’s population, but this formula was rejected at the IGC meetings that took place in December 2003, and approval of the Constitution was postponed. The chief problem was that Spain and Poland wished to protect the favorable weighting of their Council votes as assigned to them in the Treaty of Nice, and the proposed QMV percentage formulas negated the special advantage they had come to expect. The Irish presidency invested a great deal of energy in solving the problem, and the result was a revised voting scheme approved at the June 2004 IGC. This is the formula that carried over into the Lisbon Treaty. Thomas Fuller, *Split on Voting Rights Sinks the EU Constitution*, INT’L HERALD TRIB., Dec. 15, 2003, at 1. For an extensive historical review of QMV formulas and an assessment of the positions of Spain and Poland under the Nice Treaty, see Best, *supra* note 102.

109. Lisbon TEU, *supra* note 4, art. 16(4).

110. For the 2007 pre-Lisbon weighted-voting formula, see *supra* text accompanying note 100.

111. The phase-in for the new QMV formula is set forth in a protocol to the Lisbon Treaties. Protocol (No 36) on Transitional Provisions art. 3, 2008 O.J. (C 115) 322. The right of a Council member to require a vote under the pre-Lisbon requirements is found in Article 3(2) of the protocol. *Id.*

blocking minority may force the Council to reconsider a close vote.¹¹² And a non-blocking minority will be able to force reconsideration even beyond 2017.¹¹³

As under the weighted voting systems prior to Lisbon, the new version of QMV will prevent a single Member State from blocking EU legislation. Likewise, because more than fifty-five percent of the Member States must be represented in a prevailing vote under the new formula, no small group of the largest Member States will be able to dictate decisions. However, because of the requirement that sixty-five percent of the EU population be represented, a small group of the largest states will be able to prevent a successful vote, although the treaty requires at least four states to form a “blocking minority.” Giovanni Grevi has observed that the requirement of four states to reject a measure would “prevent Germany, the UK, France or Italy from forming a blocking coalition of three.”¹¹⁴ Although much analysis has been made of which combinations of Member States could form to approve or block Council action,¹¹⁵ the essence of qualified majority voting has been retained under Lisbon. QMV has been and will remain a decision-making procedure that allows EU action to be taken over the objection of a Member State. We will now examine the new subjects for which the EU’s members have yielded their individual veto rights.

4. WHERE THE LISBON TREATY REPLACES UNANIMITY WITH QMV

As noted in Part 2 above, the Treaty of Rome anticipated a phase-in of qualified majority voting on a number of subjects critical to Commu-

112. Declaration on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union § 1, 2008 O.J. (C 115) 338.

113. *Id.* § 2.

114. Giovanni Grevi, *Light and Shade of a Quasi-Constitution: An Assessment* 8 (Eur. Policy Ctr., EPC Issue Paper No. 14, 2004), available at http://www.epc.eu/TEWN/pdf/1054718699_EPC%20Issue%20Paper%2014%20Light%20and%20shade%20of%20a%20quasi-Constitution%20.pdf.

115. For a detailed analysis of the various majority and blocking formulas possible under the Constitution and its predecessors, see Janis A. Emmanouilidis, *Historically Unique, Unfinished in Detail—An Evaluation of the Constitution*, EU REFORM, 2004/03, at 5–8, 12–13, available at http://www.cap.uni-muenchen.de/download/spotlight/Reformspotlight_03-04_en.pdf. For an examination of QMV formulas and suggestions for alternative allocations of voting power, see Bela Plechanovová, *Draft Constitution and the Decision-Making Rule for the Council of Ministers of the EU—Looking for an Alternative Solution* (Eur. Integration Online Papers, Working Paper, Vol. 8, No. 12, 2004), available at <http://ssrn.com/abstract=594946>. For an earlier review of coalition-forming and negotiations that have led to QMV decisions on the Council, see Madeleine O. Hosli, *Coalitions and Power: Effects of Qualified Majority Voting in the Council of the European Union*, 34 J. COMMON MKT. STUD. 255 (1996).

nity success, particularly with regard to the internal market and agriculture. However, due to the “empty chair” episode and the Luxembourg Accord, significant extension of QMV was not possible until the Single European Act of 1986.¹¹⁶ Thereafter, the 1992 Treaty on European Union created the unanimity-based Second and Third Pillars, but it also extended QMV to a variety of subjects.¹¹⁷ Additional QMV was provided when the Treaties of Amsterdam (1997)¹¹⁸ and Nice (2002)¹¹⁹ amended the foundational treaties.¹²⁰ The Lisbon Treaty continues this trend, offering both movement from unanimity to QMV and the application of QMV to new subjects of EU activity. This Part will analyze where Lisbon abandons existing unanimous voting requirements on the Council and allows decisions to be taken in accordance with the new qualified majority calculation. For the treaty provisions described in this Part, the qualified majority requirement will arise, unless otherwise noted, as a result of the decision being subject to the “ordinary legislative procedure.”¹²¹

4.1. Institutional Matters

a. Council presidencies. Article 16(9) of the Lisbon TEU and Article 236(b) of the TFEU provide for a qualified majority decision of the European Council to determine the system for rotation of all Council formation presidencies, other than the presidency of Foreign Affairs. This is a rare instance in which the European Council may vote by QMV;

116. Devuyst, *supra* note 78, at 285–86.

117. For an exhaustive list of the matters subject to QMV at various stages of EU history, including the Treaty of Rome, the Single European Act, the TEU, and the treaties of Amsterdam and Nice, see Vaughne Miller, *The Extension of Qualified Majority Voting from the Treaty of Rome to the European Constitution* 10–18, (House of Commons Library, Research Paper No. 04/54, 2004), available at <http://www.parliament.uk/commons/lib/research/rp2004/rp04-054.pdf>.

118. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

119. Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1.

120. Amsterdam and Nice moved certain decisions from unanimity to QMV and authorized new fields of EU activity that were subject to QMV. Miller, *supra* note 117. For analysis of the Amsterdam Treaty, see generally Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1 (1998). For analysis of the Nice Treaty, see generally Finn Laursen, *Explaining the Treaty of Nice: Beyond Liberal Intergovernmentalism?*, in THE TREATY OF NICE: ACTOR PREFERENCES, BARGAINING AND INSTITUTIONAL CHOICE 529 (Finn Laursen ed., 2006); Andreas Maurer, *Qualified Majority Voting: A Joint but Failed Search for Efficiency Building*, in THE TREATY OF NICE, *supra*, at 433.

121. The “ordinary legislative procedure” entails both a QMV decision by the Council and a co-decision by the European Parliament. Lisbon TEU, *supra* note 4, art. 16(3); TFEU, *supra* note 65, art. 294.

under Article 15(4) of the Lisbon TEU, the European Council is normally required to act by consensus.¹²² Previously, Article 203 of the EC Treaty provided that the rotation of Council presidencies was determined by the Council itself, acting unanimously. *Comment:* The system of rotation is a technical, administrative matter. Protection for the Member States is found in Article 16(9) of the Lisbon TEU, which says that Council presidencies will be held “on the basis of equal rotation.”

b. Commission. Under Article 291(3) of the TFEU, EU regulations may “lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.” These regulations will require a QMV decision of the Council under the ordinary legislative procedure. There was not a directly parallel provision in the Pre-Lisbon Treaties that addressed how the Member States could exert control over the Commission’s implementing authority. Instead, EC Treaty Article 202 generally permitted the Council to confer on the Commission the power to implement “rules which the Council lays down.” The Council could “impose certain requirements in respect of the exercise of these powers,” presumably including any assignment of authority to the Member States. In any event the Commission was required to act according to “principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from Commission and after obtaining the opinion of the European Parliament.” Thus, in at least one respect the unanimous approval required under the EC Treaty has been changed to a QMV decision under the TFEU. *Comment:* This slight change to more QMV actually makes it easier to give oversight authority to the Member States. Now, a QMV decision can grant some measure of “control” to the Member States, whereas previously a unanimous vote would have

122. The Lisbon Treaties provide for specific instances in which European Council decisions may be taken by less than consensus or unanimity. For situations calling for a qualified majority vote, see Lisbon TEU, *supra* note 4, arts. 15(5) (election of the European Council President), 17(7) (selection of the Commission President and final approval of the Commission), and 18(1) (appointment or removal of the Union Minister for Foreign Affairs). For QMV decisions in the TFEU, see TFEU, *supra* note 65, arts. 236(a) (establishing the list of Council configurations), 236(b) (requiring a decision on presidency of Council configurations); see also Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank art. 11.2, 2008 O.J. (C 115) 230 (explaining the appointment of the Executive Board of the European Central Bank). The European Council may adopt its own procedural rules by simple majority vote. TFEU, *supra* note 65, art. 235(3). It may also decide by simple majority whether to examine proposed amendments to the Constitution and whether to convene a new constitutional convention. Lisbon TEU, *supra* note 4, art. 48(3). Abstentions by a member of the European Council will not prevent unanimous decisions from being taken. TFEU, *supra* note 65, arts. 235(1), 354.

been required. Rather than a loss of power, this change may enhance Member State authority.

c. Statute of ESCB and ECB. Article 129(3) of the TFEU permits regulations to amend specified provisions in the Statute of the European System of Central Banks (ESCB) and of the European Central Bank (ECB), relating to monetary policy. These regulations will require a QMV decision of the Council. In contrast, Article 107(5) of the EC Treaty identified the same provisions in the Statute, and if an amendment to any of them had been proposed by the Commission, the Council's vote on the matter was required to be unanimous. If such an amendment had been proposed by the ECB itself, the Council was permitted to vote by QMV. The TFEU thus offers a shift to QMV for Commission-proposed amendments only. *Comment:* Arguably this is merely an inter-institutional change that will remove a measure of protection for the ECB against unwanted adjustments to its Statute. Powers of the Member States are not affected.

d. ECB Executive Board. Under Article 283(2) of the TFEU, the six-member Executive Board of the ECB will be appointed by a qualified majority vote of the European Council (euro-zone Member State representatives only), upon a recommendation by the Council and after consultation with the European Parliament and the ECB's Governing Council. This is a change from EC Treaty Article 112(2), which required the appointment to be made by the *common accord* of the heads of state or government of the euro-zone Member States. *Comment:* All euro-zone Member States are represented on the Governing Council of the ECB through the heads of their central banks,¹²³ and all Member States are represented on the Council and European Council. Thus, all Member States have two or more opportunities for input into the selection of the ECB's Executive Board. The change to QMV for the European Council's final appointment decision does eliminate a Member State's ultimate veto right.

e. Court of Justice Statute. TFEU Article 281 allows a regulation (requiring only a qualified majority vote of the Council) to amend the Statute of the Court of Justice, excluding Title I (qualifications, terms, and immunities of judges) and Article 64 (language requirements for the Court).¹²⁴ These excluded provisions can be amended only through a

123. TFEU, *supra* note 65, art. 283(1).

124. Title I sets the basic rights and duties of judges, while Article 64 governs the language arrangements at the Court. Protocol (No 3) on the Statute of the Court of Justice of the European

treaty amendment, because the Statute is appended to the Lisbon Treaties as a protocol. The corresponding provision in the EC Treaty is Article 245, which requires a *unanimous* Council decision for amendments to the Statute, with Title I (but not Article 64) thus being subject to a treaty amendment. *Comment:* Changes to Title I remain subject to a treaty amendment. Under the TFEU, any change to Article 64 actually becomes more demanding under the Lisbon Treaty, also requiring a treaty amendment rather than a unanimous Council vote. With the exception of Title I and Article 64, the Lisbon Treaty offers a broad shift to qualified majority voting for changes to the Statute. However, this shift does not affect matters of the Court's substantive jurisdiction, but merely those that govern its procedures and operations.

f. Specialized courts. Article 257 of the TFEU permits regulations to create specialized courts (formerly called "judicial panels") to be attached to the General Court (previously called the "Court of First Instance"). The regulations may also determine the specialized courts' fields of jurisdiction. These laws will require a qualified majority vote of the Council, whereas similar provisions in Article 225(a) of the EC Treaty required a unanimous Council decision. *Comment:* Despite this change, Article 257 of the TFEU retains the EC Treaty's requirements that members of specialized courts be appointed by unanimous vote of the Council, and that a QMV decision of the Council may approve rules of procedure for the special panels. The shift to QMV relates only to regulations that create the specialized courts and set their jurisdiction. In light of the fact that specialized courts are intended to foster the efficient administration of judicial matters, and because their decisions are subject to appeal to the General Court,¹²⁵ the streamlining measures relating to these courts can hardly be seen as a threat to Member State sovereignty.

4.2. Resources and Revenues

a. Own resources. The TFEU, in Article 311, permits regulations approved by a QMV Council decision to implement measures relating to the Union's own resources, the system by which the EU may independently generate funds for its budgetary needs. However, such implementing regulations must be based on a policy previously approved by a

Union arts. 2–8, 64, 2008 O.J. (C 115) 210. Amendments to these provisions will require an amendment to the protocol, which constitutes an amendment to the TFEU and Lisbon TEU.

125. TFEU, *supra* note 65, art. 257.

unanimous Council vote, and such policy must also be approved by the governments of all of the Member States. EC Treaty Article 269 required unanimity for all “provisions” without differentiating between the basic policy and subsequent implementing measures. *Comment:* Because the budget is a politically sensitive area, the drafters of the Lisbon Treaty apparently felt it necessary to preserve the veto power of each Member State at the critical policy-setting stage. Any Member State that is concerned about subsequent implementation can in principle withhold its vote at the policy stage until any controversial aspects of potential implementation are agreed to in advance. The TFEU’s addition of QMV at the implementation stage must be seen as a technical change instituted in the interest of efficiency.

b. Revenues. Under TFEU Article 322(2), the Council may adopt by QMV a regulation governing how EU budget revenues will be made available to the Commission. This provision is a change from EC Treaty Article 279(2), which required unanimity for such action. *Comment:* This is a technical matter of budgetary implementation. As discussed in the previous paragraph, the Member States are protected by unanimity requirements at the policy-setting stage.

4.3. *Internal Market*

a. Social security. Article 48 of the TFEU permits regulations, approved by a QMV decision of the Council, to protect the social security of workers moving from one state to another within the Union. This article deletes a unanimity requirement that was found in its predecessor, EC Treaty Article 42. *Comment:* Despite this potentially significant change, the TFEU provision provides a so-called “emergency brake” to prevent a QMV decision from taking place. Under this procedure a Member State may remove a matter from the agenda of the Council, which would be entitled to act by qualified majority, and instead have it presented to the European Council for a decision by consensus. In order to invoke the emergency brake, the concerned Member State must assert that the proposed EU law might “affect important aspects of its social security system.”

b. Professional licensing. The right of establishment (including self-employment) is covered by Articles 49 to 55 of the TFEU. The closely related freedom to provide services is governed by Articles 56 to 62. These provisions are generally consistent with their predecessors under

the EC Treaty,¹²⁶ including the utilization of QMV for most decision-making on the Council. However, with regard to professional licensing, Article 47(2) of the EC Treaty required a unanimous Council decision “on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons.” The TFEU has eliminated this unanimity requirement. *Comment:* This provision is potentially significant, because professional services and licensing arise from each Member State’s educational system, and education is a key component in national identity. However, the right of establishment and the free movement of services lie at the heart of the EU’s economic activity—its internal market. A movement toward greater uniformity in professional licensing must be seen as a further refinement of “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”¹²⁷

4.4. Policies in Other Areas

a. Structural Funds and Cohesion Fund. Under Article 177 of the TFEU, regulations relating to the Union’s Structural Funds and Cohesion Fund may be approved by the Council using QMV. These funds are to be utilized to assist development in economically depressed areas within the EU.¹²⁸ This provision is a change from EC Treaty Article 161, under which QMV would replace unanimity on January 1, 2007, but only if a multiannual financial perspective and a related interinstitutional agreement had been adopted. *Comment:* The TFEU eliminates the previous qualification. However, this alteration is more of a housekeeping matter than a substantive change, because the EC Treaty’s requirements had previously been fulfilled.¹²⁹

b. Transport. European legislation to support a common transport policy is permitted by the TFEU, and, under Article 91(1), the Council’s decision on these new laws may be determined by a qualified majority vote. Article 71(1) of the EC Treaty was substantively and procedurally identical to the TFEU’s Article 91(1). Article 91(2) of the new treaty requires that these laws take account of “cases where their application

126. EC Treaty, *supra* note 33, arts. 43–48 (right of establishment), 49–55 (services).

127. TFEU, *supra* note 65, art. 26(2). This language is essentially transposed from EC Treaty Article 14(2).

128. TFEU, *supra* note 65, art. 174.

129. See Commission Interinstitutional Agreement, 2006 O.J. (C 139) 1.

might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.” In contrast, EC Treaty Article 71(2) stated that where these special circumstances existed the EU legislation was to be subject to a unanimous Council vote. *Comment:* Under Article 71(2) of the EC Treaty, a veto right was hovering over any new item of transport legislation. Whenever such legislation could have a “serious effect” on a Member State’s standard of living, employment, or transport facilities, the Council was to act unanimously rather than by QMV. Presumably, the Council would move to unanimity at the request of the affected state. This was a significant protection of Member State sovereignty, because it avoided the unwanted imposition of external legislation that could have a “serious effect” at the national level. On the other hand it is obvious that transportation, whether of goods or people, is critical to the smooth functioning of the EU’s internal market. Since the Member States have willingly yielded to Brussels their right to nationally govern most of the other components of the internal market, the TFEU’s elimination of a previous veto point actually amounts to removal of a glaring inconsistency in the EC Treaty.

4.5. *Area of Freedom, Security, and Justice*

Prior to 1993, the Treaty of Rome was the primary instrument governing the European Community, and its chief focus was the creation and management of the EC’s internal market. When the Maastricht Treaty took effect in 1993, it added two new areas of activity for the Member States: (1) the common foreign and security policy (CFSP);¹³⁰ and (2) police and judicial cooperation in criminal matters, also called the area of freedom, security, and justice (AFSJ).¹³¹ The Maastricht Treaty also created the European Union as a treaty organization to manage the new areas of activity and to provide overall coordination among the treaties, although technically the European Community remained in existence to govern the internal market.¹³² With the institution of CFSP and AFSJ, the Community’s internal market became known as the First Pillar, the CFSP as the Second Pillar, and the AFSJ as the Third Pillar.¹³³ The Lisbon Treaty amends the Pre-Lisbon TEU and the EC Trea-

130. Pre-Lisbon TEU, *supra* note 7, arts. 11–28.

131. *Id.* arts. 29–42.

132. *Id.* arts. 1–2.

133. The treaties have never used the term “pillars.” The Pre-Lisbon TEU states: “The Union shall be founded on the European Communities, supplemented by the policies and forms of coop-

ty (renamed the “TFEU”), but the two separate treaties remain in place. However, Lisbon takes the important step of transferring all of the Pre-Lisbon TEU’s Third Pillar provisions to the TFEU.¹³⁴ As part of the TFEU, the Third Pillar effectively merges into the First Pillar.

Under the TFEU, most decisions of the Council on the AFSJ will be made by a qualified majority vote.¹³⁵ As the ensuing analysis demonstrates, many of these QMV decisions were formerly subject to unanimity. For example, under Article 34(2) of the Pre-Lisbon TEU, the Council was required to act unanimously in a number of AFSJ matters. Furthermore, EC Treaty Article 67(1) generally required unanimity for decisions on AFSJ matters found within Articles 61 through 69 of that treaty. EC Treaty Article 67(2) contemplated a move away from unanimity in this field, but it did require a unanimous Council decision to shift certain decisions to QMV. Despite the fact that a Council decision in December 2004 did institute QMV for certain matters under EC Treaty Articles 62 and 63,¹³⁶ the TFEU generates greater movement in this direction. On the surface, this might appear to be a major substantive shift.¹³⁷

There are, however, two significant limitations to this shift. First, Article 68 of the TFEU requires the European Council to “define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice,” and, under Article 15(4) of the Lisbon TEU, such action will require consensus. AFSJ guidelines should be on the broadest level, and the European Council should not insert itself into the details of lawmaking.¹³⁸ Nevertheless, as a political matter, a Mem-

eration established by this Treaty.” *Id.* art. 1.

134. In the TFEU, the AFSJ comprises Articles 67 through 89. Articles 67 through 76 (general provisions), 77 through 80 (policies on border checks, asylum, and immigration), and 81 (judicial cooperation in civil matters) are generally carried over from the EC Treaty. Articles 82 through 86 (judicial cooperation in criminal matters) and 87 through 89 (police cooperation) reflect provisions transferred from the Pre-Lisbon TEU.

135. For decisions subject to QMV, see TFEU, *supra* note 65, arts. 70, 74–75, 77(2), 78(2)–(3), 79(2), 79(4), 81(1), 82(2), 84–85, 87(2), 88(2).

136. Council Decision 2004/927, 2004 O.J. (L 396) 45 (EC). The Decision approved QMV decisions on (1) the crossing of internal EU borders (EC Treaty, *supra* note 33, art. 62(1)); (2) standards and procedures for checking persons crossing external EU borders (*Id.* art. 62(2)(a)); and (3) measures relating to third country nationals traveling within the EU (*Id.* art. 62(3)). Council Decision 2004/927, *supra*, art. 1(1). The Decision left intact the unanimous voting requirement for rules on the issuance of visas to third country nationals (EC Treaty, *supra* note 33, art. 62(2)(b)).

137. For a detailed examination of the shift in the AFSJ, see SIEBERSON, *supra* note 9, at ch. 16.

138. Lisbon TEU, *supra* note 4, art. 15(1) states: “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political direc-

ber State with concerns as to the ultimate nuts and bolts of AFSJ legislation theoretically could object at the strategic guideline stage. Such an objection might be asserted to avoid future legislation that would ultimately be subject to a QMV decision by the Council. This scenario might be unlikely, but the Lisbon Treaty creates the possibility.

The second limitation to the shift to QMV is that each of the AFSJ matters described below is carefully contained. The specific voting changes are as follows:

a. Administrative cooperation. TFEU Article 74 permits the Council, by QMV, to adopt regulations relating to administrative cooperation in the AFSJ. This is a change from Article 34(2) of the Pre-Lisbon TEU. The former provision, although not specifically referring to administrative cooperation, required unanimity for actions of this type. *Comment:* This appears to be a change toward greater efficiency, with little substantive impact.

b. Border controls. Article 77(2) of the TFEU provides for regulations, with the Council voting by QMV, to set forth a policy on border controls. This is a change from EC Treaty Article 62, in which measures on border controls were subject to the unanimity requirement of EC Treaty Article 67(1) unless the Council under Article 67(2) had unanimously decided that QMV was to be employed. *Comment:* In fact, such a Council decision was made in December 2004,¹³⁹ but the TFEU enshrines the qualified majority vote as a treaty requirement. Substantively, this is not a change at all.

c. Asylum. EU laws to determine a “common European asylum system,” with the Council approving the measures by a qualified majority vote, are permitted by TFEU Article 78(2). This is a departure from EC Treaty Article 63, which contemplated such measures,¹⁴⁰ but under which Community action was subject to the unanimity provisions of EC Treaty Article 67(1). However, the December 2004 Council decision had already moved certain aspects of Article 63 to QMV.¹⁴¹ The TFEU

tions and priorities thereof. It shall not exercise legislative functions.”

139. Council Decision 2004/927, *supra* note 136.

140. EC Treaty, *supra* note 33, art. 63(1)–(2).

141. Council Decision 2004/927, *supra* note 136, art. 1(2). The Decision moved to QMV all decisions on measures aimed at balancing the efforts among Member States with regard to receiving and caring for refugees pursuant to EC Treaty Article 63(2)(b). The Decision left in place the setting of standards and mechanisms for asylum under EC Treaty Article 63(1) as well as the setting of standards relating to temporary protection for displaced persons under EC Treaty Article 63(2)(a).

completes the shift. *Comment:* This change is substantive, but the Council had started down this path with its 2004 decision.

d. Immigration. EU laws (with a QMV Council approval) to provide for a common immigration policy are mandated by TFEU Article 79(2). This deviates from EC Treaty Article 63(3), whose corresponding measures were subject to the unanimity provisions of EC Treaty Article 67. The December 2004 Council decision had partially shifted Article 63 to QMV,¹⁴² and the TFEU completes this process. *Comment:* Again, this change is a continuation of developments already underway.

e. Cooperation in criminal matters. Article 82(1) of the TFEU permits EU directives, approved by a QMV decision of the Council, to establish minimum rules for cooperation on recognition of judgments and judicial cooperation in criminal matters. This is a change from Article 31(1) of the Pre-Lisbon TEU, in which legislation is subject to the unanimity requirements of that treaty's Article 34(2). Notwithstanding this general increase in QMV, certain of the TFEU provisions are subject to an "emergency brake" by which a Member State may refer the question to the European Council (for a consensus decision) on grounds that a proposed EU law might "affect fundamental aspects of its criminal justice system."¹⁴³ *Comment:* The emergency brake is a highly significant protection for the Member States, and it may undermine expectations for an effective shift to QMV.

f. Definition of criminal offences. Directives to define certain criminal offences having cross-border dimensions are permitted by Article 83(1) of the TFEU. The Council may approve such directives by a qualified majority vote. The corresponding provision of the Pre-Lisbon TEU, Article 31(1)(e), subjected such legislation to the unanimity requirements of that treaty's Article 34(2). However, the TFEU once again provides an "emergency brake." Its Article 83(3) permits any Member State to move a directive to the European Council for a consensus decision, and the only justification required for such a referral is the Member State's belief that a proposed EU law might "affect fundamental aspects of its

142. Council Decision 2004/927, *supra* note 136, art. 1(2). The Decision permitted QMV decisions on immigration measures relating to immigration and illegal residence, including repatriation of illegal residents under EC Treaty Article 63(3)(b). The Decision did not change the unanimity requirement for measures on conditions of entry and residence, or the standards for issuance of long-term visas and residence permits pursuant to EC Treaty Article 63(3)(a).

143. TFEU, *supra* note 65, art. 82(3).

criminal justice system.” *Comment:* Again, the emergency brake blunts the impact of additional QMV.

g. Eurojust. Article 85(1) of the TFEU mandates EU regulations (with the Council approving by QMV) to determine the structure of Eurojust, a body whose mission is cross-border cooperation in fighting crime. Previously, Eurojust affairs were covered by Article 31(2) of the Pre-Lisbon TEU, and relevant legislation was subject to the unanimity requirements of that treaty’s Article 34(2). *Comment:* This is a technical provision affecting the structure of an agency that will facilitate Member State cooperation.

h. Nonoperational police cooperation. EU legislation on nonoperational aspects of police cooperation is permitted under Article 87(2) of the TFEU, with such legislation to be approved by the Council on a qualified majority vote. Under Article 30(1) of the Pre-Lisbon TEU, all aspects of legislation relating to police cooperation were subject to the unanimity requirement of Article 34(2) of that treaty. *Comment:* This is a significant streamlining measure to enhance information-sharing and other nonoperational police activities. However, since it is restricted to nonoperational matters, it avoids any substantial encroachment on national law enforcement activities.

i. Europol. TFEU Article 88(2) requires EU regulations to determine the structure and responsibilities of Europol, a cooperative law enforcement organization. Once again the ordinary procedure would have the Council voting by qualified majority, whereas under Article 30(2) of the Pre-Lisbon TEU all aspects of legislation relating to Europol were subject to the unanimity requirement of that treaty’s Article 34(2). *Comment:* The emergence of a new and powerful European police force is technically possible as a result of this change. Nevertheless, any broad policies for such expansion will first require consensus approval by the European Council pursuant to TFEU Article 68.

4.6. *Areas of Supporting, Coordinating, or Supplementary Action*

The only voting change with regard to the Union’s actions to support, coordinate, or supplement Member State activities is found in a TFEU provision, Article 167(5), which addresses EU action to “contribute to the flowering of the cultures of the Member States.”¹⁴⁴ This provision authorizes the Council to adopt recommendations to the Member States

144. *Id.* art. 167(1).

by a qualified majority vote. The same activity under EC Treaty Article 151(5) required unanimous Council approval. *Comment:* Support, coordination, or supplemental action by the EU appears to pose no threat to the cultural heritage of any of the Member States. At best, the EU may take a secondary role in cultural affairs.

4.7. *External Action—Certain CFSP Decisions*

Article 31(2) of the Lisbon TEU identifies certain decisions in the field of common foreign and security policy that may be made by the Council through a qualified majority vote. This revises and expands a list of QMV decisions permitted under Article 23(2) of the Pre-Lisbon TEU, which included actions based on a “common strategy,” decisions to implement a “joint action” or “common position,” and the appointment of a “special representative” to carry out a CFSP policy. The Lisbon TEU no longer uses the term “common strategy,” but its Article 31(2) permits Council action by QMV in two new instances. First, a qualified majority is permitted for action based on a previous unanimous European Council decision relating to “the Union’s strategic interests and objectives.” Second, QMV is permitted for “a decision defining a Union action or position” when the European Council has specifically requested such action. *Comment:* The new areas of QMV are not dramatic, because they relate to implementation of previous actions taken by consensus at the European Council. Furthermore, several safeguards under the former treaty are preserved in the new version. First, under Article 31(2) of the Lisbon TEU, a Member State may invoke national policy and force referral of a Council matter to the European Council for a unanimous decision. This mirrors the protections provided in Article 23(2) of the Pre-Lisbon TEU. Second, under Article 31(1) of the new treaty, a Member State may abstain from a Council vote and declare its intention not to be bound by the decision. A similar protection was found in Article 23(1) of the Pre-Lisbon TEU. Finally, under Article 26(1) of the Lisbon TEU, the general guidelines for the CFSP are always to be determined by the European Council, acting unanimously under Article 31(1). This requirement is carried over from Article 13(1) of the Pre-Lisbon TEU.

4.8. *Lisbon’s Built-In Shortcuts to Additional QMV*

In light of the Lisbon Treaties’ many changes from unanimity to QMV, it is important to note that the Lisbon Treaty may well engender

additional qualified majority voting in the future. Article 48(7) of the Lisbon TEU contains a “simplified” amendment process not found in the prior versions of the treaties. Under this provision, most matters for which the Council is required to vote by unanimity may be changed to allow QMV. However, even this streamlined procedure will require a unanimous decision by the European Council and the right of any national parliament to block the change. Each Member State will thus have two opportunities to exercise its veto over any attempt to institute further qualified majority voting by the Council.

There are several additional articles created by the Lisbon Treaty that permit movement to more extensive qualified majority voting on the Council without going through the rigors of the treaty amendment process. These “bridging” or *passerelle* provisions include the following:

- Under Article 31(3) of the Lisbon TEU, a unanimous European Council decision may permit additional QMV in certain areas of the common foreign and security policy.
- TFEU Article 212(2) permits a unanimous European Council decision to approve QMV in place of unanimity when the Council determines the EU’s multiannual financial framework.
- Article 81(3) of the TFEU provides that a unanimous Council decision may substitute QMV for unanimity in AFSJ measures affecting family law with cross-border implications. In addition to the unanimity required of the Council, any national parliament may block such a decision.
- Under Articles 330 and 333(1) of the TFEU, a unanimous Council decision (made by representatives of participating Member States only) may permit additional QMV within a program of enhanced cooperation.
- Pursuant to Article 192(2) of the TFEU, a unanimous Council decision may permit additional QMV within EU programs on environmental protection.

These bridging provisions are without precedent in the previous versions of the treaties. However, each decision to permit more qualified majority voting requires a unanimous decision of the European Council or Council, and in one instance the approval of all Member State parliaments is also mandated. In the case of a program of enhanced cooperation, only participating Member States will take part in the unanimous decision.

4.9. *Assessing the Changes*

It is legitimate to ask whether the identified changes from unanimity to QMV will remove the national veto power in any areas of policy that are critical to Member State sovereignty. Brendan Donnelly and Lars Hoffmann have described the Constitution's additional areas for QMV (which carried over into the Lisbon Treaty) as "technical policy areas with cross-border implications."¹⁴⁵ Andreas Føllesdal comments that it is "unsurprising that the default procedure [QMV] does not apply in a number of key cases involving legislation on matters close to national sovereignty."¹⁴⁶

Indeed, the items described above consist primarily of noncritical areas relating to the functioning of the EU and its current programs. However, several of the changes arguably go beyond the category of technical adjustment. Foremost among these is the change to qualified majority voting in many aspects of the area of freedom, security, and justice. The Member States will retain certain veto rights in the AFSJ, but a wide-ranging shift has been created in this field.¹⁴⁷ As noted in Part 4.5, several of these changes constitute a continuation of previous movement, and each change is carefully contained. Nevertheless, the EU is recognizing that today's criminals can operate internationally, while refugees and migrants in one Member State can potentially impact the entire Union. Thus, the EU has chosen to take decisive steps to more successfully address these modern challenges.

Another change of interest is the broadening of QMV on EU laws that support free movement of professional services, as discussed in Part 4.3(b). The loss of the limited unanimity requirement under EC Treaty Article 47(2) might be narrow in scope, but it will affect Member State control over professional training and licensing. In the interests of uniformity and consistency, and in furtherance of the internal market, the Member States have agreed to cede this aspect of their sovereignty to central control. A third item of note is discussed in Part 4.4(b), namely, the elimination of a Member State veto right when matters of transport might affect the standard of living or levels of employment in certain regions. Once again, the Member States appear to have indicated their

145. Brendan Donnelly & Lars Hoffmann, *All Change or No Change? Convention, Constitution and National Sovereignty*, EUR. POL'Y BRIEF, Nov. 2003, at 3, available at <http://www.fedtrust.co.uk/admin/uploads/PolicyBrief1.pdf>.

146. Føllesdal, *supra* note 69, at 5.

147. As noted in Part 4.5, *supra*, there is the theoretical possibility that the shift to QMV could be affected by the European Council's right to unanimously set strategic guidelines in matters of the AFSJ.

trust in central management over national interests in transport, obviously a field that is critical to the internal market.

Finally, the partial elimination of unanimity in the EU's support for cultural programs might raise concerns in countries of particular cultural sensitivity, such as France. It is safe to predict that cultural affairs will not become a major EU program in the near future, if ever. However, if the EU does undertake programs of a cultural nature, its activities could be viewed as more than mere technical cross-border policy.

How should these new areas of qualified majority voting be viewed? Janis A. Emmanouilidis offers a positive comment (relating to the Constitution):

The extension of decisions taken by majority in the Council of Ministers is a step forward for the enlarged EU's ability to act efficiently. It is also positive that decisions in the Council of Ministers taken on the grounds of the ordinary legislative procedure will as a rule be decided by qualified majority. Exceptions to this rule, when Council decisions are to be taken on the basis of unanimity, will have to be explicitly listed. In the end, this will not only substantially improve the enlarged EU's ability to act. It will also help prevent unjustified crossover deals, for example, between milk quotas and tax issues.¹⁴⁸

Nevertheless, as the above analysis demonstrates, it is difficult to conclude that the Lisbon Treaty's new areas of qualified majority voting represent a major shift toward greater centralization. With respect to voting power and voting procedures, the EU appears to be basically the same organization under the Treaty of Lisbon as it was before.

5. LISBON'S NEW SUBJECTS FOR THE APPLICATION OF QMV

This Part addresses those provisions in the Lisbon TEU and the TFEU that create new areas of EU legislative activity subject to qualified majority voting on the Council. Under the previous versions of the treaties, these new matters would have been either (1) outside the EU's competence, in which case action would not have been possible; or (2) subject to unanimity under EC Treaty Article 308, the so-called "flexibility clause." Article 308 permitted legislation in new fields outside the Community's specified powers, but only in matters related to the internal market, and always subject to a unanimous vote on the Coun-

148. Emmanouilidis, *supra* note 115, at 5.

cil.¹⁴⁹ The new subjects identified below are addressed explicitly in the text of the Lisbon Treaties, and thus there is no need to resort to the special requirements of the TFEU's own flexibility clause, Article 352.

In instituting these new fields of EU activity, the drafters of the Lisbon Treaty could have selected a unanimous voting requirement as a reflection of what the EC Treaty might have required under Article 308. However, any new amendment provides an opportunity to update the text of the treaties and to provide for efficient management of new subjects that fit within the current and anticipated needs of the Union. Therefore, in addressing these new fields, the drafters chose to permit qualified majority voting on the Council, and the Member States have endorsed that choice by ratifying the Lisbon Treaty.

In the following list, unless there is a specific mention of the required voting method, the qualified majority vote will take place on the Council by application of the ordinary legislative procedure under TFEU Article 294. Also note that one identified item (Part 5.1(a) below) describes a QMV decision by the European Council.

5.1. Institutional and General Union Matters

a. New Council configurations. Article 16(6) of the Lisbon TEU and Article 236(a) of the TFEU permit the European Council to decide by QMV the list of Council configurations other than Foreign Affairs. The EC Treaty did not address how configurations are to be created. *Comment:* This fills a gap in the Pre-Lisbon Treaties. It does not add to the powers or competences of the Union.

b. Representation on advisory committees. Under Article 300(5) of the TFEU, the Council may adopt decisions by QMV regarding the types of representatives who will comprise the Committee of the Regions and the Economic and Social Committee. Adjustments are contemplated to reflect "economic, social and demographic developments within the Union." Actual composition of the committees—the number of members allocated to each Member State—is subject to a unanimous Council vote under TFEU Articles 301 and 305. The EC Treaty specified the allocation of members by country, but it was silent as to adjusting the segments of society represented. *Comment:* This is another insti-

149. TFEU Article 352 constitutes an expanded version of EC Treaty Article 308, and it likewise requires unanimous Council action to approve lawmaking on subjects not specifically covered in the treaty's text. Article 352, however, is not limited to matters of the common market, but covers all subjects addressed in the Lisbon Treaties.

tutional gap filler that has no impact on the substantive activities of the committees or of the Union itself.

c. Citizen initiatives. The Lisbon Treaties require regulations, approved by QMV, to determine the procedures and conditions for citizen initiatives. The initiative process is a Lisbon innovation under which the signatures of one million EU citizens from a “significant” number of Member States can force the Commission to consider new legislation or other action. These requirements are found in Article 11(4) of the Lisbon TEU and Article 24 of the TFEU. *Comment:* The unprecedented citizen initiative procedure has been harshly criticized,¹⁵⁰ but the use of qualified majority voting under TFEU Article 24 to set procedural rules is nothing more than a technical matter. Neither the initiative nor the means by which it is carried out can be seen as enhancing the EU’s substantive competence.

d. Withdrawal agreement. Article 50(1) of the Lisbon TEU declares for the first time in EU history the right of a Member State to withdraw from the Union. If a notice of withdrawal is submitted, Article 50(2) requires a QMV vote of the Council to conclude an agreement with the withdrawing state.¹⁵¹ Failure to agree will result in the withdrawal taking effect two years after notice is given.¹⁵² *Comment:* Overall, the withdrawal right emphatically affirms Member State sovereignty. Since withdrawal will be effective with or without a negotiated agreement, the use of QMV to approve the terms of such an agreement may be seen as an appropriate efficiency built into the process.

e. Services of general economic interest. In the TFEU’s Rules on Competition,¹⁵³ Article 107(1) contains a basic prohibition against aid granted by a Member State if such support “distorts or threatens to distort competition by favouring certain undertakings or the production of

150. Commenting on the EU Constitution’s identical citizen initiative provision, the editors of the *European Law Review* asserted:

This gimmick reeks of crass populism, as it allows minority interests representing less than a third of one per cent of the Union population to hijack Commission legislative resources. It forgets that the point of political institutions is that we pay them and hold them to account for exercising their judgment on these matters, not for kowtowing to newspaper editorial initiatives.

Editorial, *A Constitution Whose Bottle Is Definitely Half-Full and Not Half-Empty*, 28 EUR. L. REV. 449, 450 (2003).

151. The QMV decision would be made by Council representatives other than those of the withdrawing Member State. Lisbon TEU, *supra* note 4, art. 50(4).

152. *Id.* art. 50(3).

153. See TFEU, *supra* note 65, arts. 101–09.

certain goods.” Nevertheless, Article 107(2) explicitly permits aid to consumers, aid following natural disasters or other “exceptional occurrences,” and certain aid to the former East Germany. In addition, Article 107(3) contemplates permitting other specified forms of aid, such as support for economically depressed areas. These provisions have been carried over from Article 87 of the EC Treaty.¹⁵⁴ Article 14 of the TFEU permits EU regulations (adopted by QMV) to establish principles and conditions relating to “services of general economic interest” to be provided by the Union and the Member States. Article 16 of the EC Treaty recognized the propriety of these services, but it contained no provision for EU legislation on the matter. *Comment:* These newly authorized regulations will be subject to a qualified majority decision by the Council. The fact that QMV was authorized rather than unanimity is a reflection that competition rules are an integral part of the Union’s internal market. Legislation governing the internal market, the EU’s First Pillar, has generally been QMV-based.¹⁵⁵

f. Diplomatic and consular protection. TFEU Article 23 permits a citizen of one Member State to avail himself or herself of diplomatic and consular protection by a different Member State in a non-EU country if the citizen’s own government is not represented there. EC Treaty Article 20 contained the same provision, and both treaties contemplate “international negotiations” among the Member States to facilitate the treaty rights. An addition in the TFEU is that it permits EU directives “establishing the coordination and cooperation measures necessary to facilitate such protection.” These directives may be adopted by QMV. *Comment:* If the mandate to offer diplomatic protection to another country’s nationals can be characterized as an infringement on national sovereignty, the Member States had already accepted the infringement by including the requirement in the EC Treaty. Permitting a qualified majority vote to approve facilitating directives may be seen as a further infringement, because these directives will undoubtedly impact the manner and scope of international negotiations among the Member States. Nevertheless, a qualified majority on these matters seems eminently reasonable, because a unanimity requirement would permit one Member State to block a directive and thus prevent meaningful application of the treaty’s basic mandate.

154. There are other permissible forms of Member State aid. *See id.* arts. 93 (certain state aid to transport), 106 (operation of certain public undertakings). These provisions were derived from their EC Treaty predecessors. EC Treaty, *supra* note 33, arts. 73, 86.

155. *See* discussion *supra* Part 2.

g. EU administration. Regulations to support “open, efficient and independent European administration”¹⁵⁶ of the EU institutions are mandated by TFEU Article 298(2). There is no precedent for this provision in the previous versions of the treaties, and thus the choice of the ordinary legislative procedure to approve regulations under Article 298(2) establishes a preference for QMV in this new field. *Comment:* The openness, efficiency, and independence of Union institutions are qualities that benefit the Member States in general by ensuring that the EU functions honestly and well. However, one could hypothesize that an individual Member State might at some point benefit by lack of transparency in the administration of a Union program that worked to the special advantage of that Member State. If the benefitting state possessed a veto, it might act to block regulations that would make the responsible EU institution behave more openly. The TFEU provision and its QMV requirement seem to be a sensible approach to ensuring overall fairness in EU administration.

5.2. *Internal Market—Intellectual Property*

Legislation to create European intellectual property rights is authorized by TFEU Article 118. This is a new field, not previously covered in the treaties, and the TFEU provides for the ordinary legislative procedure (using QMV) for this legislation. *Comment:* Intellectual property protection is a significant aspect of modern commerce, and thus it is closely tied to the EU’s internal market. As noted before, the First Pillar has generally been subject to qualified majority voting. Updating the treaties to introduce EU intellectual property rights is arguably nothing more than a refinement of the First Pillar and an attempt to make the free movement of goods and services more reflective of the times.

5.3. *Policies in Other Areas*

a. Space. Legislative “measures” to create an EU space program may be adopted by the ordinary legislative procedure under Article 189(2) of the TFEU. Space is not a subject of the prior versions of the treaties. *Comment:* The purpose of a space program is expressed in Article 189(1), namely, to “promote scientific and technical progress, industrial competitiveness and the implementation of [the EU’s] policies.” The expression of these goals seems to point to the overall industrial and commercial focus of the Union, its internal market. In that aspect, a

156. TFEU, *supra* note 65, art. 298(1).

QMV procedure for approving legislative measures is consistent with most procedures in the existing First Pillar. To the extent that a space program has other implications, such as national security or defense, one might ask whether unanimity as in the Second Pillar might be more appropriate. In reality, despite its seeming potential, the scope of the EU's space activities is carefully contained. Article 189(1) permits the Union to "promote joint initiatives, support research and technological development and coordinate the efforts needed for the exploration and exploitation of space." This paints the picture of the EU as filling a secondary role to that of the Member States. Article 189(2) prohibits EU measures from requiring the harmonization of any Member State laws. Finally, Article 189(3) contemplates "appropriate relations" with the European Space Agency (ESA), a non-EU organization,¹⁵⁷ rather than competition with the ESA. Thus, Article 189 does not appear to envision a significant and autonomous EU space program. Given that limited scope, legislative measures approved by QMV will not likely expand the EU in any significant way or threaten independent Member State activities.

b. Energy. Article 194(2) of the TFEU permits legislation by the ordinary legislative procedure to support a Union policy on energy. Although Article 3(u) of the EC Treaty mentioned energy as one of a long list of Community activities, prior to Lisbon there were no specific provisions for legislation in the field. *Comment:* Energy legislation will grow out of an energy policy "[i]n the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment."¹⁵⁸ Both the internal market and matters of environmental policy have traditionally been part of the First Pillar.¹⁵⁹ Thus, even though energy policy is an expansion of EU competence, the TFEU's requirement of QMV is consistent with past policy in the two fields related to energy.

c. Climate change. TFEU Article 191(1) includes "combating climate change" in the list of permitted EU environmental protection activities.

157. The ESA is completely separate from the EU, even though most ESA members are EU Member States. One ESA member, Norway, is not in the EU. *See generally* ESA, About ESA – ESA and the EU, http://www.esa.int/esaMI/About_ESA/SEMFEPPYV1SD_0.html (last visited May 1, 2010).

158. TFEU, *supra* note 65, art. 194(1).

159. *See* EC Treaty, *supra* note 33, art. 175(1) (most environmental decisions to be subject to a qualified majority vote of the Council). *But see id.* art. 175(2) (reserving certain decisions for votes of unanimity). *See generally id.* arts. 174–76.

These activities had previously been addressed in EC Treaty Article 174, without any mention of climate change. Under TFEU Article 192(1), as under its EC Treaty predecessor,¹⁶⁰ action by the Union may be approved by a QMV decision by the Council. *Comment:* The inclusion of climate change in a broader article on the environment appears to be nothing more than an updating of the treaty to reflect current awareness of the consequences when humankind fails to adequately address environmental degradation. The use of QMV in this new context is consistent with past practice and is thus unremarkable.

5.4. *Area of Freedom, Security, and Justice—Crime Prevention*

A new provision in the TFEU, Article 84, permits EU legislation (utilizing QMV) to support Member State efforts in crime prevention. Article 31 of the Pre-Lisbon TEU generally supported cooperation in criminal matters through judicial cooperation and through Eurojust, an EU agency dedicated to fighting cross-border crime.¹⁶¹ However, the former provision did not specifically mention crime prevention measures. *Comment:* If crime prevention is something different from crime-fighting, then it would have fallen within the scope of Article 31 of the Pre-Lisbon TEU, in which case it would have been subject to the general unanimity requirement of that treaty's Article 34(2). The TFEU's permission for legislation through the ordinary legislative procedure (including QMV at the Council) is thus an extension of what would have been possible under the previous versions of the treaties. In the Lisbon Treaty's other extensions of qualified majority voting in the AFSJ,¹⁶² the Member States are obviously expanding the EU's competences to meet the modern challenges of sophisticated criminals whose activities are not neatly confined within a single Member State. The new field of crime prevention is part of that trend.

5.5. *Areas of Supporting, Coordinating, or Supplementary Action*

a. Public health. Article 168(4) of the TFEU permits the Union to take action "to meet common safety concerns." In general, these provisions are carried over from EC Treaty Article 152(4), and QMV decisions by the Council are retained. However, there is a noteworthy expansion in the new treaty. The TFEU adds to the list of activities by

160. *See id.* art. 175(1).

161. *See* Pre-Lisbon TEU, *supra* note 7, art. 31(1)–(2); *see also* Eurojust, The History of Eurojust, <http://www.eurojust.europa.eu/about.htm> (last visited May 1, 2010).

162. *See* discussion *supra* Parts 4.5, 4.9.

mandating the Union to take action in setting standards for medicines and medical devices,¹⁶³ combating cross-border threats to health, and dealing with the use of tobacco and alcohol.¹⁶⁴ *Comment:* The choice of QMV with regard to medicines and medical devices may be seen partly as a nod to the internal market and the need for uniform product standards and easier movement of both goods and services. QMV with respect to threats to health from tobacco and alcohol appears to arise from a desire for effective action relating to the constant movement of people and products within the Union. Efficacy trumps national control in these limited new fields.

b. Tourism. Article 195 of the TFEU permits EU legislation by the ordinary procedure to promote European tourism. The EC Treaty mentioned tourism in Article 3(u) as a subject of Community activity, but no separate provision was made for legislation in the field. *Comment:* Since tourism has long been contemplated as an EU activity, it seems logical that at some point the treaties would specifically provide for appropriate legislation. The fact that QMV is permitted for such lawmaking is unsurprising for several reasons. First, TFEU Article 195(1) states that Union activity will complement Member State endeavors, thus relegating the EU to a somewhat secondary rule. Second, TFEU Article 195(2) prohibits “any harmonisation of the laws and regulations of the Member States,” and thus EU activity will be well contained. Finally, with the significant challenges facing the EU in so many other important fields, it is not likely that there will be any institutional desire in Brussels to expend valuable time and resources on tourism. With so little at stake, unanimity in tourism legislation is simply not a protection that the Member States will need.

c. Sport. TFEU Article 165 permits EU legislation, using QMV, to promote and support sporting activities. The corresponding provision in the EC Treaty, Article 149, had addressed “education, vocational training and youth,” but sport was not identified as a field for Union activity. *Comment:* When sport was mentioned for the first time in a draft of the Constitution, concerns were raised by the Union of European Football Associations, the body that regulates European soccer. As a result, the language of the final Constitution and now the TFEU carefully limits the role of the EU.¹⁶⁵ TFEU Article 165(1) states: “The Union shall con-

163. TFEU, *supra* note 65, art. 168(4)(c).

164. *Id.* art. 168(5).

165. The *Economist* has reported:

tribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.” Article 165(2) emphasizes “promoting . . . cooperation between bodies responsible for sports.” As with tourism, sport is never likely to become a major activity of the EU, and thus the use of qualified majority voting in sports legislation would seem to pose no threat to the activities of the Member States.

d. Civil protection. Union legislation to support Member State cooperation in “preventing and protecting against natural or man-made disasters” is permitted under TFEU Article 196. The Council may approve such legislation by qualified majority. Civil protection was mentioned in Article 3(u) of the EC Treaty, but its inclusion as a Community “activity” was not accompanied by any specific call for legislation. *Comment:* The mandate for EU legislation on civil protection recognizes that natural disasters and terrorism may transcend national borders, affecting much more than a single Member State. Thus, Union activity may be appropriate. The choice of QMV is understandable in light of the very limited role that the EU will play. TFEU Article 196(1) calls on the Union to “encourage cooperation between Member States” and to “support and complement Member States’ action.” The Union’s role will be secondary, and thus QMV in this field will not undermine the rights of the Member States.

e. Administrative cooperation. Article 197 of the TFEU permits EU regulations, adopted by the ordinary legislative procedure, to assist Member States in improving their administrative capacity to implement EU law. There was no counterpart to this provision in prior versions of the treaties. *Comment:* Under Article 197(2), Member States may decline to accept EU assistance, and thus the protection of unanimous voting on EU regulations is not necessary.

This is the first time the EU has claimed power over sport in its basic legal documents. UEFA was alarmed that it might herald a fresh barrage of legislation. So it launched an energetic lobbying campaign that has now managed to get the phrase “taking account of its special nature, its structures based on voluntary activity and its social and educational function” inserted into a new draft [of the Constitution]. The hope is that this phrase will provide a legal basis to argue that sport can, in certain circumstances, be exempted from the usual strictures of the EU’s single-market rules.

Those Crucial Clauses: How Special Interests Infiltrate the European Union Constitution, ECONOMIST, May 22, 2004, at 50.

5.6. *External Action*

a. European Defence Agency. Article 45(2) of the Lisbon TEU permits the Council to adopt a decision by qualified majority to define the “statute, seat and operational rules” of the European Defence Agency. The Agency is a body not contemplated in prior versions of the treaties. *Comment:* It should be noted that the Council’s ability to act by QMV is limited to the statute, seat, and operational rules. Actual creation of the Agency will be subject to unanimous decisions by the European Council and the Council.¹⁶⁶

b. Permanent structured cooperation. The Lisbon TEU states that certain Member States that have greater military capabilities and have made binding commitments to each other in matters of defense “shall establish permanent structured cooperation within the Union framework.”¹⁶⁷ Article 46(2) of the treaty permits a decision of the Council, pursuant to a qualified majority vote, to recognize such cooperation and to determine which Member States will participate. Once the system is established, Article 46(3) provides for a QMV decision (by Council members of participating states only) that a particular Member State qualifies to be engaged in the cooperation, and Article 46(4) permits a similar decision to end a state’s participation. Although the word “cooperation” was used frequently in the common foreign and security policy section of the Pre-Lisbon TEU,¹⁶⁸ the precise concept of “permanent structured cooperation” was not in the treaty. *Comment:* The provision for three areas of QMV Council decisions is a departure from the Lisbon TEU’s general requirement of unanimity with regard to permanent structured cooperation.¹⁶⁹ The reason for adopting QMV under Article 46(2) is nevertheless understandable. The decision is simply the Council’s agreement that the involved Member States have already made binding defense commitments to each other and have otherwise qualified for Union recognition. The decision poses no challenge to the Union overall or to nonparticipating Member States, and thus the efficiency of QMV is appropriate. As to the decisions under Articles 46(3) and 46(4), the Union’s policy is obviously to encourage flexibility in pro-

166. Lisbon TEU, *supra* note 4, arts. 42(2) (European Council decision to create a common defense policy), 42(4) (implementing decisions by the Council, presumably including the actual creation of the Agency).

167. *Id.* art. 42(6).

168. Pre-Lisbon TEU, *supra* note 7, arts. 11–27.

169. Lisbon TEU, *supra* note 4, art. 46(6). Note that decisions within such a program are to be made by Council representatives of the participating Member States only. *Id.*

gram membership. Thus, a qualified majority of participating Member States is sufficient to admit or remove Member States from the program.

c. Startup fund. Article 41(3) of the Lisbon TEU also permits a QMV decision on the creation and administration of a defense startup fund, which is to be made up of contributions by the Member States. The fund may be used for a variety of peacekeeping activities.¹⁷⁰ A startup fund was not addressed in the prior versions of the treaties. *Comment:* The matters subject to QMV are limited to technical and administrative aspects of the fund. More significant policy decisions as to where the fund will be used are subject to unanimity under Article 31(1) of the Lisbon TEU.

d. Urgent financial assistance. Under Article 213 of the TFEU, the Council may make decisions by QMV when “the situation in a third country requires urgent financial assistance from the Union.” There is no counterpart to this provision in the prior treaties. *Comment:* Even though the chapter on economic, financial, and technical cooperation with third countries relates to the EU’s external action, it is found in the TFEU¹⁷¹ and not the Lisbon TEU. It is technically part of the QMV-based First Pillar and not the unanimity-based Second Pillar. Thus the QMV decision in Article 213 is consistent with the Lisbon Treaties’ overall pattern.

e. Humanitarian aid. The TFEU, in Article 214(3), mandates EU legislation to determine the framework within which the Union’s humanitarian aid operations will be implemented. The Council will decide by qualified majority. Article 17(2) of the Pre-Lisbon TEU referred to “humanitarian and rescue tasks” as part of the Union’s common foreign and security policy, but it did not mention a formal, ongoing program of humanitarian aid. *Comment:* This is another aspect of external action that is placed in the TFEU’s First Pillar. QMV is not surprising in this context.

f. Aid Corps. A European Voluntary Humanitarian Aid Corps is contemplated in Article 214(5) of the TFEU, and EU legislation pursuant to a QMV Council decision may determine its operating rules. This is an entirely new program, not contemplated in the previous versions of the treaties. *Comment:* This is yet another aspect of the EU’s external action that is placed in the First Pillar, and QMV is unremarkable.

170. *Id.* arts. 42(1), 43.

171. TFEU, *supra* note 65, arts. 212–13.

g. Solidarity clause. The TFEU contains a new solidarity clause, Article 222, which requires the Union and all Member States to support any Member State that becomes a victim of a terrorist attack or a natural or man-made disaster. Under Article 222(3), decisions on EU action are to be made by a qualified majority vote of the Council, although decisions with “defence implications” are subject to unanimity under Article 31(1) of the Lisbon TEU. While solidarity was mentioned as a political ideal in the prior versions of the treaties, the TFEU provision is unprecedented. *Comment:* It is difficult to know where the line falls between ordinary decisions under Article 222 and those decisions that have “defence implications.” Obviously, any Member State objecting to a QMV decision can argue that such implications are present. However, Article 222 lacks an “emergency brake” that guarantees each Member State the right to force a unanimous vote. The choice of QMV in nondefense decisions may be a reflection that decisions under the solidarity clause will likely be urgent, requiring expeditious action.

5.7. No Major Shift in EU Competences

Many of the matters described in this Part are intriguing. Citizen initiatives and the withdrawal clause may be controversial. Expansion of EU activity into space, public health, tourism, sport, climate change, and energy could potentially extend the impact of the Union in people’s lives and imaginations, but the scope of these changes is modest. A European Peace Corps could help young people further identify with the Union as a whole, but such a program does not significantly shift power to Brussels. An EU system for intellectual property rights is significant, but it is a natural part of the internal market. The addition of crime prevention to activities in the AFSJ may be of some substance, but its QMV component is consistent with the Lisbon Treaty’s greater adoption of qualified majority voting in this field. Perhaps the greatest attention will be paid to those proposed changes in the EU’s external activities, which are always matters of heightened national sensitivity. Nevertheless, under Lisbon, the common foreign and security policy will generally remain subject to unanimity requirements, so Member States should feel assured that the approved new areas of QMV-based activity in external affairs will not lead to unapproved expansion into other areas.

Overall, it is difficult to conclude that these new activities will meaningfully expand the competences of the Union. Most of the Lisbon Treaty’s new subjects are either technical subjects that are tied to exist-

ing Union activity, or they are activities that pose no threat to essential Member State sovereignty.

6. WHERE THE LISBON TEU REQUIRES UNANIMITY

To complete the analysis of the EU's voting requirements, it is useful to identify all of the provisions in the TFEU and Lisbon TEU that require a unanimous vote, consensus, or common accord. A review of these items reveals that most references are to decisions of the Council, for which unanimity is the exception rather than the rule. However, the analysis also identifies each instance in which the Lisbon Treaty mentions a decision of the European Council, either specifying that it must be taken by consensus or unanimous vote, or not specifying a voting procedure, in which case the default consensus requirement will govern.¹⁷² In addition to acts of the two councils, this analysis identifies several provisions in which the unanimous consent of the Member State governments is specifically mandated. The identified matters are generally subjects for which unanimity was required under the Pre-Lisbon Treaties, but they may also represent variations brought about by the Lisbon amendments. The material on unanimity in the Lisbon TEU is presented in this Part. The next Part will address unanimous decision-making in the TFEU.

In these Parts (6 and 7), the identified requirements of unanimity are followed by brief comments, either item by item, or in groupings. These comments will attempt to explain why unanimous voting might be appropriate for the particular matter. Later, in Part 8, the analysis will look back and consider which of the unanimity subjects might be changed to QMV in a future treaty amendment.

The Lisbon TEU is organized in six titles. The four titles containing unanimity requirements are addressed below. No unanimous decisions are addressed in Title II, describing the EU's democratic principles, or in Title IV, which introduces the prospect of groups of Member States entering into programs of "enhanced cooperation." More details on enhanced cooperation, including several provisions requiring unanimity, are found in the TFEU.

172. For those few situations in which the European Council may vote by less than unanimity, see *supra* note 122.

6.1. *Lisbon TEU Title I—Common Provisions—Breach of EU Values*

Lisbon TEU Article 7(2) provides for a unanimous decision that a Member State has breached the EU's core values. Such a decision may lead to suspension of that state's EU voting rights. The decision is to be made by the European Council, and the offending Member State does not participate in the vote. Article 7(2) of the Pre-Lisbon TEU had provided for a unanimous decision by the Council "meeting in the composition of the Heads of State or Government." The difference is that the European Council also seats the Commission President and the permanent European Council President as nonvoting members. *Comment:* The addition or removal of a Member State is akin to a treaty amendment, because it essentially redefines the European Union. As noted in Part 6.4 below, all forms of amendment to the Lisbon Treaties require unanimous approval in some fashion. The unanimity requirement in Article 7(2) reflects the gravity of a decision that may lead to suspension of a Member State's voting rights.

6.2. *Lisbon TEU Title III—The EU's Institutions*

a. *European Parliament composition.* Article 14(2) of the Lisbon TEU provides for a unanimous decision of the European Council to set the European Parliament's composition. In contrast, EC Treaty Article 190(2) defined the composition of the Parliament, allocating a number of parliamentarians to each Member State. No decision was involved, because the composition was specified in the treaty text. Any change under the EC Treaty required a treaty amendment. *Comment:* Unanimity under the Lisbon TEU preserves the unanimity required for a treaty amendment under the EC Treaty. Representation in the Parliament is a key component of EU membership and thus a matter to be jealously protected by each Member State. The veto right reflects the importance of this matter.

b. *European Council decisions in general.* The Lisbon TEU, in its Article 15(4), provides that all European Council decisions, except where the Lisbon Treaties provide otherwise,¹⁷³ are to be taken by consensus. Article 4 of the Pre-Lisbon TEU did contain a general description of the European Council, but no voting or consensus requirement was mentioned in Article 4 or any other provision of the Pre-Lisbon

173. See generally *id.*

Treaties. *Comment:* The European Council has always represented the essence of intergovernmentalism within the EU, and consensus has always been the norm for this body's policymaking.¹⁷⁴ The Lisbon Treaty clarifies this critical feature of the Union.

c. Commission composition. Lisbon TEU Article 17(5) and TFEU Article 244 will take effect as of November 1, 2014, at which date the number of members of the Commission will be reduced from one per Member State to a total equal to two-thirds the number of Member States. As of that date, the Lisbon Treaties will require unanimous European Council decisions to alter the number of Commissioners and to determine the rotation of Commission membership. EC Treaty Article 213(1) and Article 4(3) of the Protocol on Enlargement of the European Union provided for unanimity on these matters, but the decisions were to be taken by the Council.¹⁷⁵ *Comment:* As with the European Parliament, a Member State's representation on the Commission is a key component of its EU membership, and the unanimity requirements reflect this fact.

6.3. *Lisbon TEU Title V—External Action and Common Foreign and Security Policy*

The Lisbon TEU preserves the EU's Second Pillar, the field consisting primarily of the common foreign and security policy. As in the pre-Lisbon treaty scheme, the Second Pillar is presented in the Lisbon TEU and kept separate from the First Pillar, which was presented in the EC Treaty and is now set forth in its successor, the TFEU.

a. Strategic interests and objectives. Lisbon TEU Article 22(1) mandates that the European Council make decisions on the EU's strategic interests and objectives in the EU's CFSP and other areas of external action. These decisions are to be made unanimously. In the Pre-Lisbon TEU, Articles 13(1) and (2) called for similar decisions, without specifying unanimity, while its Article 23(1) generally required unanimity whenever the Council (not the European Council) was to act on the CFSP.

174. Hervé Bribosia, *The Main Institutional Innovations of the Lisbon Treaty*, in *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* 57, 64–66 (Stefan Griller & Jacques Ziller eds., 2008). For a description of the historical development of the European Council, see Jan Werts, *The Unstoppable Advance of the European Council*, in *THE EU CONSTITUTION: THE BEST WAY FORWARD?* 297 (Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans eds., 2005).

175. Protocol on the Enlargement of the European Union art. 4(1), 2002 O.J. (C 325) 163.

b. CFSP definition and implementation. Article 24(1) of the Lisbon TEU states that the CFSP will be “defined and implemented” by the European Council and Council acting unanimously, except if the Lisbon Treaties provide otherwise. There was no direct counterpart to this provision in either of the Pre-Lisbon Treaties.

c. CFSP strategic interests, objectives, and guidelines. Article 26(1) of the Lisbon TEU requires the European Council to “define” the strategic interests, objectives, and guidelines for the CFSP. Unanimity is not specified, but the general unanimity requirement of the amended treaty’s Article 24(1) will govern. Pre-Lisbon TEU Articles 13(1) and (2) called for similar actions, without specifying unanimity. However, Pre-Lisbon TEU Article 23(1) generally required unanimity in the CFSP.

d. CFSP decisions in general. Lisbon TEU Article 31(1) reiterates that all CFSP decisions by the European Council or Council in the CFSP are to be taken unanimously, unless otherwise provided in the CFSP chapter. Pre-Lisbon TEU Article 23(1) contained the same requirement, although only the Council was mentioned.

e. Unanimity in vital matters. Article 31(2) of the Lisbon TEU permits a QMV vote of the Council to refer what would have been a QMV Council decision to the European Council for a decision by unanimity. This referral will be triggered by a Member State’s declaration that it is opposed to an impending QMV decision for vital and stated reasons of national policy. This “emergency brake” procedure is taken from Pre-Lisbon TEU Article 23(2).

f. Passerelle to QMV in the CFSP. Lisbon TEU Article 31(3) permits a unanimous European Council decision to allow more qualified majority voting on the Council in the area of the CFSP. This shortcut or “bridging” (*passerelle*) provision had no predecessor in the Pre-Lisbon Treaties.

g. Expenditures. Article 41(2) of the Lisbon TEU requires a unanimous decision of the Council to allocate CFSP operating expenditures (other than those relating to defense) in a manner other than charging them to the Union budget. For matters not charged to the EU budget, the expenditures are to be charged to the Member States proportionally based on national GNP, unless the Council unanimously decides on a different allocation. These provisions are taken from Pre-Lisbon TEU Article 28(3).

h. Common defense establishment. A unanimous European Council decision establishing a common defense is permitted by Lisbon TEU Article 42(2). Pre-Lisbon TEU Article 17(1) was similar, although unanimity was not specified, and there was no general provision requiring the European Council to vote by unanimity. However, unanimity was presumed under Pre-Lisbon TEU Article 23(1).

i. Common defense policy. Lisbon TEU Article 42(4) requires unanimity for all Council decisions relating to the common security and defense policy. Articles 23(1) and (2) of the Pre-Lisbon TEU contained the same requirement.

j. Permanent structured cooperation in defense. The Lisbon TEU, in Article 46(6), requires unanimous Council decisions within the framework of permanent structured cooperation in the field of defense, except in matters for which QMV is specified. Only the participating Member States may take part in this decision-making. Pre-Lisbon TEU Article 17 dealt with related matters, but permanent structured cooperation was not mentioned. Unanimity in defense was generally provided in Pre-Lisbon TEU Article 23(1).

Comment on Part 6.3: One of the key indicia of statehood is the capacity to conduct international relations.¹⁷⁶ Within the European Union, the Member States have always preserved their separate right and ability to engage in foreign policy as sovereign states. This preservation is found primarily in the Second Pillar's unanimity requirements, which significantly limit the EU's ability to develop a common foreign and security policy by which the Member States may be bound. The Lisbon Treaty does nothing to change this situation. EU activity in the CFSP will continue to depend upon each Member State agreeing to each significant Union action.

6.4. *Lisbon TEU Title VI—Amendments and EU Membership*

a. Treaty amendment recommendation by convention. Lisbon TEU Article 48(3) requires that in the ordinary procedure to amend the Lisbon Treaties, a convention (if convened) must approve a proposed amendment by consensus before it is referred to an intergovernmental conference for further consideration. The Pre-Lisbon Treaties did not

176. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987). The other key characteristics are a permanent population, a defined territory, and a functioning government. *See id.*

provide for such a convention. The 2002–2003 convention that drafted the EU Constitution was convened without specific treaty authority.

b. IGC and Member State approval of treaty amendment. Lisbon TEU Article 48(4) requires an intergovernmental conference (acting with or without a prior convention) to approve by common accord an amendment to either of the Lisbon Treaties. The same article requires that all amendments be ratified by all Member States. Pre-Lisbon TEU Article 48 contained these same requirements, although without any reference to a convention as precursor to an IGC.

c. Amendment of TFEU internal policies. Lisbon TEU Article 48(6) permits the European Council by unanimity to approve an amendment to the TFEU in regard to internal policies and action of the Union. After such a vote of the European Council, the amendment must be ratified by all Member States. The Pre-Lisbon TEU and EC Treaty did not contain such a streamlined amendment procedure.

d. Simplified treaty amendment. Lisbon TEU Article 48(7) permits the European Council to unanimously decide to change (1) any unanimous Council voting requirement in the TFEU or the CFSP title of the Lisbon TEU to a qualified majority voting requirement, and (2) any special legislative procedure in the TFEU to the ordinary legislative procedure. After such a decision by the European Council the matter must be referred to the national parliaments of the Member States, and any opposition expressed within six months will nullify the amendment. The Pre-Lisbon Treaties did not contain such a procedure.

Comment on Sections a through d: Although the Lisbon Treaty adds new forms of amendment, each of them requires consensus or unanimity, and each Member State will have the opportunity to block a proposed change. This is consistent with the Vienna Convention on the Law of Treaties, which states simply: “A treaty may be amended by agreement between the parties.”¹⁷⁷ As the Constitution was being drafted, proposals for amendment by majority and even super majority were rebuffed.¹⁷⁸ The result is that each Member State may have confidence that it will be bound only by what it has agreed to, and that the EU will not evolve in any critical fashion without its explicit approval. Unity in treaty amendments is a significant guaranty of stability, predictability, and sovereignty.

177. VCLT, *supra* note 66, art. 39.

178. NORMAN, *supra* note 45, at 81, 293, 332.

e. New EU members. Lisbon TEU Article 49 requires a unanimous Council decision to approve a new EU member. Such a decision must be ratified by all Member States. Pre-Lisbon TEU Article 49 contained the same requirement.

f. Extension of withdrawal period. Lisbon TEU Article 50(3) provides for a unanimous European Council decision to extend the two-year withdrawal period of a withdrawing Member State. There was no withdrawal provision in the Pre-Lisbon Treaties and thus no counterpart to the extension provision.

Comment on Sections e and f. As noted in Part 6.1 above, the addition, expulsion, or acquiescence to the withdrawal of a Member State is a serious matter akin to a treaty amendment. Unanimity would be expected, and the Lisbon Treaty so provides.

7. UNANIMITY UNDER THE TFEU

The TFEU is divided into seven parts. Of these, unanimity provisions are found in all except the first part. Part One is important in that it describes how legislative competences are divided between the EU and its Member States, and it expresses certain foundational principles for the Union and its citizens. However, it does not deal with legislative procedures or decision-making, and thus it contains no references to unanimity or qualified majority voting.

Unanimity requirements in the remaining six parts of the TFEU are described below. Because of the great length of Part Three (internal affairs of the Union), its provisions on the area of freedom, security, and justice are described separately.

7.1. TFEU Part Two—Nondiscrimination and Citizenship

a. Discrimination. TFEU Article 19 provides for a unanimous vote of the Council on legislation to combat discrimination on the basis of sex, race, religion, disability, age, or sexual orientation. EC Treaty Article 13 contained the same requirement. *Comment:* Attitudes toward gender and sexual preference will undoubtedly vary from a religiously conservative country like Poland to the more open societies of Scandinavia. Poland can be expected to question certain types of antidiscrimination legislation, especially EU laws that might conflict with Polish interpretation of Catholic doctrine. Thus, Poland is likely one Member State that will

welcome the retention of unanimity for Union action on those aspects of individual rights.

b. Free movement of persons. TFEU Article 21(3) requires a unanimous Council vote on legislation relating to social security or social protection, to the extent that such legislation goes beyond specific powers granted to the Union in the Treaties. The predecessor provision, EC Treaty Article 18(3), did not affirmatively specify unanimity, but it did state that ordinary Council action (QMV) did not apply to these subjects. *Comment:* Social security is a major budget item for any Member State. The requirement of unanimity for EU legislation on matters not specifically provided for in the Treaties is an acknowledgment of how social programs may be highly sensitive to every Member State, whether wealthy or not. Furthermore, as with discrimination, certain types of “social protection” may be sensitive in more religiously conservative Member States. Thus, the unanimity requirement may be seen as necessary to preserve certain bedrock societal principles.

c. Right to vote and stand for election. Article 22(1) of the TFEU requires the Council to vote unanimously on EU legislation detailing the right of an EU citizen to vote and stand as a candidate in a municipal election in another Member State. Article 22(2) contains a similar unanimity requirement regarding legislation on an EU citizen’s right to vote and stand as a candidate in an election for the European Parliament in another Member State. These requirements are carried over from EC Treaty Articles 19(1) and 19(2). *Comment:* Voting in local elections, especially in areas that have experienced significant in-migration from the newer, poorer Member States, may well be a sensitive issue among some segments of the more established population. Thus, unanimity for EU laws that embellish on the relevant treaty provisions may be seen as a political necessity.

d. Citizenship rights. TFEU Article 25 mandates a unanimous Council vote on legislation to add to the citizenship rights described in the EC Treaty. The TFEU also requires approval by all of the Member States in accordance with their constitutional requirements. The unanimity and ratification requirements have their antecedents in Article 22 of the EC Treaty. *Comment:* Any expansion of EU citizenship rights may have emotional and political impact at the local level, especially in Member States that have experienced significant in-migration. The drafters of the Treaties have felt strongly enough about this that they have required such measures to be subject to unanimity at the Council and

then additional approval by each Member State in the same fashion as would be involved in a treaty amendment.

7.2. TFEU Part Three—The Area of Freedom, Security, and Justice

As noted in Part 4.5 above, the TFEU's provisions on the AFSJ include First Pillar materials carried over from the EC Treaty and Third Pillar materials transferred from the Pre-Lisbon TEU. The surviving unanimity requirements and their antecedents are described here.

a. AFSJ strategic guidelines. TFEU Article 68 requires the European Council to “define” the strategic guidelines for legislative and operational planning within the AFSJ. Unanimity or QMV is not specified, but the general consensus requirement for the European Council will apply.¹⁷⁹ There was no direct counterpart to this provision in the Pre-Lisbon Treaties. However, Pre-Lisbon TEU Article 34(2) specified unanimous Council decisions within the Third Pillar.

b. Personal identification. Article 77(3) of the TFEU requires a unanimous Council decision on EU measures relating to passports, identity cards, and similar items. EC Treaty Article 18(3) addressed these subjects, and it implied unanimous Council action by stating that ordinary decision-making (QMV) did not apply to these subjects.

c. Family law. TFEU Article 81(3) mandates a unanimous Council vote on legislation regarding measures concerning family law with cross-border implications. It also creates a *passerelle* to QMV by permitting a unanimous Council decision to shift certain of these matters to a qualified majority vote. However, any Member State parliament may block such a decision. EC Treaty Article 67(5) permitted the Council to act by QMV in matters governed by EC Treaty Article 65 (a listing of items relating to judicial cooperation in civil matters), “with the exception of aspects relating to family law.” There was no counterpart to the *passerelle* provision of the TFEU.

d. Matters of criminal law. The TFEU contains a number of provisions relating to criminal law for which a unanimous Council vote is required, and for which there is no direct antecedent in the Third Pillar of the Pre-Lisbon TEU. However, all of these matters would arguably have been covered by the general Third Pillar unanimity requirement of Pre-Lisbon TEU Article 34(2). TFEU Article 82(2) requires unanimity for

179. Lisbon TEU, *supra* note 4, art. 15(4).

Council decisions relating to certain aspects of Member States' mutual recognition of criminal procedures. TFEU Article 82(3) permits a Member State to refer to the European Council a draft EU law relating to judicial cooperation in criminal matters, if the Member State believes that the legislation will affect fundamental aspects of its criminal justice system. Where the Council might have taken a vote by qualified majority, the European Council must make a consensus decision on the matter. TFEU Article 83(1) requires a unanimous Council decision to identify areas of cross-border crime beyond those listed in the treaty. TFEU Article 83(3) permits a Member State to refer to the European Council a draft EU law relating to the definition of criminal offenses and sanctions, if the Member State believes that the legislation will affect fundamental aspects of its criminal justice system. Where the Council might have taken a vote by qualified majority, the European Council must make a consensus decision on the matter.

e. Prosecutor's Office. TFEU Article 86(1) requires a unanimous Council decision to establish a European Public Prosecutor's Office. TFEU Article 86(4) mandates a unanimous European Council decision to extend the powers of the European Prosecutor. There were no direct counterparts to these provisions in the Pre-Lisbon Treaties, but Pre-Lisbon TEU Article 34(2) generally required unanimity in the Third Pillar, which has been transferred to this part of the TFEU's expanded AFSJ. Otherwise, these types of decisions might have required unanimity under the EC Treaty's flexibility clause, Article 308, because these were areas of activity not otherwise covered in the Pre-Lisbon Treaties.

f. Police operational cooperation. Article 87(3) of the TFEU requires a unanimous vote of the Council on legislation concerning operational cooperation between police authorities of the Member States. If unanimity is not obtained, the matter may be referred to the European Council for a consensus decision. Pre-Lisbon TEU Article 30(1)(a) contained language regarding operational cooperation, but unanimity came through the general unanimity requirement of that treaty's Article 34(2).

g. Police operations in another state. TFEU Article 89 requires a unanimous Council vote on legislation regarding operations of one Member State's police officers in another Member State. Pre-Lisbon TEU Article 32 contained similar language on cross-border police activity, but unanimity was achieved through the general unanimity requirement of Pre-Lisbon TEU Article 34(2).

Comment on Part 7.2: These unanimity requirements demonstrate that the AFSJ has not yet become fully communitarian or majoritarian. Consensus on the European Council is preserved for all strategic guidelines in the AFSJ, a potentially sweeping limitation on EU action. Unanimity for measures relating to passports and identity cards may reflect the fact that sovereign Member States wish to retain some control over such a visible and tangible sign of nationhood. Family law reaches deep into societal norms, and attitudes toward families may vary widely from South to North and from religious to secular Member States. The same might be said for basic concepts of criminal law and criminal justice, as well as the prospect of a pan-European public prosecutor and cross-border police operations. All of these fields may be seen as areas of heightened sensitivity, for which unanimity provides a tangible protection against unwanted infringement by Brussels.

7.3. *TFEU Part Three (cont.)—Other Union Policies and Internal Actions*

7.3.1. *Free Movement of Persons, Services, and Capital*

a. Social security calculations. TFEU Article 48 provides for a European Council decision regarding the impact of a draft EU law relating to multi-state social security calculations. The provision initially provides for a QMV Council vote, but permits any Member State to demand that the matter be referred to the European Council. A unanimous decision by the European Council would be required under the general consensus requirement of Lisbon TEU Article 15(4). EC Treaty Article 42 required a unanimous Council vote on these subjects in all instances. *Comment:* As noted in Part 7.1(b), social security benefits are especially important to the Member States, and the Lisbon Treaty provides an emergency brake to force consideration of EU legislation on an intergovernmental basis at the European Council.

b. Restrictions on capital flow. Article 64(3) of the TFEU requires a unanimous vote of the Council on legislation restricting the movement of capital to or from third countries. EC Treaty Article 57(2) contained the same requirement.

c. Support for restrictive measures. TFEU Article 65(4) provides for a unanimous Council decision affirming that a Member State's restrictive tax measures against a third country are acceptable. This is an addi-

tion to the predecessor provision, EC Treaty Article 58, which made no reference to such a decision.

Comment on Sections b and c: The EC Treaty and TFEU are obviously based on the assumption that trade with third countries should flow freely, because restrictions on capital movement and restrictive tax treatment must earn the approval of the full Council. The free-trade approach is broadly endorsed in the preamble to the TFEU, which describes the Member States' desire "to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade."¹⁸⁰ Furthermore, under TFEU Article 207(2), measures for implementing the common commercial policy are generally subject to a qualified majority vote of the Council.¹⁸¹ As a result, restrictive measures at the EU or Member State level are to be seen as contrary to the broader common commercial policy, and thus are subject to unanimous approval.

7.3.2. *Transport*

A common transport policy is provided for in TFEU Article 90, and Article 91 allows legislation under the ordinary legislative procedure (using QMV) to govern international transport, transport in multiple Member States, and safety measures. In contrast, TFEU Article 92 requires a unanimous Council decision to permit a Member State to discriminate against carriers from other Member States. EC Treaty Article 72 was nearly identical. *Comment:* TFEU Articles 95(1) and 96(1) basically prohibit discrimination in transportation policy within the Member States. Furthermore, under Article 91, all EU legislation on the common policy is subject to QMV. Thus, it is not surprising that unanimous Council approval will be required for a Member State to impose policies that violate the equal treatment principle.

7.3.3. *Competition, Taxation, and Approximation of Laws*

a. Approval of aid granted by a state. In the EU's laws on competition policy, a basic principle is that the Member States may not grant aid to businesses or industry sectors if such support will distort competition and thus affect trade between the Member States.¹⁸² Thus, TFEU Article

180. See also TFEU, *supra* note 65, art. 206.

181. Note that under TFEU Article 207(4), certain matters will require a unanimous Council vote. See discussion *infra* Part 7.5(a).

182. TFEU, *supra* note 65, art. 107(1).

108(2) mandates a unanimous Council decision to affirm that aid granted by a Member State is acceptable due to “exceptional circumstances.” This is carried over from EC Treaty Article 88(2). *Comment:* Since the underlying EU policy is to create a level playing field and prohibit anticompetitive behavior by a Member State, it is logical that approvals of state aid would require unanimity on the part of the Council.

b. Harmonization of certain tax matters. Article 113 of the TFEU requires a unanimous vote of the Council on EU legislation to harmonize turnover taxes, excise taxes, and “other forms of indirect taxation.” The same provision was found in Article 93 of the EC Treaty. *Comment.* An early draft of the Constitution contained a provision that would have allowed a QMV decision for certain harmonizing measures in these fields to combat tax fraud or tax evasion that might affect the internal market or distort competition.¹⁸³ This measure was ultimately rejected due to the objections of the United Kingdom and others. One commentator has described the QMV proposal as breaching a “red line” for some Member States, and thus unanimity has been preserved under the Lisbon Treaty.¹⁸⁴ Currently the EU Member States are not subject to any form of tax harmonization, and this red line is obviously seen by some leaders as essential to preserving national sovereignty over critical fiscal affairs.

c. Approximation of laws affecting the internal market. Article 26 of the TFEU mandates EU action to establish the internal market and the free movement of goods, persons, services, and capital. Article 114 permits “measures” adopted by the ordinary legislative procedure to require Member States to harmonize their laws that affect the internal market.¹⁸⁵ If it becomes necessary for such measures to take the form of an EU directive, Article 115 provides for a unanimous Council vote. The same requirement was found in EC Treaty Article 94. *Comment:* A harmonizing directive is apparently considered to be more intrusive than a “measure” requiring harmonization of national law.

d. Language for EU intellectual property rights. TFEU Article 118 requires a unanimous Council vote on legislation establishing language arrangements for European intellectual property rights. There was no

183. Grevi, *supra* note 114, at 10; NORMAN, *supra* note 45, at 258–59, 305.

184. Grevi, *supra* note 114, at 9–10; NORMAN, *supra* note 45, at 258–59, 305.

185. Harmonization is also referred to as “approximation.” See, e.g., TFEU, *supra* note 65, arts. 114(1), 115.

provision in the Pre-Lisbon Treaties for EU intellectual property rights, and thus no counterpart to this unanimity requirement. *Comment:* This unanimity requirement is consistent with the requirement for establishing the use of languages within the EU institutions, as discussed in Part 7.7(b) below. Since language and national identity are intertwined, unanimity is a means by which any Member State may avoid being marginalized within the EU system.

7.3.4. *Economic and Monetary Policy*

a. Economic policy guidelines. TFEU Article 121(2) requires the European Council to “discuss a conclusion” on broad guidelines of the economic policies of the Member States. The Council will then be able to act by QMV to adopt a recommendation based on such a conclusion. These provisions have their antecedents in EC Treaty Article 99(2). Neither the EC Treaty nor the TFEU specifies that the European Council must be unanimous in drawing its “conclusion,” but Article 15(4) of the Lisbon TEU generally specifies that the body must act by consensus. *Comment:* Despite the impact of EU membership on all Member States and euro-zone membership on many of them, important aspects of economic policy such as taxation and government spending remain under national control. Unanimity under TFEU Article 121 serves as a protection against unwanted encroachment by Brussels into these areas of Member State autonomy.

b. Replacement of budget deficit protocol. Article 126(1) of the TFEU prohibits “excessive government deficits,” while Protocol 12 to the Lisbon Treaties sets the reference values for determining whether a deficit exists.¹⁸⁶ TFEU Article 126(14) provides for a unanimous vote of the Council on legislation to replace the protocol. This has its antecedent in EC Treaty Article 104(14). *Comment:* The Union’s reins on budget deficits constitute a meaningful limitation on national budgetary autonomy. The terms of the protocol are appended to the Lisbon Treaty and thus have been negotiated and ratified by all Member States. It is not surprising that changes to the protocol by means of a streamlined alternative to a treaty amendment must nevertheless be unanimously approved.

c. Expansion of ECB powers. The primary functions of the European Central Bank, according to TFEU Article 127(2), are to manage the Un-

186. Protocol (No 12) on the Excessive Deficit Procedure, 2008 O.J. (C 115) 279.

ion's monetary policy, conduct foreign exchange operations, hold foreign reserves, and facilitate payment systems. Article 127(6), like its predecessor EC Treaty Article 105(6), mandates unanimity on the Council if it wishes to expand the ECB's powers to supervise European financial institutions. *Comment:* The ECB is a powerful institution that operates independently.¹⁸⁷ It is to be expected that unanimity will be required for any expansion of its fields of activity, especially where it might encroach on national supervision of banks.

d. New euro-zone member. TFEU Article 140(3) requires certain steps to admit a Member State to the euro-zone. These steps will require a unanimous Council vote of members from the current euro-zone states. EC Treaty Article 123(5) contained essentially the same requirement. *Comment:* Admission to the euro-zone is somewhat analogous to joining the European Union itself, and unanimous approval by all relevant parties is consistent with EU procedures and basic treaty practice.¹⁸⁸

7.3.5. *Employment*

TFEU Article 148, like Article 128(1) of the EC Treaty, calls for European Council "conclusions" on the employment situation in the EU. Unanimity is not specified, nor is QMV. Under the Lisbon Treaties, however, the European Council's general consensus requirement will apply. *Comment:* The TFEU's provisions on employment give very little power to the EU, leaving most aspects of employment policy to the Member States.¹⁸⁹ The Union's role is generally advisory. EU "conclusions" on the employment situation are subject to consensus, lest the EU encroach on a Member State's national prerogatives.

7.3.6. *Social Policy*

a. Social policy in general. In matters of social policy, the EU's role is generally limited to actions that will "support and complement the activities of the Member States" in a variety of fields.¹⁹⁰ TFEU Article 153(2) requires a QMV decision of the Council to implement this mandate, although matters of social security, employee termination benefits, union activity, and rights of third country nationals require un-

187. See TFEU, *supra* note 65, art. 130.

188. See discussion *supra* Parts 6.1, 6.4.

189. See TFEU, *supra* note 65, arts. 145–50.

190. *Id.* art. 153(1). The title on social policy includes TFEU Articles 151 through 161.

animous Council decisions. The same article permits certain of the identified subjects to be transferred to a QMV Council decision, but that transfer itself must be unanimously approved. EC Treaty Article 137(2) contained the same requirements. *Comment:* Social policy lies at the heart of national life, and the EU must tread lightly in its supporting and complementary role. The unanimity requirements are a nod to national autonomy.

b. Labor-management agreements. TFEU Article 155(2) requires a unanimous vote of the Council to adopt regulations or decisions relating to certain EU-facilitated labor-management agreements. The EC Treaty had the same requirements in its Article 139(2). *Comment:* This unanimity requirement is tied to the unanimity requirements on social policy, described in the preceding paragraph.

7.3.7. *Environment*

Article 191 of the TFEU sets forth broad objectives for the EU's environmental protection activities. Under Article 192(1), most action may be approved by the ordinary legislative procedure. On the other hand, Article 192(2) provides for a unanimous vote of the Council on EU legislation pertaining to specific matters such as fiscal provisions, land use planning, and allocation of resources. A unanimous Council decision is also required to institute limited QMV decision-making in these areas. EC Treaty Articles 175(2) contained the same unanimity requirements. *Comment:* The subjects protected by unanimity are apparently too close to the core business of the national and local governments to be entrusted to a qualified majority vote on the Council. All affected or interested Member States must accept the terms of an EU policy; otherwise they can block the action.

7.3.8. *Energy*

TFEU Article 194 permits the creation of an EU-wide energy policy, and most measures to achieve Union objectives may be adopted by QMV. However, Article 194(3) mandates a unanimous vote of the Council on energy-related measures "when they are primarily of a fiscal nature." The Pre-Lisbon Treaties contained no counterpart to Article 194, although energy was mentioned in a long list of Community activities in EC Treaty Article 3. *Comment:* As with fiscal provisions on environmental matters, fiscal measures on energy require all Member States to concur. The concern may be that energy policy could be costly to im-

plement, and no Member State should have such a burden imposed upon it without its specific consent.

7.4. *TFEU Part Four—Overseas Countries and Territories*

TFEU Article 203 mandates a unanimous vote of the Council on legislation regarding rules and procedure for the association within the EU of overseas countries and territories of Denmark, France, and the Netherlands. TFEU Article 202 provides that freedom of movement of workers from these areas is to be “regulated by acts adopted in accordance with Article 203.” These provisions have been carried over, respectively, from EC Treaty Articles 187 and 186. However, where TFEU Article 202 requires legislation, EC Treaty Article 186 had mandated “agreements” made with the “unanimous approval of the Member States.” *Comment:* The overseas countries and territories arguably expand the EU geographically and extend its programs in a fashion analogous to the accession of a new Member State. Thus, association agreements and agreements regarding movement of workers are subject to unanimity requirements.

7.5. *TFEU Part Five—External Action*

a. Common commercial policy. The common commercial policy is the EU’s trade policy with non-EU countries, including its relationship with the World Trade Organization. TFEU Article 207(4) requires unanimous Council decisions on international agreements in certain fields. These unanimity requirements have been carried over from EC Treaty Article 133(5)–(7). The affected subjects are trade in services, commercial aspects of intellectual property, and foreign direct investment, and unanimity is mandated for international agreements if internal EU action would require unanimity. Further unanimity is required for international agreements on trade in cultural and audiovisual services and on trade in social, education, and health services. *Comment:* The principle of unanimity in international agreements where it would be required internally is logical. As to cultural and audiovisual services, Article 207(4) explains that unanimity is required if an international agreement will “risk prejudicing the Union’s cultural and linguistic diversity.” With regard to social, education, and health services, the unanimity mandate governs where an international agreement will “risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.”

b. International agreements. TFEU Article 218(8) requires unanimity for Council decisions relating to the making of international agreements in fields where internal EU decisions would require unanimity. Unanimity is also required for association agreements with countries that are candidates for accession to the EU. These unanimity requirements were found in EC Treaty Article 300(2) and Pre-Lisbon TEU Article 24(2). The TFEU provision also requires unanimity on the Council, followed by Member State ratification, to approve an agreement for the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a step that was not addressed in the Pre-Lisbon Treaties. *Comment:* All of these subjects are significant. As noted in the preceding paragraph, it is logical that if an internal matter requires unanimity, an international agreement on the same subject should require it as well. Association agreements, as a step toward accession, affect the very definition of the EU. Finally, although Lisbon TEU Article 6(2) requires the Union to accede to the ECHR, the terms of accession may be nuanced. This is because of the substantive similarity between the Convention and the EU's own Charter of Fundamental Rights of the European Union, which the Lisbon TEU describes as having "the same legal value as the Treaties."¹⁹¹

c. Euro exchange rate agreements. Article 219(1) of the TFEU requires a unanimous Council decision on euro exchange rate agreements with third countries. EC Treaty Article 111(1) contained the same requirement. *Comment:* The financial impact of exchange rate agreements is potentially significant, and the unanimity requirement affords special protection to each Member State.

7.6. TFEU Part Six—Institutions and Financial Provisions

7.6.1. Primary Institutions

a. Parliament election procedures. TFEU Article 223(1) mandates a unanimous vote of the Council on legislation setting uniform procedures for electing members of the European Parliament. This carries over the requirements of EC Treaty Article 190(4). Both the TFEU and EC Treaty require Member States to ratify these procedures in accordance with their own constitutional requirements.

191. Lisbon TEU, *supra* note 4, art. 6(1).

b. Taxation of parliamentarians. Article 223(2) of the TFEU mandates a unanimous decision of the Council on taxation of members and former members of the European Parliament. This mirrors the requirements of EC Treaty Article 190(5).

Comment on Sections a and b: The election of the Parliament affects the makeup of one of the EU's primary institutions, and thus unanimity and ratification are not unexpected. Taxation of MEPs may not be as foundational, but it personally affects each Member State's representatives.

c. Commission vacancy. TFEU Article 246 requires a unanimous Council decision not to fill a vacancy on the Commission. EC Treaty Article 215 contained the same requirement.

d. Advocates General. The TFEU, in its Article 252, requires a unanimous decision of the Council to increase the number of Advocates General. This retains the unanimity provision of EC Treaty Article 222.

e. Appointment to ECJ positions. TFEU Article 253 provides for a common accord of the governments of the Member States to appoint judges to the European Court of Justice (ECJ), as well as Advocates-General attached to the Court. This carries over the requirements of EC Treaty Article 223.

f. Appointments to General Court. TFEU Article 254 requires common accord of the Member States to appoint Judges to the General Court (previously called the Court of First Instance). EC Treaty Article 224 contained the same common accord procedure.

g. Appointments to specialised courts. The TFEU, in Article 257, mandates unanimity in a Council decision to appoint members to "specialised courts." These were formerly referred to as "judicial panels," and unanimity for appointments was required by EC Treaty Article 225a.

Comment on Sections c through g: All of these institutional matters affect the representation of the Member States within the identified EU institutions. These are matters of great sensitivity, and thus unanimity or common accord is not surprising.

h. Extended ECJ jurisdiction. TFEU Article 262 allows a unanimous Council decision to extend the jurisdiction of the European Court of Justice into matters of EU intellectual property rights. EC Treaty Article 229a had a similar requirement that referred to "Community industrial

property rights,” even though the earlier treaty had no provision for legislative creation of such rights.¹⁹² Also mirroring the EC Treaty, the TFEU requires such decisions to be ratified by all Member States. *Comment:* Any extension of the Court’s jurisdiction carries with it the prospect of a corresponding reduction of the jurisdiction of the national courts. Even in a matter as limited as European intellectual property rights, the Member States will have the right to veto a centralization of judicial power.

7.6.2. *Legal Acts of the Union*

a. Recommendations. TFEU Article 292 requires unanimity by the Council if it makes recommendations in cases in which a legislative act would require unanimity. Recommendations were permitted by EC Treaty Article 249, but there was no counterpart to the TFEU’s unanimity requirement. *Comment:* Although recommendations by definition are not binding, they may have political force. Thus, the TFEU creates a logical parallel between recommendations and legislation on the same subjects.

b. Amendment of Commission proposal. TFEU Article 293(1) requires unanimity on the Council to amend most legislative proposals from the Commission. EC Treaty Article 250(1) contained the same requirement.

c. Legislative amendments. TFEU Article 294(9) requires a unanimous Council vote to approve legislative amendments proposed by the European Parliament if the Commission has given a negative opinion on the amendments. This retains the unanimity requirement of EC Treaty Article 251(3).

Comment on Sections b and c: These procedural requirements reflect a carefully crafted balance of power within the Union, one that is not altered by the Treaty of Lisbon.

7.6.3. *Other EU Bodies*

a. Economic and Social Committee. TFEU Article 301 mandates a unanimous Council decision to determine the composition of the Economic and Social Committee, while its EC Treaty predecessor, Article 258, did not contain such a requirement. However, no decision was ne-

192. For a discussion of European intellectual property legislation, see *supra* Part 5.2.

cessary under the EC Treaty, because the actual composition of the committee was delineated in Article 258. Any amendment to the specified committee membership would have required an amendment to the EC Treaty, which would have involved ratification by all of the Member States.

b. Committee of the Regions. TFEU Article 305 provides for a unanimous Council decision to determine the composition of the Committee of the Regions. Its predecessor, EC Treaty Article 263, did not contain such a requirement, because the actual composition of the committee was specified in Article 263. As with the Economic and Social Committee, any amendment to the treaty would have involved ratification by all of the Member States.

Comment on Sections a and b: Even though the two committees are “advisory” bodies only,¹⁹³ each Member State is obviously concerned about the size of its delegation and the overall makeup of the Committees. The TFEU merely preserves the prior unanimity protection, albeit in a new manifestation.

c. European Investment Bank. TFEU Article 308 requires a unanimous vote of the Council on legislation to amend the Statute of the European Investment Bank (EIB). EC Treaty Article 266 similarly addressed the EIB Statute, but only certain of its provisions were specified for amendment by unanimous Council action; all other changes would have required an actual treaty amendment. *Comment:* Because the EIB Statute is appended as a protocol to the Lisbon Treaties, its amendment would normally entail a treaty amendment. Where the EC Treaty allowed for limited changes without a treaty amendment, the TFEU extends the streamlined procedure to the entire document. Regardless of the procedure, unanimity is retained as a requirement.

7.6.4. *EU Resources and Budgets*

a. System of own resources. TFEU Article 311 requires a unanimous vote of the Council for EU legislation relating to the system of the EU’s own resources, the means by which the Union can raise its own revenues. EC Treaty Article 269 contained the same requirement. The TFEU and EC Treaty also require approval by all Member States in accordance with their respective constitutional requirements. *Comment:* Each Member State has a vested interest in controlling the EU’s ability to

193. TFEU, *supra* note 65, art. 300(1).

generate funds. Without a veto right, a state might find that the EU could significantly expand its resources and its activities over the state's objections.

b. Multiannual financial framework. TFEU Article 312(2) requires a unanimous vote of the Council to approve a regulation establishing the multiannual financial framework. Because the multiannual financial framework was introduced in the Lisbon Treaty, there was no counterpart to this provision in the Pre-Lisbon Treaties.

c. Passerelle to QMV on the multiannual framework. TFEU Article 312(2) mandates a unanimous European Council decision to allow QMV on the Council in matters relating to the multiannual financial framework. There was no multiannual financial framework in the Pre-Lisbon Treaties, and thus no counterpart to this *passerelle*.

Comment on Sections b and c: The multiannual financial framework is new, and therefore the Member States have insisted on the right to veto its actual adoption. Once the process has been carried out one or more times, the Member States may develop confidence in the process, and the *passerelle* anticipates the day in which QMV will be acceptable.

7.6.5. *Enhanced Cooperation*

Article 20 of the Lisbon TEU introduces the concept of a program of enhanced cooperation among a group of Member States, although the procedural and substantive details are found in Articles 326 through 334 of the TFEU. The basis of such a program is that Member States will join together to carry out cooperative activity “as a last resort” when the EU as a whole has been unable to achieve the necessary Member State approval to act.¹⁹⁴ As of the effective date of the Lisbon Treaty, no formal program of enhanced cooperation has ever been instituted.¹⁹⁵

a. Enhanced cooperation in CFSP. Article 329(2) of the TFEU requires a unanimous Council decision to approve a program of enhanced cooperation in the area of the CFSP. Articles 27c and 23(2) of the Pre-Lisbon TEU permitted Council decisions to be taken by QMV, although an “emergency brake” under Article 23(2) permitted any member of the Council to require that the matter be referred to the European Council

194. Lisbon TEU, *supra* note 4, art. 20(2).

195. Michael Dougan, *The Convention's Draft Constitutional Treaty: A 'Tidying-Up Exercise' That Needs Some Tidying-Up of Its Own* 12 (Fed. Trust for Educ. & Research, Online Paper No. 27/03, 2003), available at http://www.fedtrust.co.uk/uploads/constitution/27_03.pdf.

for a unanimous decision. The TFEU's specification of unanimity is a change in form, but not in substance.

b. Permission to join a CFSP program in progress. TFEU Article 331(2) requires a unanimous Council decision (participating Member States only) to allow a new Member State to join a program of enhanced cooperation in the CFSP that is already in progress. Article 27e of the Pre-Lisbon TEU provided for such Council decisions to be taken by QMV of participating Member States only, under the Pre-Lisbon TEU Article 44(1). This is a rare instance in which Lisbon has replaced QMV with unanimity.

c. Program costs. TFEU Article 332 mandates unanimity for a Council decision by all Member States to charge the Union budget with the costs (other than administrative costs) arising from a program of enhanced cooperation. Pre-Lisbon TEU Article 44a contained the same requirement.

d. Passerelle to QMV. TFEU Article 333(1) requires a unanimous decision of the Council, by participating Member States only, to shift voting within a program of enhanced cooperation from unanimity to QMV. There was no counterpart to this *passerelle* in the Pre-Lisbon Treaties.

e. Passerelle to ordinary legislative procedure. TFEU Article 333(2) mandates a unanimous Council decision, by participating Member States only, to shift the legislative procedure within a program of enhanced cooperation from a special procedure to the ordinary legislative procedure. The Pre-Lisbon Treaties did not contain such a *passerelle*.

Comment on Part 7.6.5: the unanimous approvals relating to enhanced cooperation programs in the CFSP reflect the general requirement of unanimity in the Second Pillar. The need for unanimity in charging program costs to the overall Union budget is similarly unsurprising, since nonparticipating Member States will undoubtedly be reluctant to share in the cost of a program they do not wish to be involved in. The two *passerelles* anticipate that once a program is underway the need for unanimity may diminish.

7.7. TFEU Part Seven—General and Final Provisions

a. Location of EU institutions. Article 341 of the TFEU requires a common accord decision of the governments of the Member States with respect to the location of EU institutions. This mirrors the requirements of EC Treaty Article 289.

b. Languages of the EU institutions. TFEU Article 342 mandates a unanimous Council decision to adopt a regulation setting the rules for use of languages in the EU institutions other than the European Court of Justice. This reflects the predecessor provision, EC Treaty Article 290.

Comment on Sections a and b: Each Member State wishes to have an EU presence, and each wishes to have its language protected and respected at the Union's institutions. Unanimity on these matters serves as a protection of national pride and identity.

c. List of arms, munitions, and war material. TFEU Article 346(1)(b) permits a Member State to "take such measures as it considers necessary for the protection of the essential interest of its security which are connected with the production of or trade in arms, munitions and war material." Article 346(2) requires a unanimous Council decision to change an April 15, 1958 list of arms, munitions, and war materials that qualify for Member State protective measures. This is carried over from EC Treaty Article 296(2). *Comment:* This is basic to Member State security, and any changes to the list would require each state to concur.

d. Flexibility clause. TFEU Article 352(1) permits the Union to act where "the Treaties have not provided the necessary powers." This provision requires that all such legislation will require a unanimous vote of the Council. EC Treaty Article 308 contained similar terms, although extraordinary legislation was limited to "the operation of the common market." *Comment:* Unanimity in utilizing the "flexibility clause" is a justifiable means to avoid circumvention of the Lisbon Treaties.

e. Change of status. Article 355(6) of the TFEU permits the European Council to unanimously adopt a European decision changing the status of one of the overseas countries or territories of Denmark, France, or the Netherlands. In general, TFEU Article 355 has its antecedent in EC Treaty Article 299, but the EC Treaty provision had no language comparable to TFEU Article 355(6). *Comment:* This is consistent with the unanimity requirement for approval of an association agreement.¹⁹⁶

f. Ratification. TFEU Article 357 requires ratification of the Lisbon Treaty by all Member States. EC Treaty Article 313 and Pre-Lisbon TEU Article 52 contained the same standard for their respective ratifications. *Comment:* Under the Vienna Convention, a treaty enters into force "in such manner and upon such date as it may provide or as the

196. See discussion *supra* Part 7.4.

negotiating States may agree.”¹⁹⁷ If the treaty does not specify the manner in which it takes effect, it will come into force “as soon as consent to be bound by the treaty has been established for all the negotiating States.”¹⁹⁸ Whether or not the manner is expressed in the treaty, unanimity of consent is assumed. Ratification is a standard means of indicating a state’s consent.¹⁹⁹ TFEU Article 357 is consistent with recognized treaty practice.

8. CAN THE REMAINING UNANIMITY REQUIREMENTS YIELD TO QMV?

As Parts 6 and 7 of this Article have demonstrated, the unanimity requirements in the Lisbon Treaties are extensive. In theory, these matters lie at the heart of political sensitivity and Member State sovereignty, and thus one might consider that these core subjects are etched in European granite. Historically, however, each new treaty amendment has brought further movement toward qualified majority voting,²⁰⁰ and there is no reason to expect that this will never happen again. Critics of unanimity would certainly expect more QMV in the future. For example, Janis A. Emmanouilidis offered the following comments on the Constitution, whose unanimity requirements have been transposed into the Treaty of Lisbon:

In the case of the extension of majority decision-making in the Council of Ministers, it is unfortunate that the Constitution provides for a large number of areas where decisions will still be taken unanimously. Most prominent among these are tax harmonization, questions of social security, some areas of trade in services and intellectual property, some areas of environmental policy, anti-discrimination measures, . . . some areas of immigration policy, and—with a few exceptions—the Common Foreign and Security Policy.²⁰¹

Emmanouilidis was identifying a few prominent, unanimity-based matters by way of illustration, and not arguing that these particular items should be changed to qualified majority voting. It is possible,

197. VCLT, *supra* note 66, art. 24(1).

198. *Id.* art. 24(2).

199. *Id.* art. 14(1). Other means of consent to be bound are by signature of a representative, *id.* art. 12, and exchange of instruments, *id.* art. 13.

200. *See* Miller, *supra* note 117.

201. Emmanouilidis, *supra* note 115, at 7.

however, to review Lisbon's subjects of unanimity and evaluate which of them could be shifted to QMV in the future without seriously impinging on Member State sovereignty.

The following list will broadly reprise the items identified in Parts 6 and 7 of this article. However, whereas the comments offered in those Parts attempted to explain why unanimity may have been selected by the Member States, the ensuing analysis will consider whether QMV might be a reasonable alternative.

8.1. The Lisbon TEU

8.1.1. Breach of EU values

There is no vital need for a unanimous decision that a Member State has breached the EU's core values. If a qualified majority believes such a breach has taken place, its strong feelings should be respected. Although a QMV decision would have an impact on all Member States, it would not impinge on the sovereignty of those states that voted against the measure.

8.1.2 Institutions

Article 4(2) of the Lisbon TEU proclaims the equality of the Member States. Article 17(5) talks about "strictly equal rotation" of Commission seats. If these provisions could be supplemented by a guaranty of some form of proportional representation in the European Parliament reflective of the current weighting in favor of the smallest Member States, then unanimous decisions with regard to setting the composition of the Parliament and Commission would not be necessary to ensure fairness. As to the general consensus requirement for European Council action, there is no obvious need for such a broad rule, because unanimity could still be specified for particular subjects.

8.1.3 Common Foreign and Security Policy

As long as the Second Pillar is subject to unanimity, a true common foreign and security policy will be slow to develop. Nevertheless, there are serious implications for national sovereignty if the Member States surrender their international relations to majority control. Movement toward QMV would create a different European Union than the intergovernmental/federal mix that currently exists.

8.1.4. Amendments and EU membership

The ability to amend the Lisbon Treaties by supermajority is highly appealing in terms of efficiency, but the loss in ultimate national sovereignty would be daunting for the Member States. In contrast, majority-based decisions on admission of new Member States or the withdrawal of a current member would pose no such threat.

8.2. The TFEU

8.2.1. Nondiscrimination and citizenship

As the newer Member States become psychologically further integrated into the Union, their national sensitivities on matters of discrimination may lessen, and movement toward QMV may be possible. The same may be said for social security matters when living standards in the newer states catch up with the EU norm. Even election rights may no longer need unanimity if experience shows that local government is not threatened by voting noncitizens. On the other hand, the use of QMV in adding to EU citizenship rights would seem to be problematic, because defining national citizenship is a core feature of statehood, and more extensive EU rights could lessen the importance of national rights.

8.2.2. Area of Freedom, Security, and Justice

There is no reason to believe that the remaining items for unanimity will not move to QMV in the future. These items may be politically sensitive today, but positive experiences with current AFSJ programs may ease the anxieties and pave the way for less unanimity and more efficiency.

8.2.3. Other internal matters

None of these matters seem to lie at the core of sovereignty, and thus a shifting to QMV is plausible. Under the TFEU, the EU's role in sensitive policy matters such as economics, employment, and social affairs is merely advisory or supportive. Thus, the use of qualified majority voting would pose no real risks to an objecting Member State.

8.2.4. Overseas countries and territories

In the big picture, these are relatively minor matters, and QMV should not be problematic.

8.2.5. *External action*

These matters are external, but they are set in the TFEU's First Pillar rather than the Lisbon TEU's Second Pillar. A full move to QMV in the common commercial policy seems possible. To the extent that internal affairs retain any unanimity requirements, there is symmetry in requiring unanimity for international agreements in the same fields. Exchange rate agreements seem ripe for shifting to qualified majority voting.

8.2.6. *Institutions and financial provisions*

With regard to the EU institutions and their legal acts, the only truly critical matter is expanding the jurisdiction of the European Court of Justice. Such expansion could have profound impact on the national courts and the accountability of national governments. In addition, the Member States will likely prefer to preserve their veto over the EU's ability to raise its own revenues. All other matters in Part 7.6 seem amenable to QMV.

8.2.7. *General and final provisions*

Decisions on location of the EU institutions should move to QMV, although one should not underestimate the national pride at stake. Even more so, matters of language will be jealously protected by many of the Member States. Trade in arms and other matters of national defense are core issues of foreign policy and national existence, and movement to any form of majority voting would require a paradigm shift within the Union. Finally, unanimity in applying the flexibility clause is a sensible means of assuring that the EU will stay within the mandate of the Lisbon Treaties.

Each of the above suggestions is open to debate, and the reality is that in crafting the Treaty of Lisbon the Member States chose not to adopt QMV for any of these subjects. The point of this brief discussion is that many of the remaining fields of unanimity may well be susceptible to future change; however, these changes can occur only after the Member States develop deeper trust in each other and only after they agree that there is a need for greater efficiency.

9. UNANIMITY, QMV, AND THE STATE OF EUROPEAN SUPRANATIONALISM

This Article has analyzed three aspects in which the Treaty of Lisbon has affected decision-making by the European Union's primary legislative body, the Council. Part 4 examined where the Treaty has changed unanimity requirements to a qualified majority vote; Part 5 identified new subjects for EU legislation under Lisbon, matters that will be subject to QMV; Parts 6 and 7 analyzed all of the decisions for which unanimity will remain in place; and Part 8 considered whether these matters may be amenable to QMV in the future. The question remains whether the Union has indeed become more supranational as a result of Lisbon.

The conclusion of this Article is that the decisions that have been moved from unanimity to a qualified majority are largely technical, and they do not alter the Union's basic identity. The same can surely be said of the new areas of EU activity for which QMV will apply. Nevertheless, the Treaty of Lisbon does represent a measured move toward further integration. Lisbon offers what most prior treaty amendments have provided, namely, logical and carefully contained development that is intended to make the Union more effective. The Lisbon Treaty was not designed as an assault on the sovereignty of the Member States or on their national competences. When compared with the Maastricht Treaty and its creation of the Second and Third Pillars, Lisbon is relatively modest.

The Treaty of Lisbon is another episode in the evolution of an organization that strives to respond to the times and meet the needs of its Member States. The changes under Lisbon may justifiably be characterized as no more than refinements to an entity that has achieved a workable balance between intergovernmentalism and federalism. Or they might be described as yet another stride on the road toward pan-European supranationalism. If the latter, then what has occurred is not a giant leap, but a step to be measured in inches.