

The impact of the UK's withdrawal on the institutional set-up and political dynamics within the EU



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STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCD Committee, examines the impact of Brexit on the institutional balance within the Council and European Parliament, on the interinstitutional balance and on the necessity of Treaty changes, and delineates constitutional limits on the participation of non-Member States in EU policies.

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CONTENTS

EXECUTIVE SUMMARY	6
1. INTRODUCTION	8
1.1. Levels of analysis	9
1.2. Structure of this report	9
2. REPRESENTATION OF MEMBER STATES IN THE COUNCIL: VOTING POWER	10
2.1. The manifold meanings of voting power	10
2.2. Implications of Brexit for political dynamics in the Council: the UK's voting behaviour	12
2.3. Voting arrangements	20
2.3.1. Present voting rules	20
2.3.2. The impact of Brexit	22
2.3.2.1. Ordinary qualified majority	23
2.3.2.2. Qualified majority in case of non-participating Member States	33
2.3.2.3. Reinforced qualified majority	33
2.3.2.4. Special majorities: the Ioannina Compromise and the EBA Board of Supervisors	35
2.3.2.5. Simple majority	36
3. REPRESENTATION OF MEMBER STATES IN THE EUROPEAN PARLIAMENT	37
3.1. Implications of Brexit for political dynamics in the Parliament	37
3.2. Representation in the European Parliament: constitutional concept and historical trajectory	38
3.3. Brexit and the composition of the European Parliament within the present legal framework	41
3.3.1. Legal requirements	42
3.3.2. The necessity for a fresh distribution of seats for the 2014–2019 Parliament	43
3.3.3. The 2019–2024 Parliament post-Brexit	45
3.3.4. The 2019–2024 Parliament if Brexit is delayed or cancelled	46
3.4. Brexit and the quest for a stable, fair, objective and transparent method	46
3.4.1. Transparency, objectivity and fairness in EU constitutional law	46
3.4.2. Seat distribution post-Brexit as decided in 2018	47
3.4.3. The wish not to lose seats and the influence of Brexit	50
3.5. Summary: the influence of Brexit on representation in the European Parliament	51
4. IS THERE REASON FOR CHANGE?	52
4.1. Voting rules in the Council	53
4.2. Apportionment of seats in Parliament	55

4.3.	Interinstitutional balance	55
5.	PARTICIPATION OF NON-MEMBER STATES IN EU POLICIES	58
5.1.	Constitutional parameters	58
5.2.	Forms and varieties of peration with non-Member States	59
5.3.	Need for change?	59
6.	CONCLUSIONS AND RECOMMENDATIONS	61
6.1.	The voting balance in the Council	61
6.2.	The institutional balance within the European Parliament	61
6.3.	interinstitutional balance	62
6.4.	Participation of non -member states in eu policies	63
6.5.	Recommendations	63
ANNEX		64

LIST OF TABLES

TABLE 1:	23
55% of the Member States in a larger or smaller EU	
TABLE 2:	28
Changes in population shares and net voting power caused by Brexit	
TABLE 3:	30
Increase and loss in voting power caused by Brexit	
TABLE 4:	31
Change in voting power after post-Brexit accession of small Member State in comparison with the EU27	
TABLE 5:	32
Increase in voting power post-Brexit and post-accession small Member State after Brexit	
TABLE 6:	35
Voting power change in reinforced QMV	
TABLE 7:	39
Distribution of seats in EP under the original ECSC and EEC Treaties	
TABLE 8:	40
Changes in the number and distribution of EP seats over time	
TABLE 9:	44
Seats in the outgoing Parliament of term 2014 to 2019; population figures and corresponding representation ratios in 2017 and 2018. Violations of criteria	
TABLE 10:	45
Seat distribution 2018 in relation to population and representation ratios	
TABLE 11:	49
Comparison of EP seats decided in 2018 with Power Compromise and seats 2014	

LIST OF FIGURES

FIGURE 1:	13
Visualisation of abstention and negative votes by Member State over 679 votes (2009-2018)	
FIGURE 2:	13
Votes against per member state as a percentage of the total votes 2004–2009	
FIGURE 3:	14
Votes against per Member State as a percentage of the total votes 2009–2015	
FIGURE 4:	14
UK allies, % of votes, 2009-15	
FIGURE 5:	15
Degree of UK being outvoted per policy area	
FIGURE 6:	17
Consensual and non-consensual adoption of proposals in the Council 2010- (Nov) 2018 -1	
FIGURE 7:	17
Consensual and non-consensual adoption of proposals in the Council 2010- (Nov) 2018 - 2	
FIGURE 8:	48
Seats post-Brexit as decided in 2018 compared to two mathematical methods	

EXECUTIVE SUMMARY

The voting balance in the Council

Although the United Kingdom has supported the vast majority of measures adopted by the Council over the last two decades, it has been the most active veto player. The UK's allies substantively, and also in voting behaviour, have been Sweden, the Netherlands and Denmark. New coalitions will be sought by traditional UK allies, though the expectation is that these cannot easily form a sufficient majority or blocking minority in terms of the population requirement.

The UK's withdrawal has some consequences for the power relations within the Council under the ordinary qualified majority rule (Article 16(4) TEU). The required number of Member States voting in favour (55%) goes from 16 to 15 Member States and under the present Treaty provisions cannot go lower than that. This means that should the EU shrink further, the required number of Member States will be gradually higher than 55%.

The population percentages of France and Germany will go up (to just over 33%), as a consequence of which there are more theoretical possibilities of blocking decision-making. Although France has a tradition of rarely voting against a proposal, the potential of forming a blocking minority can be a powerful bargaining chip prior to taking a vote, and hence the bargaining power of France may increase. This may also be the case for Germany and smaller countries that ally with them.

In qualified majority voting, overall the larger Member States gain numerical voting power, whereas the smaller and smallest lose some, Member States of the population size of Ireland being the turning point between gaining and losing. Should a small Member State of the size of Montenegro accede to the EU, this would lead to gains in the formal voting power of the small Member States. The UK's withdrawal will have no consequences for the voting balance under the slightly different qualified majority rule in case of non-participating Member States. Under the reinforced qualified majority rule (Article 238(2) and (3) (b) TFEU), Brexit will increase the voting power of all Member States in proportion to the differences in population size, larger Member States gaining more power than smaller Member States.

The institutional balance within the European Parliament

An estimate of impact of Brexit on the future political dynamics in the European Parliament (Parliament) can only be made *ceteris paribus*, which is impractical given the upcoming May 2019 elections.

The use of habitual residents as the relevant population figures for distributing Parliament seats over the Member States is justifiable constitutionally, historically and practically.

The distribution of seats must comply with the (justiciable) Treaty requirements of degressivity (Article 14(2) TEU), the general principle of transparency and the duty to state the reasons on which a legal act is based (Article 296(2) TFEU). The distribution of seats has to be degressively proportional when measured against the population data as available at the time of decision-making. Employing an objective method is the best guarantee for objectivity and fairness. If a mathematical method is used to translate population numbers into seat numbers, it should be made clear explicitly which of the various methods discussed is chosen.

The composition of the Parliament of 2019–2024, based on the European Council Decision of 28 June 2018, for the first time since introduction of the present legal framework under the Lisbon Treaty conforms fully to the requirement of degressive proportionality under Article 14(2) TEU. It turns out to come very close to the result of an objective mathematical method, namely that of the so-called

Power Compromise. However, whether this or a similar method was used is not apparent from the preparatory materials to the Decision, which therefore leaves something to be desired in terms of the quest for an open and transparent, stable, fair and objective method. The principle that no member state shall lose seats as compared to the previous seat distribution may not be sustainable with future accessions.

Postponement or a cancellation of Brexit will lead to an extension of the composition of the Parliament 2014–2019 to that of 2019–2024; this distribution infringes the Treaty requirement of degressive proportionality and cannot persist for a longer period.

Interinstitutional balance

The overall interinstitutional balance seems to give a relatively greater weight to large Member States in the Council, and to smaller states in the Parliament, whereas – somewhat more indirectly – the equality of Member States, in particular also the smaller states, is guaranteed in the composition of the Commission. Brexit will not upset the interinstitutional balance overall.

Participation of non-member states in EU policies

Participation of the UK as a non-member-state in EU policies beyond transition must respect EU decisional autonomy. The great variety in present forms of cooperation with non-member states would require a further categorization as to the institutional parameters and in particular the levels of cooperation that can be allowed to a former Member State that has decided to be essentially outside the Union. In this regard, it deserves further scrutiny to what extent the status of a former Member State is comparable to the status of a candidate state or a potential candidate state. Participation in a Union policy area by a non-Member State can never take the form of having a vote on legally binding instruments. The factual power of non-Member States in certain areas can function as a factual constraint of the normative autonomy of the Union.

Recommendations

To gain more insight into the consequences of Brexit for the political dynamics within the Council, further research into coalition building in the Council in particular policy areas after Brexit is desirable.

The requirement of a minimum of 15 Member States consenting to a proposal does not seem very meaningful in a Union of >27; it would run counter to the possible logic of deeper integration should the Union become smaller.

The requirement of a minimum of *four* members to constitute a blocking minority under the ordinary qualified majority rule would need to be recalibrated in a <27 EU; it might be reformulated in order to express the idea that a blocking minority of Member States should comprise at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one additional member.

It remains urgent to further improve on objective, fairer and more transparent decisions on the future composition of the Parliament, in order not to undermine its democratic legitimacy. This urgency can only increase with the accession of new Member States.

A codification of the principle of autonomy at the constitutional level has no additional value given the supra-constitutional status in the case law of the ECJ. Further study and consideration should, however, be given to the question of the desirability of an institutional framework for participation .

1. INTRODUCTION

TERMS OF REFERENCE

Analyse the impact of the United Kingdom's withdrawal on the institutional balance as well as the political dynamics within the EU, and in particular:

1. examine how the United Kingdom's departure would modify the voting balance, in particular:
 - a. within the Council ; and
 - b. the European Parliament;
2. delve into the political impact of such a shift;
3. explore how such changes could lead to a future modification of relevant Treaty provisions.

Delve into the institutional changes and the political consequences that might be necessary if the EU decides, also in view of the UK withdrawal, to open some of its policies to non-members, and the suitability of such opening.

In our terms of reference we have been asked, put succinctly, to assess the impact of Brexit on:

- the voting arrangements in the Council;
- the composition of the European Parliament (Parliament);
- the participation of non-member-states in EU policies.

We have also been requested to explore how such changes could lead to a future modification of relevant Treaty provisions.

Essentially, these questions focus on the constitutional role of Member States in EU decision-making. They concern the representation of Member States in the Council and the Parliament, but due to considerations of inter-institutional balance, these may also be affected by Member State representation in other institutions, such as the Commission, in terms of how this representation is affected by the UK's withdrawal from the Union.

The Terms of Reference also refer to how the 'political dynamics' are affected by the withdrawal of the United Kingdom (UK) from the European Union (EU). To avoid overly speculative statements, again we limit ourselves to what actual institutional practice implies *ceteris paribus*, and what changes of a more constitutional nature that might involve in practice. On these aspects of 'political dynamics' further political science analysis into policy coalitions might be worth pursuing subsequent to this report, in particular in light of changing circumstances, such as electoral developments in the Parliament as well as in Member States that will impact on the political dynamics in the Parliament and Council.

1.1. Levels of analysis

It is important to distinguish different levels at which the impact of Brexit on the institutional set-up of the political institutions can be assessed. From abstract to concrete, these are the following:

- The first is a meta-constitutional question: what should the rules and practices look like, beyond the existent ones? And should, in the light of this type of analysis, the treaties be changed?
- The second is the level of the present constitutional rules: what are the rules we have, and how are these intended to operate in practice?

The way in which this study proceeds is that we first look at the second level: what are the present rules and how is their functioning affected by Brexit? Next we can identify whether this provides reasons for changing the rules, which may include amending primary law.

1.2. Structure of this report

In the next chapter, Chapter 2, we discuss the representation of Member States in the Council in terms of the voting balance between Member States, and how this is affected by the UK's withdrawal from the Union.

After introductory remarks on the manifold meanings of 'voting power', we first indicate the implications of Brexit for the political dynamics, based on the UK's past voting behavior. Next we set out the present voting arrangements in the Council, in order to assess the impact of Brexit on each of the voting rules.

In Chapter 3, after an opening remark on the impracticality of assessing the implications of Brexit for political dynamics in the Parliament, we move on to discuss the representation of citizens through the apportionment of seats in the Parliament, and assess how the European Council Decision of 28 June 2018 has solved the consequences of the UK's withdrawal from the Union.

In Chapter 4, we discuss whether the UK's withdrawal of the UK from the Union requires institutional changes in secondary or primary EU law, looking at the consequences of the withdrawal for both the intra- and inter-institutional balance.

In Chapter 5, we briefly discuss the constitutional parameters for non-member state participation in EU policies.

2. REPRESENTATION OF MEMBER STATES IN THE COUNCIL: VOTING POWER

In this chapter, we look at how the UK's withdrawal from the Union affects the voting balance in the Council. This depends on the concrete voting arrangements, which largely determine political dynamics within the Council and the institutional balance. In order to be able to analyse the impact of the withdrawal on that balance within and between the political institutions, we need to analyse the various voting arrangements and the differences to which a new composition of the Council leads. In essence, we are therefore looking for shifts in power relations within the Council. The concept of voting power is therefore significant. Before analysing the various voting arrangements and the changes in their application that will be wrought by Brexit, we first reflect on this concept of voting power and its importance in the context of Brexit.

2.1. The manifold meanings of voting power

The very fact of having the power to vote in the Council, in its threefold sense of *merely having right* to exercise the vote, or *intending to exercise it* or by *actually exercising* it, expresses a variety of meanings, on which we make the following remarks.

Voting is a primary expression of the very nature of membership of the Union. Voting in the Council is inherent in the shared capacity to act as a Member State within the framework of the Union through the Council. The very fact of participating in a vote contributes to the legitimacy of the eventual decision. Through the participation in the vote and the deliberative process which it implies and concludes, the outcome of the vote acquires legitimacy, even if a Member State would not have the possibility to sway the outcome of the vote, in other words if the formal power of swaying the vote – a notion that is further explained below – is nil, *i.e.* the case of so-called 'dummy voters'.¹

The legitimating function of voting is strong when a measure is *adopted*, particularly when the result of it entails a legally binding measure that imposes obligations on the Member State's authorities, companies and citizens.

Nevertheless, in the history and practice of the Council voting power is also, and to a large extent, understood in terms of the power to *block a decision*, *i.e.* veto power when unanimity is required, and quasi-veto power in cases of qualified majority voting. Historically, much emphasis has been placed on unanimity, and with the expansion of qualified majority voting, much of the discussion was concentrated on the 'blocking minority' in the negotiations on the precise form of the qualified majority requirements.

These negotiations took place in the context of what was perceived as a struggle between smaller and larger Member States, an issue that gained momentum with the introduction of population size as a new criterion in the qualified majority rule as of the Lisbon Treaty, a majority rule that was to apply as the default voting procedure, replacing unanimity as the original default rule.

¹ See p. 27 below.

The introduction of a qualified majority based on population size was prepared by the European Convention on the future of Europe that drafted the eventually abortive Constitution for Europe. The idea of introducing the population criterion was attributed to Giscard d'Estaing, chair of the Convention's presidency, who proposed it as a breakthrough of the stalemate after the European Council's meeting of 16 April 2003 in Athens on the interim results of the Convention up to that point, which had resulted in a stalemate:

« *Je propose de généraliser la codécision et le vote majoritaire au Conseil. Avec le quota: une majorité simple d'Etats représentant les deux tiers de la population – parce qu'il faut tout de même pas que les grands pays soient les otages des petits.* »

Textbox 1: Textual origin of Council qualified majority criteria in European Convention²

This struggle between smaller and larger Member States explains the adoption of an extra requirement as to the number of Member States that are able to block a decision, in order to prevent a situation in which three large Member States can block any decision, as we shall describe below.

The emphasis on *veto power* assumes that national sovereignty is best protected by the *inability* to act in the framework of EU law; this applies to in the case of unanimity and *mutatis mutandis* also to the quasi-veto power of the 'blocking' minority in the context of majority voting. However, under conditions in which the issues tackled in the framework of European integration are of a transnational nature, the inability to act in the framework of the EU can very well imply the inability for a single Member State to act effectively. This state of affairs implies that (quasi-) veto power may protect a Member State's interests, but the opposite may just as well be the case: veto power frustrates action that is in a Member State's own interests. This latter point is exactly why Member States may prefer majority voting over unanimity: majority voting reduces the power of others to veto a decision to the detriment one's own interest.

As Craig pointed out in the context of unanimity:

'A state may well decide [...] that sovereignty and the national interest are indeed better protected via qualified majority than unanimity. This was in effect part of the rationale for the UK Conservative Party acceptance of the most important shift from unanimity to qualified majority in the EU's history, through acceptance in the Single European Act 1986 of Article 95, which became the principal vehicle for enactment of single market legislation. The unanimity rule in Article 94 was felt to be impeding the market liberalisation desired by the Conservative Party and Prime Minister Thatcher, hence the willingness to sacrifice the veto for the enhanced possibility of Community Action.'³

² The quotation is attributed to Valéry Giscard d'Estaing in the diary of Alain Lamassoure, *Histoire Secrète de la Convention Européenne*, Fondation Robert Schuman, Albin Michel 2004, p. 367. The text of the draft articles prepared by Giscard in the Easter weekend following the Athens summit were presented to the Presidium on 21 April 2003, but have only been published in Peter Norman, *The Accidental Constitution*, EuroComment, Brussels 2004, p 343-349 at 346, Art. 17b, which reads: "1. When the European Council or the Council take decisions by qualified majority, such a majority shall consist of the majority of the Member States, representing at least two-thirds of the population of the Union." Norman describes Giscard's key articles as 'a blueprint for a *directoire* of large Member States to run the Union', and the rule for qualified majority voting in the Council as 'his most provocative article' (pp. 224-225).

³ Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford, 2010, 44-45.

We will address the practical importance of the blocking minority requirements below.⁴

2.2. Implications of Brexit for political dynamics in the Council: the UK's voting behaviour

Here we make some brief remarks on patterns of voting behaviour of the UK in the Council, and what could be inferred from these patterns about the difference the withdrawal of the UK can make to the overall political dynamics in the Council.

Among policy areas in which the UK took a strong interest belong:⁵

- budgetary matters, such as the Multi-annual Financial Framework, the ceiling and on the spending side (not least because of the reduction of the budget due to the UK's departure);
- economic policy choices (liberalisation and globalisation vs more statist policy choices), and the related competitiveness and better regulation agendas, as well as tax harmonisation and approximation;
- internal market consolidation;
- the influence of the remaining (8) non-Eurozone Member States *vis-à-vis* the (19) Eurozone countries;
- global free trade;
- security, including parts of the Area of Freedom, Security and Justice (AFSJ) (police and judicial cooperation), foreign affairs and defence policies⁶.

As to the positive power resulting from its prominence in these EU policy areas or parts thereof, the UK's withdrawal may lead to less leverage for Member States that supported its approach and inspire the search for new alliances within the remaining 27 Member States (we shall henceforth refer to the 27 Member States remaining after the withdrawal of the UK as 'the EU of 27 Member states' or 'EU 27').

As to the power to *block* decision-making, in the printed media the UK has sometimes been seen as the grand veto player, and according to some, one might just as well be rid of in order to address the challenges that society and democracy is facing in Europe.⁷ These kinds of analysis tend to be caricatures.

In reality, the UK has supported more than 97% of the legislative measures adopted by the Council between 2004 and 2016.⁸ Nevertheless, there is evidence that relatively speaking the UK was in its voting practice more of a veto player than other Member states, in the sense that it voted against a proposal more often than other Member States, both in the five years prior to the entry into force of the Lisbon Treaty as well as in the post-Lisbon period from 2009–2015; also it has a relatively high abstention score.

⁴ See p. 24 below.

⁵ See, among others, Francis B. Jacobs, *The EU after Brexit: Institutional and Policy Implications*, Palgrave Pivot 2018, especially chapter 8.

⁶ See, among others, James Black, Alex Hall, Kate Cox, Marta Kepe, Erik Silfversten, *Defence and Security after Brexit*, Compendium Report, Rand Corporation 2017.

⁷ One controversialist example is Joris Luyendijk, *Brexit is great news for the rest of the EU*, available at: <https://www.theguardian.com/commentisfree/2016/jun/28/brexit-great-news-eu-britain-sovereignty>. One of the claims is that the UK stood in the way of democratic reform of the Eurozone and the EU in general, of regulation of the financial sector and other sectors dominated by the transnational corporate lobby. Making a similar claim on quite different grounds, Stephen D. Collins (2017) *Europe's united future after Brexit: Brexit has not killed the European Union, rather it has eliminated the largest obstacle to EU consolidation*, *Global Change, Peace & Security*, 29:3, 311–316.

⁸ Hix, Hagemann, Fratescu (2016) *Would Brexit matter? The UK's voting record in the Council and the European Parliament*. VoteWatch Europe, Brussels.

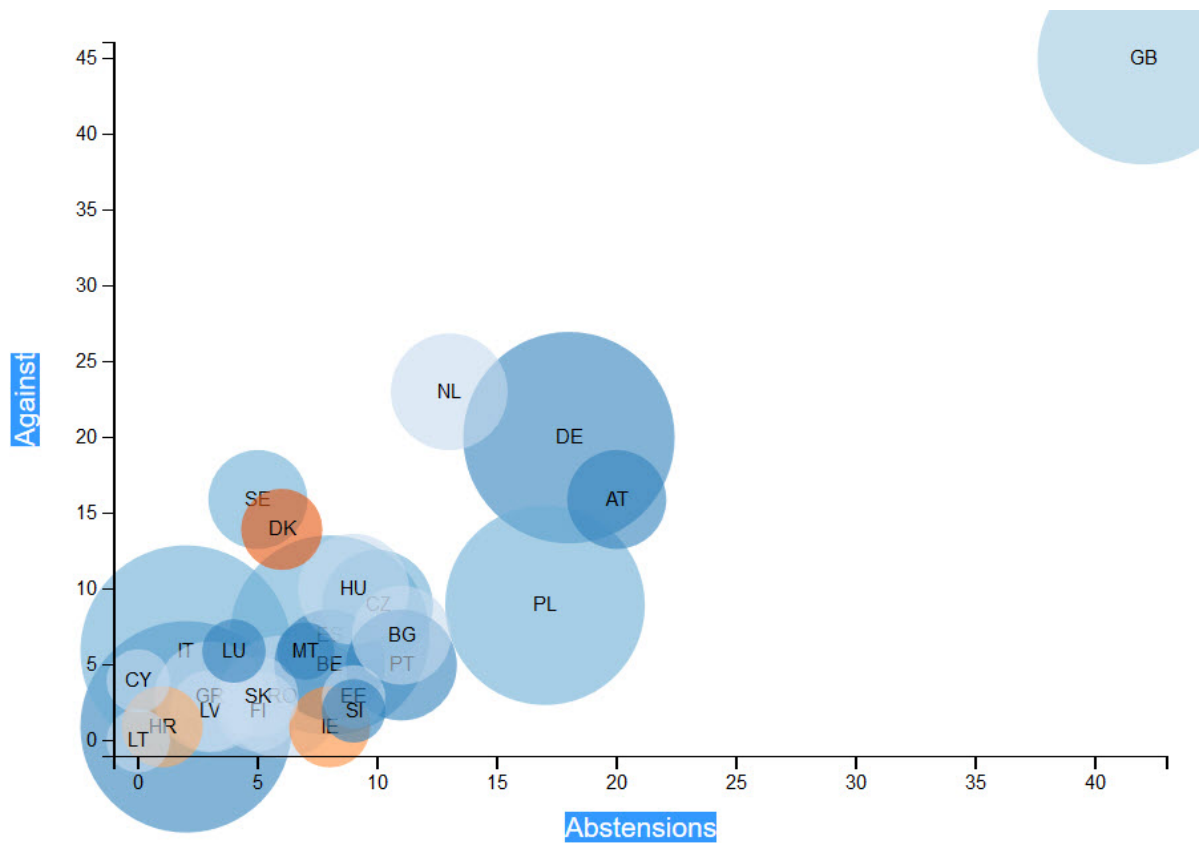


Figure 1: Visualisation of abstention and negative votes by Member State over 679 votes (2009-2018); <http://www.consiliuvote.eu/visualizer/>, (last consulted 25 October 2018).

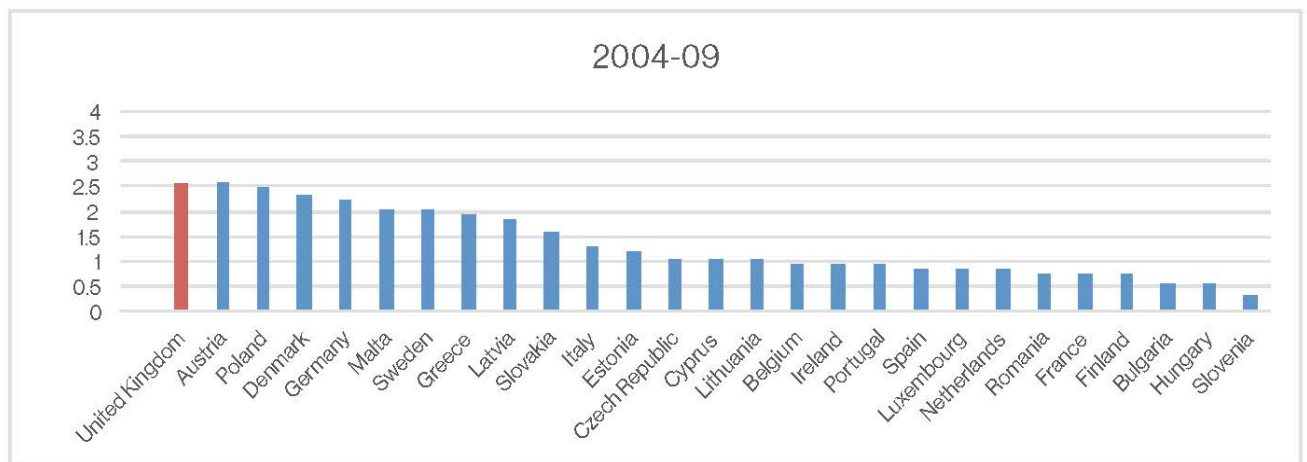


Figure 2: Votes against per member state as a percentage of the total votes 2004-2009; Hix, Hagemann, Frantescu (2016) *Would Brexit matter? The UK's voting record in the Council and the European Parliament*. VoteWatch Europe, Brussels, p. 5.

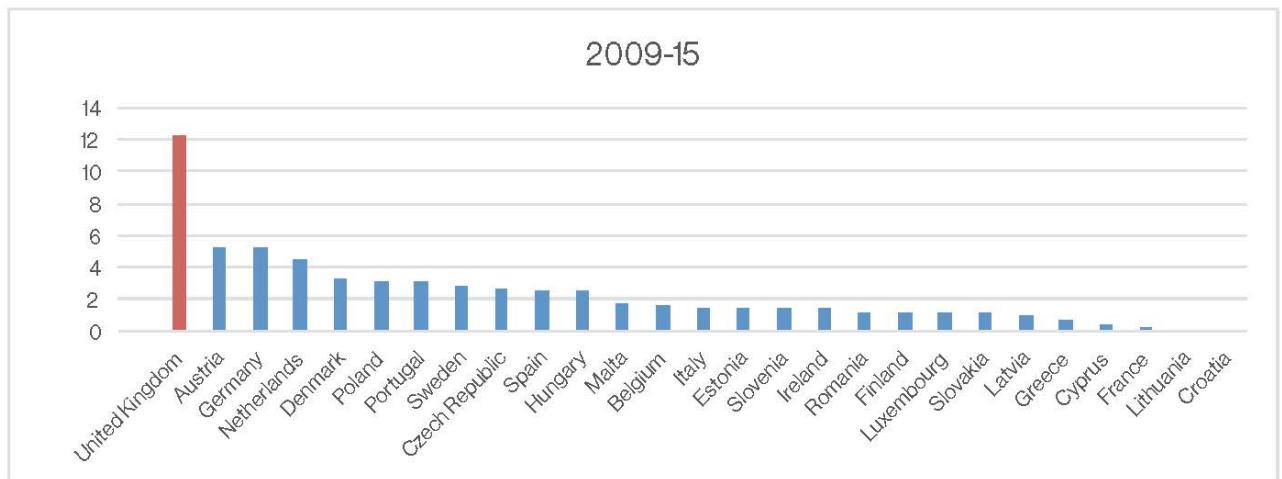


Figure 3: Votes against per Member State as a percentage of the total votes 2009–2015; ibid.

Nevertheless, these figures must be interpreted cautiously. Germany, as is apparent from Figure 1, is the second largest veto player, but this is hardly ever on the same issues as the UK. Closest allies of the UK in opposing proposals are Sweden, the Netherlands and Denmark, which can also be considered closest allies with the UK in passing proposals. This is clear from the Figure 4 which shows which Member States voted with the UK most frequently, thus sketching UK's allies in voting behaviour.

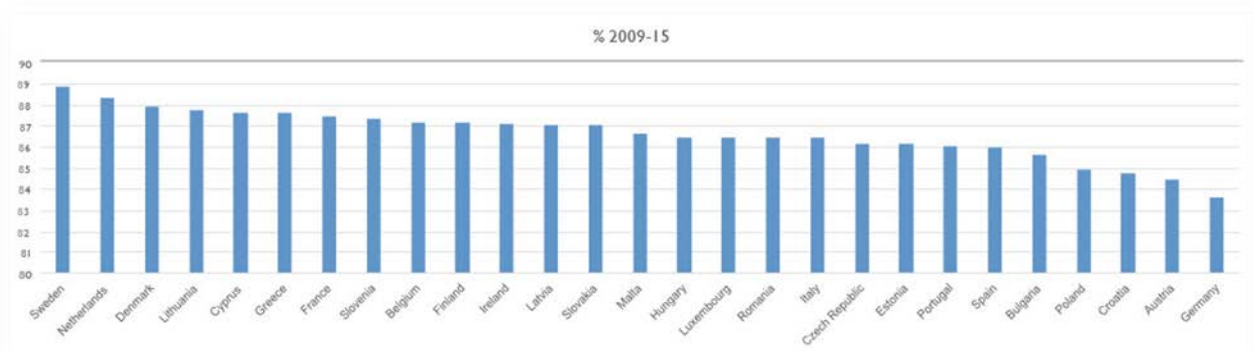


Figure 4: UK allies, % of votes, 2009-15, Hix c.s. 2016, p. 6.

Differentiating according to respective policy areas leads to the conclusion that British opposition to EU policies occurred especially on budget, foreign policy and foreign aid issues. It has been dissenter, though not the greatest dissenter, in the sectors of international trade, fisheries, legal affairs, industry, research and energy, nor was it the most frequent dissenter on internal market affairs and in the field of public health and environment. Nevertheless, the UK was not the most oppositional government on several other important issue areas. And it has in all fields been casting more negative votes than the EU average, with – in comparison with some other Member States – significant numbers of negative votes and abstentions on the internal market, legal affairs, transport, environment, and fisheries.⁹ See Figure 5 below.

⁹ Ibidem, p. 6 for the period 2009-2015.

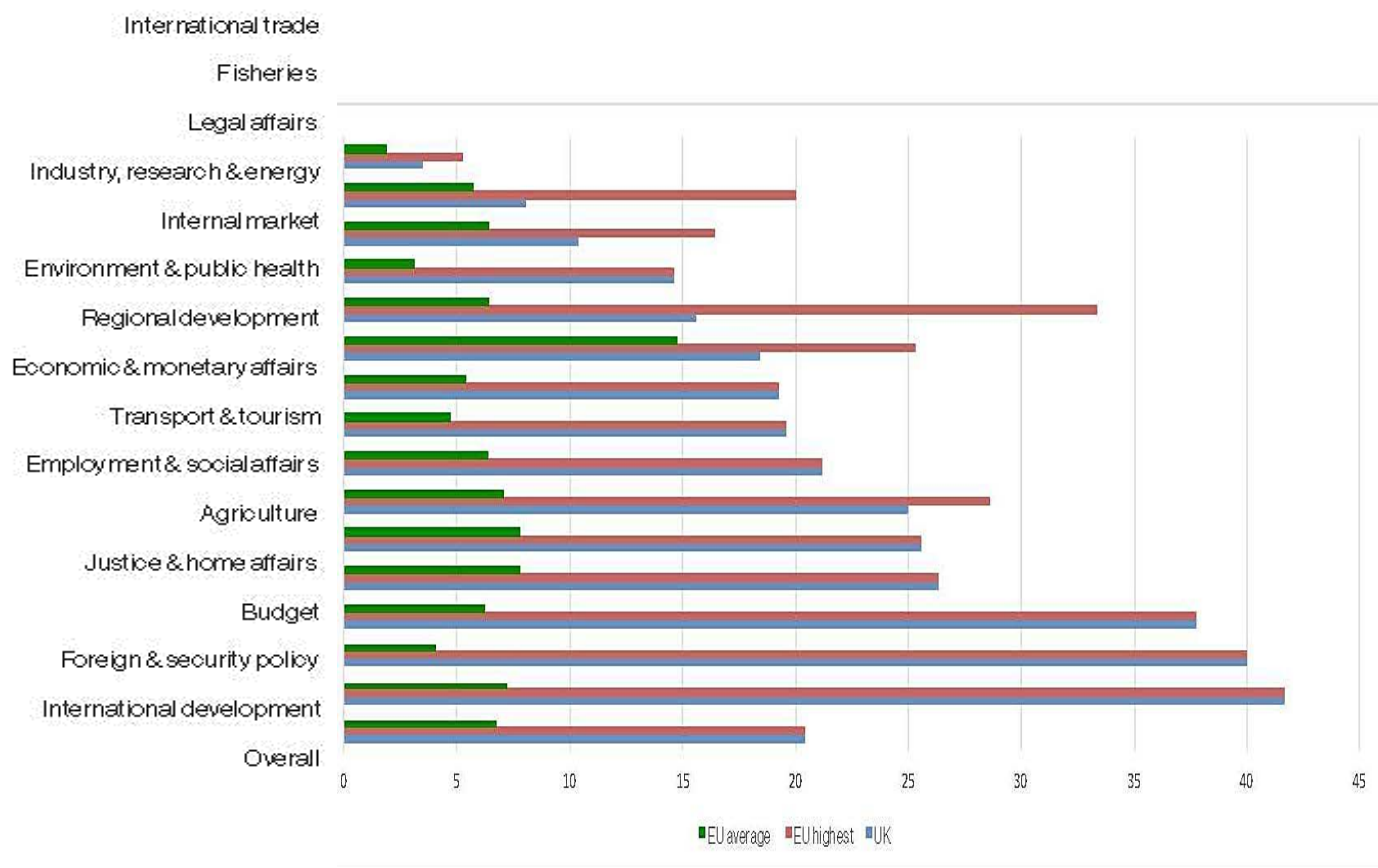


Figure 5: Degree of UK being outvoted per policy area; Hix cs 2016, p. 7.

It is self-evident that these indications do not provide definitive predictions on how the political dynamics will actually play out, as future political developments in Member States domestically can influence tendencies in directions which are different from those in the past and the present. Nevertheless from the data one can expect, Sweden, the Netherlands and Denmark as allies of the UK, can be expected to search for closer ties after the UK's withdrawal. This is also already playing out in the pre-Brexit phase, where the idea of a 'Hanze coalition' of the Scandinavian, Baltic and Benelux countries with Ireland, is gradually taking shape.¹⁰ This does not yet make for a group that either forms a majority or a minority that can block a decision, but politically it might form a political catalyst in certain policy areas that exercises influences and might on occasion counterbalance the French/German axis which has been so important in setting the EU agenda.

More generally, one may expect, given the size of the UK as a Member State in terms of population, as well as its prominence in a number of fields, that the thresholds for a blocking minority can less easily be attained after the UK has withdrawn from the Union.¹¹

Further research into new coalition building among Member States under the influence of the UK's withdrawal and the seeking of new partners among Member State governments could be entertained.¹² Although political views of Member States develop over time, they may provide possible scenarios as regards particular policy areas.

¹⁰ See on this the *Forming Coalitions in the EU after Brexit: Alliances for a European Union that Modernises and Protects*, The Netherlands Advisory Council on International Affairs (AIV), 2018, available at: <https://aiv-advies.nl/9s9/publications/advisory-reports/forming-coalitions-after-brexit-alliances-for-a-european-union-that-modernises-and-protects>.

¹¹ See p. 24 ff.

¹² The European Council of Foreign Relations has datasets based on a bi-annual expert poll that is aimed at providing material for studying coalition potentials between member states, available at: <https://www.ecfr.eu/eucoalitionexplorer#>.

Beyond the shadow of the vote and the shadow of compromise?

Traditionally, decision-making in the Council is by consensus. In the EU context this is meant to say that proposals are adopted by the Council without either an abstention or a vote against being registered

This is different from certain other domestic or international contexts where decision-making by consensus may mean that no actual vote is taken. Differently from what is sometimes thought, the Council always takes a vote whenever it adopts an act in accordance with the Treaty; in other words, decisions by consensus are not taken ‘without a vote’.¹⁸

Textbox 2: Consensus voting ¹³

The number of decisions adopted with either abstentions or votes against has been around a third. The sense, however, is that more decisions are taken by majority than previously, and on this basis there is some speculation that the consensual tradition may be gradually receding into the background.¹⁴ The figures show that the year 2018 is set to be a record year in terms of the relative number of non-consensual decisions in the Council, with a percentage of over 43% of decisions taken by majority.¹⁵ The actual numbers of non-consensual decisions taken in the Council over the last nine years are in Figures Figure 6 and Figure 7 below. Although percentage-wise there is a certain inclination towards less consensual decision-making, the fluctuations from year to year are significant, for instance looking at the years 2012–2014 as compared to 2017–2018. The period is probably too short to be entirely certain of the overall trend.

In sum, there are empirical quantitative indications of a gradual increase in non-consensual decision-making. That non-consensual decision-making will prove to be a lasting feature may be a premature conclusion if we look at the situation over the last nine years.

¹³ See the Comments on the Council's Rules of Procedure, <https://www.consilium.europa.eu/en/documents-publications/publications/council-rules-procedure-comments/#>, March 2016, p. 53: 'Whatever the practice followed [i.e., either the members casting a vote in due order, or, at the end of the discussion, the Presidency asking the members voting for, against or wishing to abstain to identify themselves, even if there are none to do so], it should be noted that the Council takes a vote whenever it adopts an act in accordance with the Treaty.' So also consensus voting without explicit votes being cast is a vote. Consequently, all votes – also those by consensus – are registered in the Council's voting register. Differently, Thomas Beukers, *Law, Practice and Convention in the Constitution of the European Union*, [PhD dissertation University of Amsterdam, 2011], p. 115 ff. uses the expression 'taking decisions without a vote' as synonymous with decision-making by consensus, for which he relies on pre-Lisbon practice, *ibidem*, footnote 400.

¹⁴ Future of Europe: Voting in Council Signals Possible Changes. VoteWatch 27 May 2017, available at: <https://www.votewatch.eu/blog/future-of-europe-voting-in-council-signals-possible-changes/>.

¹⁵ As on 1 November 2018.

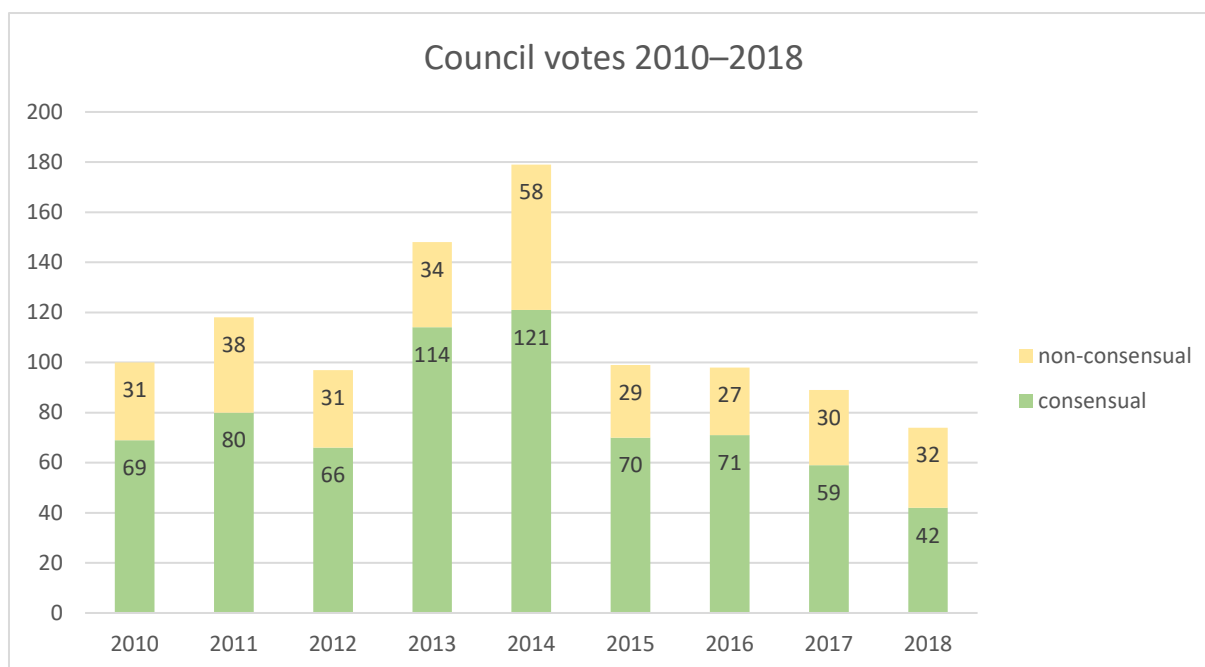


Figure 6: Consensual and non-consensual adoption of proposals in the Council 2010- (Nov) 2018; the numbers are absolute numbers of decisions, non-consensual comprising both votes against and abstentions, based on data on Council website¹⁶.

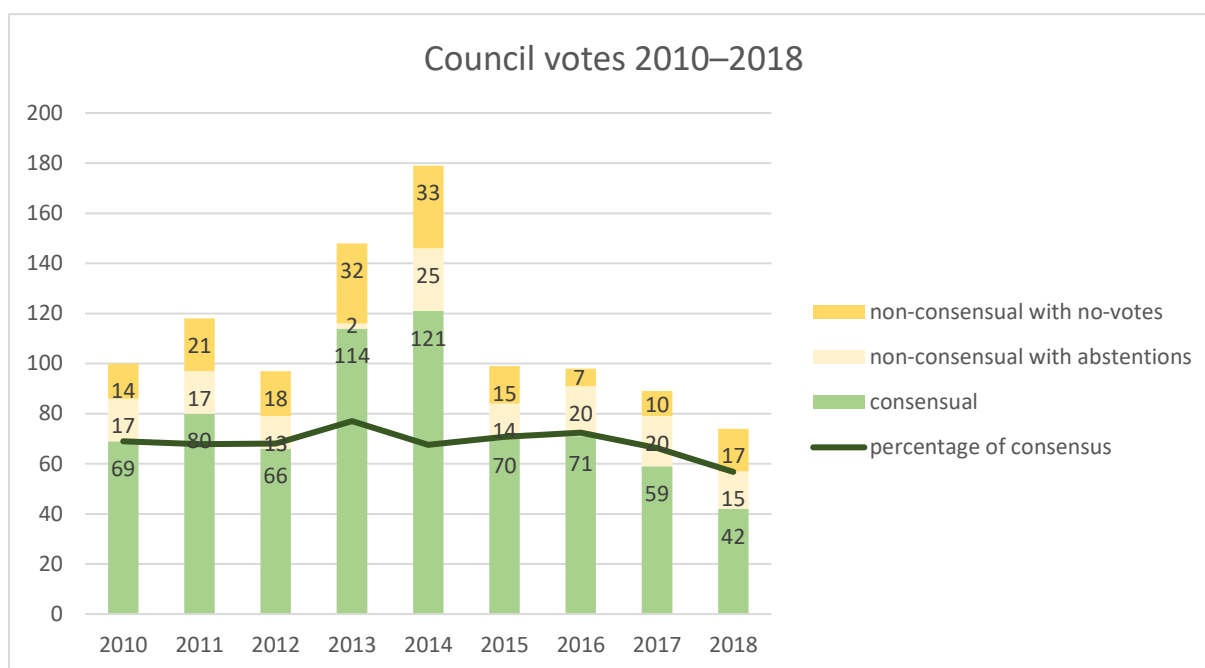


Figure 7: Consensual and non-consensual adoption of proposals in the Council 2010- (Nov) 2018; differentiating between votes against and abstentions, in absolute numbers as well as percentages of non-consensual on total number of decisions.

This being as it may, we need to look at how consensus-seeking relates to the majority voting arrangements, before focussing on these in the next sections of this chapter.

The traditional culture of consensus has sometimes led to the erroneous conclusion that rules on majority voting and blocking minorities are in practice not very relevant. Research into the practice of the Council makes it abundantly clear this is a misunderstanding. In practice the voting rules on

¹⁶ <https://www.consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data/voting-results/#>.

qualified majority voting and especially the blocking minority threshold of more than 35% of the Union's population comprising at least four Member States play a very important role in the decision-making, even when ultimately consensus is reached. From the earliest stages onwards, the question whether the presidency thinks a qualified majority is reached is decisive to move forwards with the decision as such, as well as for further working towards compromise and consensus.¹⁷

Nonetheless, the “shadow of the vote” does not fully account for the role played by QMV, because the metaphor minimizes its role. In fact, during the negotiation process, the actors are permanently counting whether there is a blocking minority. The strategy of the actors varies with the strength of the opposition. For instance, if the participants know that there is a strong blocking minority against a measure, they tend to demand higher concessions than if a qualified majority is nearly reached. And they tend to formulate the highest demands when they know that their vote is pivotal

Textbox 3: Novak S., 2014, p 179¹⁸

Awareness of the threshold of the blocking minority¹⁹ is high, from working group level up to and including COREPER (and in rare cases the Council itself)²⁰

At each stage of the decision-making process, the Presidency, the Commission and the Secretariat attempt to identify blocking minorities and eliminate them (Bal, 2004). For this reason, the national representatives build blocking minorities in order to compel the Presidency to redraft the Commission's proposals to reflect their preferences. When representatives openly oppose, they seem to be motivated by the fact that a blocking minority could emerge rather than by the belief that they have a good argument. For instance, an SCA representative explained:

When the Presidency asks ‘who's against?’, people usually don't say anything, they look at each other and are waiting to see if somebody says he's against. Because some delegations have the instructions that if they are the only one to be against, they should not say anything not to appear as isolated, but that if other delegations say they are against, then they should also say that they are against.

Textbox 4: Novak S, 2013, pp 1095-1996.

The role of majority voting rules, including the blocking minority rule, in the practice of the Council contributes to explaining the working towards compromises supported by at least the required majority, as well as the fact that no proposal has ever been voted down in the Council.²¹

¹⁷ Vaughne Miller, *Voting Behaviour in the EU Council*, 2013, House of Commons Standard Note: SN/IA/6646, p. 6; Stéphanie Novak 2011 and 2013; Florence Deloche-Gaudez and Laurie Beaudonnet, *Decision-Making in the Enlarged EU Council of Ministers: A Softer Consensus Norm as an Explanation for its Apparent Adaptability?* June 2010.

¹⁸ For a detailed discussion of the operation of the importance of the blocking minority, see S. Novak, *The Silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union*, JCMS 2013, Volume 51. Number 6. pp. 1091–1107.

¹⁹ See below p. 24.

²⁰ For a detailed discussion of the operation of the importance of the blocking minority, see S. Novak, *The Silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union*, JCMS 2013, Volume 51. Number 6. pp. 1091–1107.

²¹ This is evident from the databases at VoteWatch EU, <https://www.votewatch.eu> and the Council website <https://www.consilium.europa.eu/en/general-secretariat/corporate-policies/transparency/open-data/voting-results/#>.

However, this does not mean that the EU Council always agrees with the amendments proposed by the European Parliament. In case of rejection of the amendments by the EP (which is done by a majority vote as to the proposal to reject), a second and (potentially) third reading of a legislative text take place. Thus the Consilium website mentions 14 instances of Non-approval of the EP's Amendments by the Council, 12 of which were unanimous, the other two with abstentions by the UK.

'It is generally agreed that the availability of a qualified majority vote is the best guarantee for reaching a consensus. [...]
 Unanimity allowed the sector experts to lean back; with qualified majority people have to look for compromise. [...]
 Qualified majority voting changes the way you negotiate. If you know that you can be put in the minority, you will prepare yourself differently. The logic of the negotiation changes.'

Textbox 5: quotes from research by Beukers, T, 2011 on qualified majority and compromise seeking ²²

Contrary to several earlier empirical studies that found a negative relationship between voting power and bargaining success, there is empirical evidence – particularly in the field of environmental legislation – that voting power increases bargaining power, to the extent that the weight of votes (and the ability to block a majority decision) counts more than the mere weight of arguments.²³ This confirms findings of (amongst others) Novak and Beukers.

There can be little doubt that there is a strong culture of reaching consensus, and several reasons are adduced as to the social psychology of this phenomenon. Thus, there may be differences between the informal vote in COREPER and the formal vote in the Council – the only one publicly registered – in order not to expose the fact of having lost the vote or being isolated, or, to the contrary, one may wish to voice an abstention or make a declaration or vote against in order to make a statement. From a different perspective, outvoting Member States in the Council is a highly sensitive matter, and much is undertaken to compromise if opposition exists on the part of particularly affected Member States.²⁴ All this, of course, may not apply when there is a national parliamentary mandate as to the nationally desirable voting behaviour, which explains voting behaviour on particular issues.²⁵

At the same time, the Council Presidency has a stake in being perceived as successful, and has therefore a strong motive to adopt a measure as soon as it has acquired a relevant majority,²⁶ thus, paradoxically, sometimes enforcing the process towards consensus. The idea here is that the Presidency tends to be output oriented, as the taking of decisions is considered to be a sign of success. This attitude may lead a Presidency to push for a decision as of the moment that the required majority seems to be attained. This in turn may force members who may not initially have been contributing to the majority, into paying up as to their willingness – which may be low e.g. due to fear to being exposed as being isolated or as losing the vote – to cast a contrary vote or to abstain. One cannot underestimate all the other factors that lead to the adoption of a measure by consensus. But the interplay in the practice of the Council of the conditions of majority voting arrangements with those other factors, including the 'shadow of compromise' based on the collective ethos of achieving successful decisions, do not allow playing-down the shadows that the voting arrangements cast over deliberations. This also applies to the rules on blocking decision-making, including the 'blocking minority' rule. There is evidence that in cases of controversy over aspects that

²² Thomas Beukers, *Law, Practice and Convention in the Constitution of the European Union*, [PhD dissertation University of Amsterdam, 2011] 117, with references to the sources.

²³ Andreas Warntjen (2017) Do votes matter? Voting weights and the success probability of member state requests in the Council of the European Union, *Journal of European Integration*, 39:6, 673-687, at 674: 'Previous studies of member state interventions found no connection or even a negative relationship between the voting power of individual member states and bargaining success. In addition, they found that member states that put forward requests were less successful in the negotiations in the Council than less active member states (Cross 2013; Arregui 2016). In contrast, this study shows that member state requests that are supported by more votes are more likely to be successful.'

²⁴ For a convincing and full discussion see Stéphanie Novak, Two effects of a high threshold of qualified majority, in: *Majority Decisions: Principles and Practices* (Stéphanie Novak, Jon Elster, eds.), Cambridge 2014. 177-195.

²⁵ Novak, 2013, p. 1096. We are not aware of solid research as to the cases in which this actually applies, and how this 'external' mandate relates to the 'internal' decisional dynamics within the Council.

²⁶ *Ibidem*.

a Member State considers to make a proposal unacceptable, the potential to form a blocking minority clearly provides leverage in negotiations to obtain changes.²⁷

We now turn to the various voting arrangements as they presently exist (section 2.3.1) and how these are impacted by Brexit in practice (section 2.3.2).

2.3. Voting arrangements

2.3.1. Present voting rules

The various rules comprising the Council voting arrangements that presently apply, are listed in the Annex on Definitions of Majorities.²⁸ From an institutional point of view, the following of these are relevant to a change in membership of the EU.

Ordinary qualified majority

Although some decisions are still to be taken by unanimity, ordinarily the qualified majority voting rule of Article 16 (4, first paragraph) TEU applies.

The core requirements of this rule are that a majority is achieved with 55% of the Member States, with a minimum of 15 Member States, that constitutes at least 65% of the Union's population.

In a European Union of 28 Member States, the requirement of at least 55% of the Member States means that at least 16 Member States must vote in favour. In a Union of 27 Member States, the requirement of at least 55% will mean that at least 15 Member States must vote in favour.

Qualified majority in case of non-participating Member States

The ordinary qualified majority rule applies in cases where, under the Treaties, not all the members of the Council participate in voting (e.g. non-Eurozone countries in Euro related matters, or Member States that do not participate in enhanced cooperation), but with one difference: the qualified majority is 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States (as in Art. 16(4) TEU), and shall *not require the minimum of 15 Member States* (Art. 238 (3) TFEU).

²⁷ See Warntjen, footnote 23 above.

²⁸ See p. 64 ff. of this Report.

Blocking minority

Under the qualified majority rule of Article 16(4) TEU as well as the qualified majority rule in case of non-participating Member States (Art. 238(3)(a) TFEU), there exists a 'blocking minority rule'.²⁹ Without this special blocking minority rule, if three Member States that together comprise more than 35% of the population (i.e. three largest Member States) are against a proposal, it would be rejected. The blocking minority rule adds another condition to the threshold of 35% of the Union's population, viz. that the blocking minority must comprise *at least four Member States*. In other words, the blocking minority of more than 35% of the Union's population must comprise *at least four member states* under the ordinary qualified majority rule.³⁰

Thus, in order to prevent a vote from passing a coalition of states needs either

1. to consist of more than 45% of the total number of member states (*i.e.* 13 states in the EU 27 and EU 28) so that the requirement of 55% of the member states (*i.e.* 15 states in the EU27 and 16 states in the EU28) is not achieved

or

2. to consist of at least 4 member states that together represent more than 35% of the EU's population.

In case of non-participating members, the 'blocking minority' rule requires that a minority includes at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one additional member, failing which the qualified majority shall be deemed attained.³¹

Apart from the blocking minority based on population figures, the adoption of a measure by ordinary qualified majority may be blocked, both in an EU of 28 and of 27, if there are 13 Member States opposing the proposal. A blocking minority based on the number of Member States does not need to comprise 35% of the Union's population. Indeed, in an EU of 28 and of 27 the 13 smallest Member States comprise only 8.3% of the Union population.³²

Reinforced qualified majority

In some cases – where there is no Commission of High Representative³³ – the so-called reinforced qualified majority voting rule applies: the required number of member initiative states voting in favour is higher; 72% instead of 55%.³⁴ In a Union of 28 Member States, the requirement of at least 72% of the Member States means that 21 Member States must vote in favour. In a Union of 27 Member States, the requirement of at least 72% of the Member States means that 20 Member States must vote in favour.

²⁹ The blocking minority rule does not apply in the case of reinforced qualified majority (Art. 238(2) and (3b) TFEU).

³⁰ Art. 16(4), second subparagraph, TEU.

³¹ Article 238(3) TFEU.

³² On the basis of population figures applying to 2019, in an EU of 27 the 12 smallest comprise 35 725 166 inhabitants on a Union total of 447 036 565 inhabitants, and in an EU of 28 the 13 smallest comprise 42 775 200 out of 513 274 572.

³³ E.g. Art. 255 TFEU on consultative panel for appointment of judges and adv-gen ECJ (initiative Pres ECJ); Art. 76 TEU measures on administrative cooperation in the area of freedom security justice (1/4 MS); some ECB initiatives.

³⁴ Article 238(2) and (3) (b) TFEU.

Special majorities: the Ioannina Compromise and the EBA Board of Supervisors

There are some special majority rules in specific cases.

These include the so-called Ioannina Compromise,³⁵ which amounts to a procedural rule that voting is in practice suspended in case at least eight Member States or states comprising at least 19,25% of the EU population ('at least 55% of the population, or at least 55% of the number of Member States necessary to constitute a blocking minority') indicate their opposition to adoption of an act.

Another special majority rule is found in the context of voting in the Board of Supervisors of the European Banking Authority (EBA), which adds a 'double majority' rule, to the effect that a qualified majority or simple majority, as respectively applicable with regard to respective decisions specified under the EBA Regulation, must include at least a simple majority of members participating in the Single Supervisory Mechanism (SSM), as well as a simple majority of members not participating in the SSM'.^{36, 37}

Simple majority

In most procedural decisions, a simple majority suffices, which is defined as a simple majority of the component members.³⁸ In practice, this is 15 in an EU of 28 Member States and 14 in an EU of 27 Member States.

2.3.2. The impact of Brexit

Absolute and relative criteria

The voting rules we just described, contain *absolute* criteria (expressed in numbers) and *relative* criteria (expressed in percentages), in regard of which the withdrawal of a Member State (or for that matter, accession of a new Member State) has different effects.

The *absolute* criteria contained in voting arrangements are the concrete number of Member State votes that must be cast for a decision to be adopted, regardless of how many Member States the Union has. An example is the ordinary qualified majority rule which requires that the number of Member States in favour must be at least fifteen (Article 16(4) TEU), while 'blocking minority rule' establishes a minimum number of four Member States for blocking a decision.

The *relative* criteria are criteria the exact meaning of which depends on the number of Member States the EU has at the time of voting and the populations of those Member States. The relative criteria are expressed as *minimum percentages of the number of Member States* (for example Article 238(1) TFEU: more than 50% of the Council's component members), or a minimum percentage of the EU's population contained in countries that vote in favour (for instance in Article 16(4) TEU 65% of the population).

Sometimes, as we saw with regard to the ordinary qualified majority voting rule of Article 16(4:1)) TEU, a combination of relative and absolute criteria must be met for the adoption of a decision.

How is the effect of these absolute and relative criteria in the present voting arrangements altered by the UK's withdrawal? We arrange our discussion of this question by voting rule, beginning with

³⁵ Council Decision 2009/857, OJ [2009] L 314/73.

³⁶ Article 44, EBA Regulation, quoted in full in footnote 106 below.

³⁷ Note that the single supervisory mechanism applies automatically to Eurozone member states, but the participation of non-Eurozone countries only participate on a voluntary basis; to date no non-Eurozone countries participate.

³⁸ Article 238(1) TFEU.

the ordinary qualified majority rule as the most important decisional rule, followed by the other voting rules.

2.3.2.1. Ordinary qualified majority

Absolute criteria

In the ordinary qualified majority rule, the absolute criteria are, firstly, the requirement of a minimum of 15 Member States that must support a proposal for it to be adopted; and, secondly, the rule that a blocking minority must comprise at least four Member States. These numbers are absolute in the sense that their specific value does not alter depending on the Union's composition. The withdrawal or accession of Member States do not as such change the numbers 15 or 4 that are relevant here.

Yet, the very fact of their unchangeability makes a difference for their meaning in practice. This is apparent when we compare the absolute 15 Member State requirement with the relative requirement of a majority having to comprise 55% of the Member States.

In the Union of 28, the 55% requirement means that 16 Member States are needed for the adoption of a proposal. Brexit brings the number of Member States back from 28 to 27 (the number from before Croatia's accession). The 55% criterion and 15 Member States criterion then coincide. The absolute criterion is not of any significance as compared to the relative 55% criterion. Only if membership declines to less than 26 Member States, the absolute 15 Member States requirement becomes meaningful (then it goes beyond 55%) – and actually if it goes down to 22 the 15 Member States requirement becomes a requirement of two thirds of the vote, and as of twenty Member States it becomes a requirement of $\frac{3}{4}$ of the number of votes.

Table 1 makes that visible.

Number of MS	55%	Required number of MS voting in favour
30	16.5	17
29	15.95	16
28	15.4	16
27	14.85	15
26	14.3	15
25	13.75	15
24	13.2	15
23	12.65	15
22	12.1	15
20		15 (= $\frac{3}{4}$ votes)
15		15 (= unanimity)
< 15		No decision-making possible

Table 1: 55% of the Member States in a larger or smaller EU

The blocking minority rule before and after Brexit

A blocking minority needs to form not only at least 35% of the population but must also comprise at least four Member States.

As was explained above, the blocking minority rule is there to prevent that the 65% of population rule allows the largest states who together hold more than 35% of the EU population to form alliances of three Member States and prevent proposals from being passed. Because of the blocking minority rule specified in the Treaties, such alliances need at least four Member States to block a vote. This rule is slightly decreasing the power of large states, to block decisions that all other Member States want to see passed, but only very slightly. It is only relevant if 25 states pre-Brexit or 24 states post-Brexit all want to pass a proposal, and the three largest Member States oppose it.

As we already mentioned, in the minds of those around the table in the Council, this rule takes a quite prominent place. This is in stark contrast with the mathematical meaning of the blocking minority requirement. The number of cases in which the requirement of four Member States can sway the outcome is arithmetically quite low. Under the population figures of 2019, there are 31 512 477 winning coalitions possible in the EU28 without the blocking minority rule, and the blocking minority rule adds another 11 possible winning coalitions. In the EU 27, without the UK, 18 813 556 winning coalitions can be formed without the blocking minority rule, and the blocking minority rule just adds another 20 to those.³⁹

Specifically, the 11 possible winning coalitions added by the blocking minority rule in the context of EU28 are:

1. Everyone without Germany, France and UK;
2. Everyone without Germany, France and Italy;
3. Everyone without Germany, France and Spain;
4. Everyone without Germany, France and Poland;
5. Everyone without Germany, UK and Italy;
6. Everyone without Germany, UK and Spain;
7. Everyone without Germany, UK and Poland;
8. Everyone without Germany, Italy and Spain;
9. Everyone without Germany, Italy and Poland;
10. Everyone without France, UK and Italy ;
11. Everyone without France, UK and Spain .

These 11 coalitions (and only these) would not be winning if we did not have the blocking minority rule, but they are winning with the blocking minority rule. These 11 coalitions of 25 countries have under 65% of population, but they can still pass a decision because the 'opposition' consists of only three, and not four, Member States, which therefore together are not allowed to block a vote. After Brexit, there would be 20 possible coalitions enabled (i.e. made winning coalitions) by the blocking minority rule:

³⁹ According to Kirsch, *A Mathematical View on Voting and Power*, 2016a, pre-print at www.ResearchGate.net, p. 18 in an EU of 27 there are 'more than 30 million winning coalitions'. We thank Olivier Tieleman for calculating the precise number.

The total number of *all possible* coalitions (i.e. including any "group", winning ones and losing ones, that one could draw from the total, including also the group with no members and the group with all members), is very large indeed. The number of possible coalitions from a total of k individuals is equal to 2^k , that is 2 to the power of k . Hence, the total of all possible coalitions, depending on the number of member states is as follows:

EU of 6 ms is $2^6 = 64$;

EU of 15 ms is $2^{15} = 32,768$;

EU of 25 ms is $2^{25} = 33,554,432$;

EU of 27 ms is $2^{27} = 134,217,728$;

EU of 28 ms is $2^{28} = 268,435,456$ coalitions.

1. Everyone without Germany, France and Italy;
2. Everyone without Germany, France and Spain;
3. Everyone without Germany, France and Poland;
4. Everyone without Germany, France and Romania;
5. Everyone without Germany, France and Netherlands;
6. Everyone without Germany, France and Belgium;
7. Everyone without Germany, France and Greece ;
8. Everyone without Germany, France and Czech Republic;
9. Everyone without Germany, France and Portugal;
10. Everyone without Germany, France and Sweden ;
11. Everyone without Germany, France and Hungary;
12. Everyone without Germany, France and Austria;
13. Everyone without Germany, France and Bulgaria;
14. Everyone without Germany, Italy and Spain;
15. Everyone without Germany, Italy and Poland;
16. Everyone without Germany, Italy and Romania;
17. Everyone without Germany, Italy and Netherlands;
18. Everyone without Germany, Spain and Poland;
19. Everyone without France, Italy and Spain;
20. Everyone without France, Italy and Poland.

The increase in the number of coalitions is due to the fact of the UK's withdrawal proportionally leaves France and Germany with increased shares of population, comprising together just over 33% of EU population. That percentage can be raised to more than 35% through alliance with many other EU states – in fact, any state the population of which is more than 2%, thus creating more possible coalitions of three with 35% of population. Brexit therefore gives arithmetically a slightly higher significance to the blocking minority rule. Since this rule serves the purpose of limiting the power of larger states, Brexit thus means that the power of larger states decreases slightly. But that power decrease is still quite small considering that this is just a small fraction of all possible coalitions that can carry a vote.

The UK features prominently in the list of coalitions pre-Brexit as the blocking minority rule prevents it, together with France and Germany, to form alliances with each other or with a few other larger countries to block decisions that all the other countries want. If we combine this with the finding above (Figure 4: *UK allies*) that in practice the UK rarely votes together with Germany to oppose a certain proposal, the pre-Brexit figures suggest that practically the relevance of the blocking minority rule is even lower than the numbers suggest.

In terms of political probability in light of the past voting behaviour, we noticed that France hardly ever votes against a proposal (see Figure 2, Figure 3 and Figure 4 above). This has implications for the probability of actual blocking minorities post-Brexit. Arithmetically the significance of the blocking minority requirement is increased after Brexit. But, whereas previously the likelihood of the UK participating in a blocking minority was relatively high, the fact that 14 out of the 19 coalitions post-Brexit involve France, must mean that the UK's withdrawal most likely makes it more difficult to actually form a blocking minority on the basis of population size with four states at a vote. If France is supporting the adoption of a proposal, many smaller Member States are required to reach the blocking threshold of over 35% of the Union's population.⁴⁰

⁴⁰ As an aside to this, we note that, depending on the size of the member states involved, the smallest might more easily aim for reaching the blocking number of member state votes of 13 (or more) that block reaching the absolute threshold of 15 member state votes needed for a qualified majority. The five largest member states in a Union of 27 comprise more than 66% of the Union's population.

Again, a *caveat* is in place. We know from the studies referred to above on the decisional practice of the Council, that the blocking minority rule is not there actually to obstruct decision-making, but as a bargaining tool that issues in a majority decision to adopt the proposal with the largest possible degree of consensus. This means that France may be averse to expressing a contrary vote at the stage of taking the vote, it may well play the card of potentially obstructing adoption in the various stages of negotiations in order to influence the content of adopted measures. And here other Member States may have coalition opportunities that do not appear publicly.⁴¹

Relative criteria

We now proceed to discuss the extent to which the effect of the *relative* criteria of the ordinary qualified majority rule is altered by the UK's withdrawal.

The relative requirements of the qualified majority rule are in the abstract independent from the number of Member States and have therefore an objective value which, as a matter of constitutional principle, is not affected by the decrease or increase of Member States, and in this sense are independent thereof. Therefore, one might perhaps at first sight expect the effect of relative criteria, which are fixed percentages, not to change much when the number of Member States changes because of the withdrawal of one or more Member States (or, for that matter, because of one or more Member States' accession to the Union). It is nevertheless evident that there may be significant shifts in the actual effect of these criteria, in particular the population criterion. A large Member State leaving the Union would intuitively have different consequences from a small one leaving. And to some extent this also applies to the percentage of the required number of Member States needed to adopt a proposal. The concrete application of both brings about changes in the voting power of concrete Member States in practice.

In this sub-section, voting power is defined as the power to sway the outcome of the vote, which lends itself to quantification and modelling.⁴² So here we are concerned with the cases in which a Member State's vote can turn a losing coalition into a winning coalition by joining that coalition, as well as those in which Member State can turn a winning coalition into a losing coalition by leaving it. It is in this specific sense that we examine the changes in voting power of Member States consequent upon the UK's withdrawal.

It is worth to note here once again that the power to sway the outcome of the vote is not the only way to define and analyse political power in the context of voting (see page 10 above).

⁴¹ We do not know of any studies that provide a reliable insight in actual position shifting of respective member states during respective stages of decision-making of the Council.

⁴² On this concept of voting power and its mathematical modelling, see Werner Kirsch, A Mathematical View on Voting and Power, 2016a,; Werner Kirsch, Brexit and the Distribution of Power in the Council of the EU, CEPS Commentary, 26 November 2016b, www.ceps.eu.

As we said, through participation in the vote and the deliberative process, the outcome of the vote acquires legitimacy, even if the formal power of being able to sway the outcome of the vote is nil, *i.e.* in the case of so-called ‘dummy voters’⁴³. This was the case with Luxembourg, from 1956 to 1972.

In the original EU6, the formal voting weights in qualified majority voting were distributed as follows:

Germany	4 votes;
France	4 votes;
Italy	4 votes;
Netherlands	2 votes;
Belgium	2 votes;
Luxembourg	1 vote.

The threshold for adopting a proposal was 12 votes, so agreement of the three large member states was sufficient for a proposal to be adopted, as was agreement by two large and the two middle-sized member states; no single state on its own could block a proposal. Luxembourg could never sway the outcome: its vote would never be decisive by joining a coalition so as to make it a winning coalition, nor by joining a coalition so as to make it the vetoing coalition.

Textbox 6: Formal voting power Luxembourg, cf Piris 2010, 215 fn 14; Kirsch 2016b, pp.11-12.

However, unlike negotiating skills in the deliberative process or factors which could be seen as contributing to a voter’s power, the mere power to sway the vote can be calculated with mathematical precision, and can thus provide a useful numerical starting point for evaluating changes brought about by the UK’s withdrawal from the EU.

In the literature two important standards are developed:

- in terms of the number of scenarios in which a vote by this voter changes the outcome, divided by the number of all possible voting scenarios (the so-called ‘absolute Banzhaf index’), and
- in terms of the number of scenarios in which a vote swing by this voter changes the outcome, as a proportion of the total number of decisive swings for all voters (the so-called ‘normalized Banzhaf index’).⁴⁴

In the tables below, we make use of the ‘normalized Banzhaf index’, which expresses power as a percentage relative to the powers of all the other Member States, illustrating best how power balances shift among the remaining Member States after the withdrawal of the UK. The figures in the tables are based on the official population data for the year 2018 that apply in Council voting in 2019.⁴⁵

By comparing these indexes for the situation of the EU of 28 Member States with the situation of the EU 27, we can determine the impact of the withdrawal on the voting power of Member States thus defined. The following calculations are made for the ordinary qualified majority voting scenarios, and do not take into account the blocking minority rule (which is, as discussed above, quantitatively insignificant⁴⁶).

⁴³ Cf. Kirsch, 2016a, above footnote 39, pp. 11-12.

⁴⁴ The Banzhaf index – based on work by Penrose from the 1940s – is typically used in binary voting (in favour or against), whereas Shapley–Shubik index is used for distributive politics; see e.g. Steunenbergh, B., Schmidtchen, D., Koboldt, C., 1999, Strategic power in the European Union: evaluating the distribution of power in policy games. *Journal of Theoretical Politics* 11, 339–366. Other methods have been proposed and developed, e.g. the nucleolus measure, cf. Michel Le Breton, Maria Montero, Vera Zaporozhets, Voting power in the EU council of ministers and fair decision making in distributive politics, in: *Mathematical Social Sciences* 63 (2012), pp159–173.

⁴⁵ These are the figures of the data available to the Statistical Office of the European Union on 30 September of 2018, see Art. 2, Annex III to the Rules of Procedure of the Council, OJ L 315, 2.12.2009, p. 52, and OJ L 325, 11.12.2009, p. 36, corrigendum, OJ L 55, 5.3.2010, p. 83; the data are defined by Articles 4 and 5 jo 2 sub c) of Regulation (EU) No 1260/2013 of the European Parliament and of the Council of 20 November 2013 on European demographic statistics, OJ 2013, L 330/39.

⁴⁶ Above p. 16.

	EU with UK		EU without UK			net voting power
Germany	16,2%	10,2%	18,5%	12%	2,3%	1.8
France	13.1%	8.4%	15%	10.0%	+1.9%	1.5
Italy	11.9%	7.9%	13.7%	9.1%	+1.8%	1.3
Spain	9.1%	6.2%	10.4%	7.6%	+1.3%	1.4
Poland	7.4%	5.1%	8.5%	6.5%	+1.1%	1.4
Romania	3.8%	3.8%	4.4%	4.0%	+0.6%	0.3
Netherlands	3.4%	3.5%	3.9%	3.7%	+0.5%	0.2
Belgium	2.2%	2.9%	2.6%	3.0%	+0.4%	0.1
Greece	2.1%	2.9%	2.4%	3.0%	+0.3%	0.1
Czechia	2.0%	2.8%	2.3%	2.9%	+0.3%	0.1
Portugal	2.0%	2.8%	2.3%	2.9%	+0.3%	0.1
Hungary	2.0%	2.8%	2.3%	2.9%	+0.3%	0.1
Sweden	1.9%	2.7%	2.2%	2.8%	+0.3%	0.1
Austria	1.7%	2.6%	2.0%	2.7%	+0.3%	0.1
Bulgaria	1.4%	2.5%	1.6%	2.5%	+0.20%	0.0
Denmark	1.1%	2.3%	1.3%	2.4%	+0.16%	0.0
Finland	1.1%	2.3%	1.2%	2.3%	+0.1%	0.0
Slovakia	1.1%	2.3%	1.2%	2.3%	+0.1%	0.0
Ireland	0.9%	2.2%	1.0%	2.3%	+0.1%	0.0
Croatia	0.8%	2.2%	0.9%	2.2%	+0.1%	0.0
Lithuania	0.5%	2.0%	0.6%	2.0%	+0.1%	0.0
Slovenia	0.4%	2.0%	0.5%	1.9%	+0.1%	-0.1
Latvia	0.4%	2.0%	0.4%	1.9%	+0.06%	-0.1
Estonia	0.3%	1.9%	0.3%	1.8%	+0.04%	-0.1
Cyprus	0.2%	1.8%	0.2%	1.8%	+0.02%	-0.1
Luxemburg	0.1%	1.8%	0.1%	1.7%	+0.02%	-0.1
Malta	0.1%	1.8%	0.1%	1.7%	+1.77%	-0.1
UK	12.9%	8.3%				

Table 2: Changes in population shares and net voting power caused by Brexit

The result of this comparison is that the withdrawal of the UK increases the voting power of the larger Member States and decreases the voting power of the smaller Member States, even though also the smaller Member States' share in the EU population increases due to Brexit.

Table 2 shows this in terms of the net gain in voting power as expressed by the Banzhaf indexes in the right hand column. In terms of net gain the turning point is somewhere between Bulgaria and Lithuania.

The relative increase or decrease in voting power (in terms of Banzhaf indexes) because of Brexit are calculated in the following table in the far right hand column (Table 3). This makes clear that the more precise turning point from gaining to losing voting power is Ireland. Poland, Spain, France and Germany are gainers in voting power; the smallest Member States of the population size of Croatia and smaller the losers, with the loss increasing as the Member State is smaller.

	EU with UK		EU without UK				
	% of EU Population	Banzhaf Index voting power %	% of EU population	Banzhaf Index %	net population increase	Net power increase	Relative Power increase
Germany	16.2%	10.3%	18.5%	12.0%	2.3%	1.8	17.1%
France	13.1%	8.5%	15%	10.0%	1.9%	1.5	18.2%
Italy	11.9%	7.8%	13.7%	9.1%	1.8%	1.3	16.7%
Spain	9.1%	6.2%	10.4%	7.6%	1.3%	1.4	23.1%
Poland	7.4%	5.0%	8.5%	6.5%	1.1%	1.4	28.1%
Romania	3.8%	3.7%	4.4%	4.0%	0.6%	0.3	6.9%
Netherlands	3.4%	3.5%	3.9%	3.7%	0.5%	0.2	6.6%
Belgium	2.2%	2.9%	2.6%	3.0%	0.4%	0.1	4.5%
Greece	2.1%	2.8%	2.4%	3.0%	0.3%	0.1	4.2%
Czechia	2.0%	2.8%	2.3%	2.9%	0.3%	0.1	4.1%
Portugal	2.0%	2.8%	2.3%	2.9%	0.3%	0.1	3.9%
Hungary	2.0%	2.8%	2.3%	2.9%	0.3%	0.1	3.9%
Sweden	1.9%	2.7%	2.2%	2.8%	0.3%	0.1	3.7%
Austria	1.7%	2.6%	2.0%	2.7%	0.3%	0.1	3.1%
Bulgaria	1.4%	2.5%	1.6%	2.5%	0.2%	0.0	1.9%
Denmark	1.1%	2.3%	1.3%	2.4%	0.2%	0.0	1.0%
Finland	1.1%	2.3%	1.2%	2.3%	0.1%	0.0	0.7%
Slovakia	1.1%	2.3%	1.2%	2.3%	0.1%	0.0	0.7%
Ireland	0.9%	2.2%	1.0%	2.3%	0.1%	0.0	0.2%

Croatia	0.8%	2.2%	0.9%	2.2%	0.1%	0.0	-0.5%
Lithuania	0.5%	2.0%	0.6%	2.0%	0.1%	0.0	-1.8%
Slovenia	0.4%	2.0%	0.5%	1.9%	0.1%	-0.1	-2.6%
Latvia	0.4%	2.0%	0.4%	1.9%	0.0%	-0.1	-2.8%
Estonia	0.3%	1.9%	0.3%	1.8%	0.0%	-0.1	-3.5%
Cyprus	0.2%	1.8%	0.2%	1.8%	0.0%	-0.1	-4.1%
Luxemburg	0.1%	1.8%	0.1%	1.7%	0.0%	-0.1	-4.4%
Malta	0.1%	1.8%	0.1%	1.7%	0.0%	-0.1	-4.6%
UK	12.9%	8.3					

Table 3: Increase and loss in voting power caused by Brexit

As there is the prospect of possible accession of a number of smaller Member States, it may be useful to simulate the effect thereof after Brexit. One would perhaps expect that only if a larger new Member State would accede to the EU27, the smaller Member States will relatively increase their power and the larger ones relatively lose voting power. As a matter of fact, this is also the case if a small Member State accedes to an EU27 after Brexit. In the simulation in the table below, we have chosen Montenegro as an acceding state. The figures show that the smaller Member States will gain more decisional power and larger members lose some voting power also when a small Member State accedes. In this simulation, the turning point becomes a Member State of the size of Belgium. See Table 4 below.

	EU without UK					EU without UK + Montenegro		
	% of EU population	Banzhaf Index %	Net pop increase after Brexit	Net power increase after Brexit	Relative power increase after Brexit	% of EU population	Net power increase	Relative Power increase
Germany	18.5%	12.0	2.3%	1.8	17.1%	18.5%	-1.15%	-9.6%
France	15%	10.0	1.9%	1.5	18.2%	15.0%	-0.91%	-9.1%
Italy	13.7%	9.1	1.8%	1.3	16.7%	13.7%	-0.81%	-8.9%
Spain	10.4%	7.6	1.3%	1.4	23.1%	10.4%	-0.59%	-7.7%
Poland	8.5%	6.5	1.1%	1.4	28.1%	8.5%	-0.52%	-8.0%
Romania	4.4%	4.0	0.6%	0.3	6.9%	4.4%	-0.11%	-2.9%
Netherlands	3.9%	3.7	0.5%	0.2	6.6%	3.9%	-0.08%	-2.1%
Belgium	2.6%	3.0	0.4%	0.1	4.5%	2.5%	0.02%	0.5%
Greece	2.4%	3.0	0.3%	0.1	4.2%	2.4%	0.03%	0.9%
Czechia	2.3%	2.9	0.3%	0.1	4.1%	2.3%	0.03%	1.0%
Portugal	2.3%	2.9	0.3%	0.1	3.9%	2.3%	0.04%	1.2%

Hungary	2.3%	2.9	0.3%	0.1	3.9%	2.3%	0.04%	1.4%
Sweden	2.2%	2.8	0.3%	0.1	3.7%	2.2%	0.04%	1.4%
Austria	2.0%	2.7	0.3%	0.1	3.1%	2.0%	0.06%	2.2%
Bulgaria	1.6%	2.5	0.2%	0.0	1.9%	1.6%	0.09%	3.4%
Denmark	1.3%	2.4	0.2%	0.0	1.0%	1.3%	0.11%	4.7%
Finland	1.2%	2.3	0.1%	0.0	0.7%	1.2%	0.12%	5.0%
Slovakia	1.2%	2.3	0.1%	0.0	0.7%	1.2%	0.12%	5.1%
Ireland	1.0%	2.3	0.1%	0.0	0.2%	1.1%	0.13%	5.6%
Croatia	0.9%	2.2	0.1%	0.0	-0.5%	0.9%	0.14%	6.4%
Lithuania	0.6%	2.0	0.1%	0.0	-1.8%	0.6%	0.16%	8.0%
Slovenia	0.5%	1.9	0.1%	-0.1	-2.6%	0.5%	0.17%	9.0%
Latvia	0.4%	1.9	0.0%	-0.1	-2.8%	0.4%	0.18%	9.2%
Estonia	0.3%	1.8	0.0%	-0.1	-3.5%	0.3%	0.19%	10.1%
Cyprus	0.2%	1.8	0.0%	-0.1	-4.1%	0.2%	0.19%	10.9%
Luxemburg	0.1%	1.7	0.0%	-0.1	-4.4%	0.1%	0.20%	11.3%
Malta	0.1%	1.7	0.0%	-0.1	-4.6%	0.1%	0.20%	11.8%
Montenegro						0,1%	1,94%	

Table 4: Change in voting power after post-Brexit accession of small Member State in comparison with the EU27

The change of relative voting power in the Council post-Brexit and post-EU27+1 as compared with the present EU28 is as in Table 5 below.

	Post Brexit	EU27 + Montenegro	Total
Germany	17.1%	-9.6%	7.5%
France	18.2%	-9.1%	9.1%
Italy	16.7%	-8.9%	7.8%
Spain	23.1%	-7.7%	15.4%
Poland	28.1%	-8.0%	20.1%
Romania	6.9%	-2.9%	4.0%
Netherlands	6.6%	-2.1%	4.4%
Belgium	4.5%	0.5%	5.0%
Greece	4.2%	0.9%	5.1%
Czechia	4.1%	1.0%	5.1%
Portugal	3.9%	1.2%	5.2%
Hungary	3.9%	1.4%	5.2%
Sweden	3.7%	1.4%	5.1%
Austria	3.1%	2.2%	5.3%
Bulgaria	1.9%	3.4%	5.3%
Denmark	1.0%	4.7%	5.6%
Finland	0.7%	5.0%	5.8%
Slovakia	0.7%	5.1%	5.8%
Ireland	0.2%	5.6%	5.8%
Croatia	-0.5%	6.4%	6.0%
Lithuania	-1.8%	8.0%	6.2%
Slovenia	-2.6%	9.0%	6.4%
Latvia	-2.8%	9.2%	6.4%
Estonia	-3.5%	10.1%	6.6%
Cyprus	-4.1%	10.9%	6.9%
Luxembourg	-4.4%	11.3%	6.8%
Malta	-4.6%	11.8%	7.2%
Montenegro			7.5%

Table 5: Increase in voting power post-Brexit and post-accession small Member State after Brexit

These differences make visible the actual change in voting power. Poland, Spain, France and Germany remain the gainers. But the longer term replacement of the UK by a small Member State leads also to gain in voting power of small Member States.

2.3.2.2. Qualified majority in case of non-participating Member States

In nearly all the cases in which the rule on qualified majority applies in the context of non-participating Member States, the UK is itself a non-participating Member State.⁴⁷ So Brexit makes no difference to the balance in voting power before and after its withdrawal.

The exceptions to this are

- The case of enhanced cooperation as regards the 'European Patent with Unitary Effect', EPUE, better known as the 'unitary patent';
- The voting under Article 7 TEU: the non-participating Member States under Article 7 are the states on which a vote takes place;
- In these two cases, the balance within the Council as to the voting power would change before and after Brexit. However, the Draft Withdrawal Agreement provides no clause on the continued participation of the UK in the Unitary Patent after exit day, so under this Agreement this form of enhanced cooperation – that is still to enter into force – will cease to apply to the UK on exit day;
- The voting rule applying under Article 7 TEU is relevant as regards the Polish and Hungarian cases for which an Article 7 procedure has been initiated. Although the UK was historically important for Europe in defending the founding values that make for the identity of the European Member States and the EU itself, and although these cases might come to a vote prior to exit day, should this remain 29 March 2019, this seems unlikely. As a merely hypothetical case, we have not calculated the shift in voting power for this case.

2.3.2.3. Reinforced qualified majority

In some cases – i.e. where there is no Commission of High Representative initiative – the so-called reinforced qualified majority voting rule applies: the required number of Member States voting in favour is higher; 72% instead of 55%.⁴⁸ In a Union of 28 Member States, the requirement of at least 72% of the Member States means that 21 Member States must vote in favour. In the EU27, 20 states must vote in favour. The 65% population threshold still applies. This approximates the qualified voting rule that applied more generally prior to the Nice Treaty.⁴⁹ Under this voting procedure, the power is distributed more evenly among small and large Member States, as attaining the necessary number of Member States (21 in EU28 and 20 in EU27) is more challenging than attaining the population threshold – in a majority of cases 20+ Member States will also contain 65%+ of the EU's population. Having a large population is thus less of a source of power under this voting procedure

⁴⁷ The cases in which a qualified majority is used in matters in which not all member states participate in the vote, are the following:

- that of non-Eurozone countries in Euro related matters (third phase of the economic and monetary union, i.e. UK and Denmark, (Protocols 15 and 16 TEU), and Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania and Sweden as member states with a derogation in the sense of Art. 139 TFEU);
- member states that do not participate in enhanced cooperation (which differs per form of cooperation);
- certain Schengen measures (cf. art. 5 of Protocol 19 on the Schengen Acquis);
- certain AFSJ measures as regards UK and Ireland (Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; (Part III Title V TFEU) as regards Denmark (cf. Art. 1 and 5 Protocol 22)], (but I think this is usually under the reinforced rule – i.e. when there is no Commission proposal;
- permanent structured cooperation in the sense of Art. 42(6) jo 46 TEU regarding military cooperation;
- Art. 7 TEU voting (reinforced majority rule);
- and Art. 50 TEU voting (but reinforced majority).

⁴⁸ Article 238(2) and (3) (b) TFEU.

⁴⁹ The qualified majority threshold over time was: EU6 – 70.59%; EU9 – 70.69%; EU10 – 71.43%; EU 12 – 71.05%; EU15 – 71.26%; EU25 – 72.3%; EU27 (and 28 until 31 October 2014) – 73.9%. See Michel Le Breton, Maria Montero, Vera Zaporozhets, Voting power in the EU council of ministers and fair decision making in distributive politics, in: *Mathematical Social Sciences* 63 (2012) 159–173; and Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis*, 2010, p. 219.

compared to the regular qualified majority voting procedure. This and the changes in the voting power under the reinforced qualified majority procedure before and after Brexit are found in Table 6.

	EU with UK		EU without UK			
	Ordinary QMV	Reinforced QMV	Ordinary QMV	Reinforced QMV		Reinforced QMV
	Banzhaf Index %	Banzhaf Index	Banzhaf Index %	Banzhaf Index	Net power increase	Relative Power increase
Germany	10.3	4.5%	12.0	5.2%	0.7%	14.6%
France	8.5	4.2%	10.0	4.6%	0.4%	10.1%
Italy	7.8	4.1%	9.1	4.6%	0.5%	11.2%
Spain	6.2	3.9%	7.6	4.2%	0.3%	7.6%
Poland	5.0	3.8%	6.5	3.9%	0.1%	2.6%
Romania	3.7	3.6%	4.0	3.7%	0.1%	3.8%
Netherlands	3.5	3.5%	3.7	3.7%	0.1%	3.6%
Belgium	2.9	3.5%	3.0	3.6%	0.1%	3.5%
Greece	2.8	3.5%	3.0	3.6%	0.1%	3.3%
Czechia	2.8	3.5%	2.9	3.6%	0.1%	3.3%
Portugal	2.8	3.5%	2.9	3.6%	0.1%	3.3%
Hungary	2.8	3.5%	2.9	3.6%	0.1%	3.3%
Sweden	2.7	3.5%	2.8	3.6%	0.1%	3.3%
Austria	2.6	3.4%	2.7	3.5%	0.1%	3.2%
Bulgaria	2.5	3.4%	2.5	3.5%	0.1%	3.0%
Denmark	2.3	3.4%	2.4	3.5%	0.1%	3.1%
Finland	2.3	3.4%	2.3	3.5%	0.1%	2.9%
Slovakia	2.3	3.4%	2.3	3.5%	0.1%	2.9%
Ireland	2.2	3.4%	2.3	3.5%	0.1%	2.8%
Croatia	2.2	3.4%	2.2	3.5%	0.1%	2.8%
Lithuania	2.0	3.4%	2.0	3.5%	0.1%	2.7%
Slovenia	2.0	3.4%	1.9	3.5%	0.1%	2.7%

Latvia	2.0	3.4%	1.9	3.5%	0.1%	2.6%
Estonia	1.9	3.4%	1.8	3.4%	0.1%	2.6%
Cyprus	1.8	3.4%	1.8	3.4%	0.1%	2.5%
Luxembourg	1.8	3.4%	1.7	3.4%	0.1%	2.4%
Malta	1.8	3.4%	1.7	3.4%	0.1%	2.4%
UK	8.34	4.2%				

Table 6: Voting power change in reinforced QMV

The figures in this table make clear that in the case of reinforced qualified majority voting, the changes in voting power due to Brexit are more evenly spread than in the case of ordinary qualified majority voting: every remaining Member State gains some power as a result of the UK's exit. This is explained by this voting procedure being less dependent on the population sizes of the Member States, which leads to less variation in the weight of each vote, and consequently to more intuitive changes to the power balances in case of one voter leaving. However, the change that occurs does indeed still depend on the population of the Member State: larger Member States gain more power than smaller Member States, because in a limited number of cases 21+ (in EU28) or 20+ (in EU27) Member States will not contain 65% of the EU's population, and the population sizes will then matter for the formation of winning coalitions.

2.3.2.4. Special majorities: the Ioannina Compromise and the EBA Board of Supervisors

There are some special majority rules in specific cases. These include the so-called Ioannina Compromise (*bis*),⁵⁰ which amounts to a procedural rule that voting is in practice suspended in case at least eight Member States or states comprising at least 19,25% of the EU population ('at least 55% of the population, or at least 55% of the number of Member States necessary to constitute a blocking minority') indicate their opposition to adoption of an act. The effect of invoking it, is that the Council shall discuss the issue – this on the understanding that, as under the previous Ioannina Compromise, the Council shall do its utmost to reach broader support for the decision. According to the literature, very scarce use has been made of the Ioannina Compromise, never leading to a delay of more than a day,⁵¹ and there are no documented cases of the use of Ioannina *bis*.

The withdrawal of the UK is in the abstract not changing the overall effect of this rule, in as much as the threshold in terms of the population requirement is still such as to prevent a single large Member State from triggering the Ioannina Compromise.

Another special majority rule is found in the context of voting in the Board of Supervisors of the European Banking Authority, which adds another 'double majority' rule, to the effect that a qualified majority or simple majority, as respectively applicable with regard to respective decisions specified under the EBA Regulation, must include at least a simple majority of members participating in the

⁵⁰ Council Decision of 13 December 2007 relating to the implementation of Article 9C(4) of the Treaty on European Union and Article 205(2) of the Treaty on the Functioning of the European Union between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other (2009/857/EC), OJ [2009] L 314/73. This is referred to as 'Ioannina bis', due to the fact that it was previously adopted under different circumstances and with different thresholds on the occasion of protracted negotiations on the accession of Austria, Finland and Sweden in 1994.

⁵¹ Piris, 223.

Single Supervisory Mechanism (SSM), as well as a simple majority of members not participating in the SSM'.⁵²

Because (at the time of the writing of this report) only Eurozone states are participating, and only one Member State (Bulgaria) has expressed interest to participating the EBA, the withdrawal of the UK will not affect this voting rule.

2.3.2.5. Simple majority

In most procedural decisions, a simple majority suffices, which is defined as a simple majority of the component members.⁵³ In practice this is 15 in an EU of 28 Member States and 14 in an EU of 27 Member States. Since under this voting procedure no weighed votes are involved, as population sizes are of no significance, every state has exactly same power as every other state. The power is thus equally distributed among all Member States. In the EU28 each state holds approximately 3.6% of power, and in an EU27 that percentage rises to approximately 3.7%. After Brexit each EU Member States will gain slightly over 0.1% of power in the context of simple majority voting.

⁵² Article 44, EBA Regulation, quoted in full in footnote 106 below. Note that the single supervisory mechanism applies automatically to Eurozone member states, but the participation of non-Eurozone countries only participate on a voluntary basis; to date no non-Eurozone countries participate.

⁵³ Article 238(1) TFEU.

3. REPRESENTATION OF MEMBER STATES IN THE EUROPEAN PARLIAMENT

The Parliament represents *citizens*, while the Council represents *Member States*.⁵⁴

‘Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.’

The departure of the United Kingdom from the Union has two major consequences for the Parliament. It reduces the number of citizens to be represented, and the number of Member State constituencies. This implies the withdrawal leads to a new balance in the composition of the membership of the Parliament. This has two types of consequences. The first relates to the political dynamics within the Parliament, and the second relates to the composition of the Parliament.

3.1. Implications of Brexit for political dynamics in the Parliament

The 73 seats of members of the Parliament elected in the United Kingdom (henceforth: ‘British MEPs’) will have a clear political impact on the political groups within the Parliament as they currently exist, *ceteris paribus* (all other things being equal). To this extent shifts can be indicated, but we must realize that the *ceteris paribus* condition cannot be fulfilled in practice – some other things can be expected to change as a consequence of the 2019 elections for the Parliament.

Briefly, the present British MEPs are concentrated mainly in the Socialists and Democrats (S&D) group, which would lose 20 Labour MEPs (out of currently 187); the European Conservative and Reformist Group (ECR), which would also lose 19 Conservative and Ulster Unionist members (out of 75); the European of Freedom and Direct Democracy (EFDD), which would lose 17 UKIP members (out of 41); the Greens/European Free Alliance Group (G/EFA) would lose 6 members (out of 52); and the Europe of Nations and Freedoms (ENF) would lose 4 members (out of 37); the European People’s Party would lose 2 members (out of 217); while the Liberal Group (ALDE – presently 68 members), the European United Left (GUE – presently 52) would each lose one member; there are three non-attached UK members.⁵⁵

This would make for a shift among groups, for instance in as far as (*ceteris paribus*) the EFDD would no longer comply with the requirements for forming a parliamentary group – although obviously, new populist parties elected in other Member States might join in 2019. At any rate, the history of the parliamentary groups in the Parliament shows that many groups tend to be quite fluid with new parties (re-)joining and splitting off from existing ones. The choice of group for a party like *La République en Marche*, and the *AfD* could make much difference for the composition of ideological groups. If the elections of May 2019 are to reflect recent developments of elections within Member States, the S&D might be expected to suffer, while populist and right wing parties might grow significantly. At the time of writing, this remains a matter of speculation.

⁵⁴ Art. 10(2) TEU.

⁵⁵ Numbers are based on:

<http://www.europarl.europa.eu/meps/en/search/advanced?name=&groupCode=2970&countryCode=GB&constituency=&bodyType=ALL> ; last consulted on 1 February 2019.

3.2. Representation in the European Parliament: constitutional concept and historical trajectory

The history of the Treaty provisions on what is now the Parliament shows a shift in its very representative nature. This is expressed most clearly in the difference in wording of the earlier provision as compared with the present one.

Prior to the entry into force of the Lisbon Treaty, the Parliament was said to consist of '*representatives of the peoples of the States brought together in the Community*'. Since the Lisbon Treaty, the Treaty on European Union provides that the Parliament is composed of '*representatives of the Union's citizens*'.

From a representation of the peoples of the Member States, it has become a representation of the citizens as such. The formulation of the Court of Justice in the 1980s that through the Parliament 'the peoples should take part in the exercise of power through the intermediary of a representative assembly', no longer applies. The Parliament is no longer a representation of particular Member State peoples, and therefore not of the Member States' substratum of persons either. It represents the persons forming the Union, similar to national parliaments representing the persons forming the states.

This has been understood to have practical implications. As representatives of all citizens, members of the Parliament can participate in deliberations and decisions on any matter, independent of whether they are elected in a constituency of a Member State that does or does not participate in the relevant matter.⁵⁶ This is reflected in the law and practice of the institutions, where this means, for instance, that the participation by British MEPs in the Parliament's deliberations and voting on Brexit is not suspended. Similarly, MEPs from Member States under scrutiny under Article 7 TEU (back sliding on the EU's founding values) participate in the relevant deliberations and votes. This contrasts with the rules and practice within the Council, where the UK cannot participate in the Article 50 TEU deliberations and votes. Member States under Article 7 TEU scrutiny cannot participate in the Council vote either. The explanation is clear and simple: the Council represents the Member States, the Parliament the citizens of the Union.

The shift towards representation of citizens, rather than Member State peoples, also reflects a broader representational aspect inherent in the nature of parliaments and their members in the democratic tradition of Europe. In modern national parliaments in Europe, the members of parliament represent not merely any particular limited group; parliamentary representation is not a mechanistic reproduction of those who have elected them. Parliaments represent the whole of the body politic, the commonweal; their members have the vocation to represent and act in the general interest in accordance with the free mandate that has been given to them by the electorate. This implies that members of parliament not only represent their particular voters. They also represent those who cannot vote, those who do not have the right to vote as well as those who have not actually voted, such as minors, non-nationals and others. Members of parliament decide not only for their voters but decide what affects all over whom the polity or political community has jurisdiction. That the principles *quod omnes tangit* and *no taxation without representation* form part of the European political tradition, suggests that the representational role of the Parliament does not fully coincide with and is exhausted by its electorate.

In this context, we point out that in the Council, the qualified majority rules in the Treaties refer to population size of the Union composed of the populations of the Member States, for which the

⁵⁶ K. Lenaerts and P. Van Nuffel, *European Union law*, Robert Bray, Nathan Cambien (eds.), London : Sweet & Maxwell, 3rd ed., 2011, p. 462.

respective populations of Member States are decisive – populations which are subsequently defined as inhabitants ('habitually resident population'), and not only citizens in the strict legal sense of Article 20(1) TFEU. The Council represents Member States, and this is expressed in terms of their respective populations. From this point of view there is no incoherence in the Treaties defining the representational role of the Parliament to be that of representing 'citizens', while actually the population figures within Member States are relevant to establish the number of seats to be elected within a certain Member State constituency, as we shall presently discuss. The voting within Member States is to be understood not in a manner that turns EP elections into elections of national people's representation in the Parliament (the substratum of persons forming the Member States), but as a practical organizational arrangement of elections of the personal substrate of the Union. Practically, one has somehow to take into account the size of the Member States in which the vote is to take place, and it is not unreasonable to take habitually resident persons as a standard – a standard that is also used for the Council. In view of the European tradition of a more encompassing conception of those who are represented in parliaments, this does not raise concerns at the constitutional level.⁵⁷

The constitutional principles described in the previous section need translation into the practical political realities of the present state of European integration. In principle, the representation of Member States in the Council might, under the principle of equality of Member States translate into equal votes for Member States, whereas the representation of the citizens of the Union in the Parliament might translate into equal representation irrespective of where in the Union citizens live and vote. This is not the historical trajectory of European integration. And even though the different representational bases of Council and Parliament remain distinct, this distinction is sometimes not rigid conceptually and in its elaboration in the Treaties.

In the Council's qualified majority voting, the weighting of the vote has always depended on the different population sizes of Member States. And representation in the Parliament has been realised through Member State constituencies from its very beginning.

In the ECSC and EEC the seats were distributed as follows.

Member State	ECSC	EEC
Belgium	10	14
France	18	36
Germany	18	36
Italy	18	36
Netherlands	10	14
Luxembourg	4	6

Table 7: Distribution of seats in EP under the original ECSC and EEC Treaties

⁵⁷ Taking formal citizenship rather than population size as a basis was suggested as a possibility that needed further consideration in the *Report on the composition of the European Parliament* (2007/2169(INI)), Committee on Constitutional Affairs, Rapporteurs: Alain Lamassoure and Adrian Severin, EP A6-0351/2007, 3 October 2007, par. 21 at p. 18.

This composition has its echoes to this day. Originally Italy was put on a par with Germany and France, and even after the accession of Bulgaria and Romania in 2008 remained on par with France (compare Table 8 below). This made it difficult for Italy to accept that it would have fewer seats than other large states, and proved an obstacle when the Lisbon Treaty was negotiated and Italy (2007 population 59,131,300) threatened to get 71 seats, while the UK (population 60,833,800) would get 72, and France 74 (63,392,100). Italy refused this adamantly. Solving this objection required the intergovernmental conference, negotiating at Lisbon at the level of heads of state and government, to change the number of members of the Parliament from 750 to '750 plus the President', and to add a declaration stating that 'the additional seat in the European Parliament will be attributed to Italy'.⁵⁸

	ECSC	EEC	1972	1979	'81/'86	1994	1995	2004 (accession)	2009	2014	2019
Belgium	10	14	14	24	24	25	25	24	22	21	21
France	18	36	36	81	81	87	87	78	72	74	79
Germany	18	36	36	81	81	99	99	99	99	96	96
Italy	18	36	36	81	81	87	87	78	72	73	76
Netherlands	10	14	14	25	25	31	31	27	25	26	29
Luxembourg	4	6	6	6	6	6	6	6	6	6	6
Denmark			10	16	16	16	16	13	13	13	14
Ireland			10	15	15	15	15	13	12	11	13
UK			36	81	81	87	87	72	72	73	-
Greece					24	25	25	24	22	21	21
Spain					60	64	64	54	50	54	59
Portugal					24	25	25	22	22	21	21
Austria							21	18	17	18	19
Finland							16	13	13	13	14
Sweden							22	18	18	20	21
Czech Rep								24	22	21	21
Estonia								6	6	6	7
Cyprus								6	6	6	6
Latvia								9	8	8	8
Lithuania								13	12	11	11
Hungary								24	22	21	21
Malta								5	5	6	6
Poland								54	50	51	52
Slovenia								7	7	8	8
Slovakia								14	13	13	14
Bulgaria									17	17	17
Romania									33	32	33
Croatia										11	12

Table 8: Changes in the number and distribution of EP seats over time⁵⁹

Other considerations that entered into the choices as regards numbers of seats are related to the fact the European political parties do not as such participate in the elections within Member States. It is the other way round: national parties group themselves into the European political parties and their groups in the Parliament. This importance of national political parties has from the beginning

⁵⁸ See Art. 14(2) TEU and Declaration nr 4 on the composition of the European Parliament; cf. Piris, p. 117.

⁵⁹ Compiled (up to 2009) from *Changes in the number and distribution of seats* (2016) CVCE. European Navigator. Susana Muñoz, Cédric Sangaletti http://www.cvce.eu/obj/changes_in_the_number_and_distribution_of_seats-en-db0a51da-99ac-4b35-a3c8-78b542b22861.html; figures for 2019 are from the European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament, OJ L 165I, 2.7.2018, p. 1.

inspired the wish to give also the smaller and smallest Member States enough seats to reflect various political movements at national level, thus doing justice to government supporting parties and oppositional parties.

Impetus for the latest movements within this historical trajectory came from a small but important change in legislative instruments used. Since the Lisbon Treaty, the number of Parliament seats per Member State is no longer set in the Treaties themselves, but by secondary Union law under a special legislative procedure. This aligns EU law with a position commonly seen within modern states: the text of the constitution sets out the overall principles of representation and the main features of the electoral system, while ordinary statute law makes provision for the concrete implementation of these principles and features.

There are important practical advantages to this distinction between Treaty provision and secondary Union law. Shifts in population numbers can now be taken into account much better and periodic reviews of seat numbers, necessary to reflect such shifts, can be effectuated without the overly cumbersome procedure of Treaty revision. The distinction also opens up room for a concrete decision in secondary law to be measured against explicit, objective aims articulated in the Treaties. One especially promising prospect in this regard is that of a mechanism for translating population numbers into seat numbers by one stable mathematical method; this would bring a high degree of objectivity and transparency to the process. Over the years, the Committee on Constitutional Affairs of the European Parliament (AFCO) has commissioned several reports by mathematicians and others in order to find the best way towards establishing such a stable method.⁶⁰

We now turn to the influence of Brexit within these two dimensions: firstly, the legal framework for changes to the seat distribution by secondary Union law under the overarching rules in the Treaties and how Brexit is accommodated within this framework (3.3 below); secondly, the historical trajectory of the search for a stable, objective and transparent method and how it is influenced by Brexit (3.4 below).

3.3. Brexit and the composition of the European Parliament within the present legal framework

The composition of the Parliament for the coming term 2019–2024 was established by European Council Decision (EU) 2018/937 of 28 June 2018.⁶¹ The Decision fixes the number of seats per

⁶⁰ The full list of documents used by the EP is available at: <http://www.europarl.europa.eu/committees/en/afco/subject-files.html?id=20170919CDT01781>. Mathematical methods are described and developed in particular in Grimmett, Geoffrey, Jean-François Laslier, Friedrich Pukelsheim, Victoriano Ramírez González, Richard Rose, Wojciech Słomczyński, Martin Zacha-Riasen And Karol Życzkowski, *The Allocation Between the EU Member States of the Seats in the European Parliament – Cambridge Compromise*. European Parliament, Directorate-General for Internal Policies, Policy Department for Citizen's Rights and Constitutional Affairs, March 2011 (this formulates the so-called Cambridge Compromise); Friedrich Pukelsheim and Geoffrey Grimmett, Linking the Permanent System of the Distribution of Seats in the European Parliament with the Double-Majority Voting in the Council of Ministers, In: *The Composition of the European Parliament*, Workshop, 30 January 2017, Compilation: Two briefings and one in-depth Analysis, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, February 2017; Victoriano Ramírez González, *The r-DP Methods to Allocate the EP Seats to Member States*, ibidem.

Related studies are: Geoffrey Grimmett, Kai-Friederike Oelbermann and Friedrich Pukelsheim. 2012. A power-weighted variant of the EU27 Cambridge Compromise. *Mathematical Social Sciences* 63: 136–40;; Słomczyński, W. and Życzkowski K., 2010, Jagiellonian Compromise: an alternative voting system for the Council of the European Union, in Cichocki MA and Życzkowski K. (eds) (2010) *Design and Voting Power in the European Union*. Farnham: Ashgate Publishing Limited, pp. 43–57; Laslier JF (ed.) (2012) Special Issue around the Cambridge Compromise: Apportionment in Theory and Practice, *Mathematical Social Science*, 63; Duff, Andrew. 2018. How to Govern Europe better: Reflections on Reform of the European Parliament, Commission and Council. European Policy Centre, Working Paper 13 February 2018 (www.epc.eu/pub_details.php?cat_id=17&pub_id=8271).

⁶¹ European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament (OJ L 165I, 2.7.2018, p. 1).

Member State post-Brexit. It also makes provision for the eventuality of a Brexit delay that reaches into the new parliamentary term.

3.3.1. Legal requirements

Primary and secondary Union law

The general rules for the composition of the Parliament are laid down in Article 14(2) TEU:

The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

This Treaty provision sets the numerical limits of a minimum of six seats and a maximum of 96 seats per Member State with a total number of members of parliament of no more than 751. It is within these limits that seats are distributed over Member States by what is referred to as 'degressive proportionality': the larger the Member State, the smaller the number of seats relative to the population in that Member State. This concept of degressive proportionality is further defined in the successive European Council Decisions under Article 14(2) TEU since the entry into force of the Lisbon Treaty, most recently in the European Council Decision of 28 June 2018:

The ratio between the population and the number of seats of each Member State before rounding to whole numbers is to vary in relation to their respective populations in such a way that each Member of the European Parliament from a more populous Member State represents more citizens than each Member of the European Parliament from a less populous Member State and, conversely, that the larger the population of a Member State, the greater its entitlement to a large number of seats in the European Parliament.⁶²

As not all of its elements are clear at first sight, this provision merits closer investigation. The preparatory materials show that 'degressive proportionality' in the sense of this definition consists of two distinct requirements.

The two distinct legal requirements within the notion of 'degressive proportionality'

The explanatory statement of the AFCO report of 26 January 2018 on the composition of the European Parliament helpfully provides the two criteria that have to be fulfilled in order to meet the definition of degressive proportionality:

- (1) no less populous State shall receive more seats than a more populous State,
- (2) the ratio population/seats shall increase as population increased before rounding to whole numbers.

⁶² See European Council Decision 2013/312/EU of 28 June 2013 establishing the composition of the European Parliament (OJ L 181, 29.6.2013, p. 57) and European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament, OJ L 165I, 2.7.2018, p. 1; the '... and, conversely, ...' is confused, what is intended is '... and conversely, but also that ...', cf the Lamassoure/Severin Report, footnote 57 above.

These two criteria neither add anything to, nor subtract anything from the legal definition itself; they are, in other terms, an equivalent re-phrasing in simpler terms.⁶³ This means that, whilst words in preparatory materials like an explanatory statement do not themselves carry the binding force of law, these two criteria provide the correct test to determine whether the legally binding definition of degressive proportionality is met or is not met. Put practically: a distribution of seats that meets both criteria is degressively proportional in the sense of the established legal definition and therefore conforms to Article 14(2) TEU in this respect; a distribution of seats that violates one or both of the two criteria is not degressively proportional in the sense of the established legal definition and therefore does not conform to Article 14(2) TEU in this respect.

Testing a given distribution of seats against the two criteria

The representation ratio of a Member State is a notion central to the legal definition of degressive proportionality. This ratio is the population figure of the state divided by the number of seats allocated to that State. The representation ratio enables us easily to check whether, under any concrete distribution of seats, both requirements inherent in the notion of degressive proportionality are respected. For this, we compose a table of Member States in order of population, from large to small; with the number of seats assigned to them; and with their representation ratios. We then check whether the two criteria are fulfilled:

- (1) Does the number of seats increase (more precisely: never decrease) when reading in upwards direction, going from small Member States to large Member States?
- (2) Does the representation ratio increase when reading upwards, going from small Member States to large Member States (and, where there are small decreases, are those merely an effect of rounding to whole numbers)?

Examples for such a table are provided on the next pages, where we apply the test to different scenarios.

Justiciability

It merits attention that as secondary law made under the Treaties the Decisions taken under Article 14(2) TEU are justiciable, in particular as regards the question whether they live up to the requirement of degressive proportionality.

3.3.2. The necessity for a fresh distribution of seats for the 2014–2019 Parliament

Changes in population during one parliamentary term, as we see them occur in practice, are relatively large, so that a fresh distributions of seats over the Member States is usually necessary for the next parliamentary term. Going from the current 2014–2019 term to the next 2019–2024 term is not exceptional in this regard.

The following table shows the seat distribution in the outgoing Parliament ('seats2014'), the latest population numbers as known at the time the 2018 Decision was prepared ('population 2017') and

⁶³ The legal definition as provided by successive Decisions, cited above, features the conjunctive phrase '... and, conversely, that...', which suggests there is only one element to the definition which is merely repeated in other words. That is not so, there are in fact two elements. The correct conjunctive phrase would be '... and conversely, but also that ...', and the fact that this was used in the Lamassoure/Severin Report, footnote 57 above, suggests that there is a slight drafting error in the Decision on this point. Also on this, and on the 'rounding to whole numbers', see Geoffrey Grimmet, 'The allocation between the EU Member States of the seats in the European Parliament', European Parliament, Directorate-General for Internal Policies, Policy Department for Citizen's Rights and Constitutional Affairs, March 2011, pp. 10–11.

taken ('population 2018') and the corresponding representation ratios on those population numbers relative to the old seat distribution ('repr. ratio 2017' and 'repr. ratio 2018').

	seats 2014	population 2017	repr. ratio 2017	population 2018	repr. ratio 2018
Germany	96	82064489	854838	82437641	858725
France	74	66661621	900833	67024633	905738
United Kingdom	73	65341183	895085	65808573	901487
Italy	73	61302519	839761	61219113	838618
Spain	54	46438422	859971	46528966	861648
Poland	51	37967209	744455	37972964	744568
Romania	32	19759968	617499	19638309	613697
Netherlands	26	17235349	662898	17220721	662335
Belgium	21	11289853	537612	11365834	541230
Greece	21	10793526	513977	10757293	512252
Czech Republic	21	10445783	497418	10467628	498458
Portugal	21	10341330	492444	10309573	490932
Sweden	20	9998000	499900	10080000	504000
Hungary	21	9830485	468118	9797561	466551
Austria	18	8711500	483972	8752500	486250
Bulgaria	17	7153784	420811	7101859	417756
Denmark	13	5700917	438532	5743947	441842
Finland	13	5465408	420416	5499447	423034
Slovakia	13	5407910	415993	5435343	418103
Ireland	11	4664156	424014	4774833	434076
Croatia	11	4190669	380970	4154213	377656
Lithuania	11	2888558	262596	2847904	258900
Slovenia	8	2064188	258024	2065895	258237
Latvia	8	1968957	246120	1950116	243765
Estonia	6	1315944	219324	1315635	219273
Cyprus	6	848319	141387	854802	142467
Luxembourg	6	576249	96042	589370	98228
Malta	6	434403	72401	440433	73406
total	751				

Table 9: seats in the outgoing Parliament of term 2014 to 2019; population figures and corresponding representation ratios in 2017 and 2018. Violations of criterion (2) are marked in **orange**, one violation of criterion (1) marked in **red**.

There are several violations of criterion (2) and one violation of criterion (1) visible in the table. The latter is the case of Sweden, which through a population increase has overtaken Hungary, but still has one seat fewer than Hungary.

These discrepancies do not, in themselves, raise concerns with regard to the regularity of the Parliament's composition towards the end of the 2014-2019 term. They merely show the necessity for a fresh distribution for the next 2019–2024 term. This necessity in itself was independent of the

prospect of Brexit: whether the UK would send members to the 2019–2024 Parliament or not, the composition of that Parliament had to be changed compared to the previous 2014–2019 composition.

3.3.3. The 2019–2024 Parliament post-Brexit

The Decision of 28 June 2018 provides for 705 seats to be assigned to the 27 Member States post-Brexit. This means that not all of the United Kingdom's 73 seats have fallen away; some of these have been redistributed over the remaining Member States.

	Seats as decided 2018	Population 2018	Repr. ratio 2018
Germany	96	82437641	858725
France	79	67024633	848413
United Kingdom		65808573	
Italy	76	61219113	805515
Spain	59	46528966	788627
Poland	52	37972964	730249
Romania	33	19638309	595100
Netherlands	29	17220721	593818
Belgium	21	11365834	541230
Greece	21	10757293	512252
Czech Republic	21	10467628	498458
Portugal	21	10309573	490932
Sweden	21	10080000	480000
Hungary	21	9797561	466551
Austria	19	8752500	460658
Bulgaria	17	7101859	417756
Denmark	14	5743947	410282
Finland	14	5499447	392818
Slovakia	14	5435343	388239
Ireland	13	4774833	367295
Croatia	12	4154213	346184
Lithuania	11	2847904	258900
Slovenia	8	2065895	258237
Latvia	8	1950116	243765
Estonia	7	1315635	187948
Cyprus	6	854802	142467
Luxembourg	6	589370	98228
Malta	6	440433	73406
	705		

Table 10: Seat distribution 2018 in relation to population and representation ratios

In the second and fourth column of the table we can see that the Decision fulfils both requirements of degressive proportionality: with increasing population the number of seats increases (more precisely: does not decrease), so criterion (1) is met; and the representation ratio increases, so also criterion (2) is met. As the outer numerical limits set by the Treaties are also respected (no more than 751 seats in total, between six and 96 seats per Member State), we can conclude that the Decision of June 2018 for seat distribution post-Brexit conforms with the legal requirements set by Article 14(2) TEU.

This is the first time, since introduction of the present legal framework under the Lisbon Treaty, that a seat distribution fully conforms to the requirement of degressive proportionality and is, in this regard, an important mile stone within the historical trajectory.

3.3.4. The 2019–2024 Parliament if Brexit is delayed or cancelled

Article 3(2) of the Decision of 28 June 2018 provides that, should the UK still be a Member State at the beginning of the 2019–2024 parliamentary term, the number of representatives per Member State will remain the same as was valid for the preceding, 2014–2019 term, until the UK leaves. As shown above (section 3.3.2, Table 9, by the time the Decision of 2018 was prepared and taken, the two criteria inherent in the notion of degressive proportionality were no longer met by the seat distribution as in the 2014–2019 term. Article 3(2) of the Decision lays down a distribution of seats that is not degressively proportional in the sense of the established legal definition; it therefore does not conform to Article 14(2) TEU in this respect.

Should Brexit be delayed beyond the start of the new parliamentary term on 2 July 2019, the Parliament will be composed in breach of treaty requirements. Under the relevant law as it stands, this irregularity will persist until Brexit takes place. Should Brexit be cancelled, this would mean that the Parliament would be composed irregularly during the entire term 2019–2024. If Brexit takes place before 2 July 2019, then this problem does not arise.⁶⁴

3.4. Brexit and the quest for a stable, fair, objective and transparent method

The report on the composition of the European Parliament of 26 January 2018, by rapporteurs Danuta Hübner and Pedro Silva Pereira, comprises the preparatory work for the 2018 European Council Decision.⁶⁵ The report summarizes and is the latest iteration of a long-standing process of the Parliament working towards a 'permanent system for the fair, objective, and transparent distribution of its seats, before each new European election, in line with the provisions as set out in the Treaties'.⁶⁶ The idea behind this process is to come to a European Council Decision under Article 14(2) TEU that does not set a seat distribution for a next parliamentary term only, but lays down a permanent system. This would be possible by using a mathematical method which translates population numbers as known at a relevant date in the run-up to a new parliamentary term into seat numbers. The advantages of such an approach in terms of transparency, objectivity and fairness are obvious.

3.4.1. Transparency, objectivity and fairness in EU constitutional law

Transparency is a general principle of EU constitutional law. It has various dimensions, such as the openness of the legislative process. This must always be contextualised in terms of the necessity of room for manoeuvre and compromise in order to come to any decision acceptable to all relevant actors.⁶⁷ The legal principle of transparency is closely related to the duty to state reasons (Article 296(2) TFEU). Legitimacy of decision-making is enhanced if citizens can know what the substantive reasons are for the precise outcome of the decision-making process.

⁶⁴ For some further problems in case of postponed or cancelled Brexit, see Bastian Michel and Leonard Besselink, [The complications of a Brexit delay that runs into the European Parliament elections](https://acelg.blogactiv.eu/2019/03/14/the-complications-of-a-brex-it-delay-that-runs-into-the-european-parliament-elections-by-leonard-besselink-and-bastian-michel/), ACELG Blog Activ, 14 March 2019, <https://acelg.blogactiv.eu/2019/03/14/the-complications-of-a-brex-it-delay-that-runs-into-the-european-parliament-elections-by-leonard-besselink-and-bastian-michel/>.

⁶⁵ A8-0007/2018; for further materials taken into consideration by AFCO, see footnote 60 above.

⁶⁶ Ibid., p.11.

⁶⁷ On this trade off in the Council, see Olivier Rozenberg, *The Council of the EU: from the Congress of Ambassadors to a genuine Parliamentary Chamber?* European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate General for Internal Policies of the Union, January 2019, in particular Chapter 2.

Objectivity is especially important where electoral rules are concerned, as it implies neutrality towards irrelevant features, in order to safeguard fairness. Fairness in elections closely related to equality. Equality is inherently limited under the rule of degressive proportionality. This makes it all the more important that no inequality going beyond that should be tolerated.⁶⁸ This is of particular importance as regards the differential treatment of citizens in the context of parliamentary democracy, as it may negatively affect the democratic legitimacy of the composition of the Parliament if there is no clear and objective justification can be provided.

Employing an objective method for distributing seats is the best guarantee for objectivity and fairness, to which a stable mathematical method could contribute.

3.4.2. [Seat distribution post-Brexit as decided in 2018](#)

Given the historical trajectory of working towards an objective mathematical method for seat distribution, the question naturally arises how the Decision 2018 relates to this trajectory: whether it fulfilled the ultimate aim of laying down a permanent system based on one of the mathematical methods proposed; if not, whether nonetheless such a method was used this time; and if so, which one; whether any ad hoc adjustments were made away from its result; and what the choice of method and any ad hoc adjustments were based on. The 2018 Decision and the explanatory statement of the respective AFCO report provide answers to some but not all of these questions.

The Decision does not lay down a permanent system but, as had been the case before, limits itself to setting concrete seat numbers per Member State post-Brexit for the next parliamentary term only. The explanatory statement explicitly acknowledges this and points to a lack of political backing, further compounded by the legal complications arising from Brexit and the interconnectedness, in political terms, with voting in the Council. It concludes that 'it is legally and politically unfeasible to propose a permanent system for the distribution of the Parliament's seats at this stage.'⁶⁹

The explanatory statement recommends the so-called FPS method be taken into account in future decisions for the composition of the Parliament from 2024 onwards.⁷⁰

Turning to the proposed seat distribution for the 2019–2024 term, the explanatory statement stresses that this distribution is 'fair, objective and based on clear principles'. The principles are then spelled out:

1. Respect for the principle of degressive proportionality, as required by Article 14 TEU;
2. No loss of seats for any Member State ;
3. A minimal redistribution of the seats vacated by the UK's exit from the EU.⁷¹

⁶⁸ For an assessment under core concepts of national constitutional law of the inequality of degressive proportionality, concluding that it is expression of a level of legitimacy that does not match that of a state constitutional democracy, and that degressive proportionality implies that the EP does not represent citizens but – as before – the peoples of the member states, see BVerfG, 2 BvE 2/08, 30 June 2009, *Lissabon Urteil*, para. 276 and 284-288.

⁶⁹ Explanatory statement, contained in the Hübner/Silva Pereira report, above footnote 65, p. 12.

⁷⁰ *Ibid.*, p. 12.

⁷¹ *Ibid.*, p. 13.

The explanatory statement or the Decision itself do not, however, provide any answers to the further questions with regard to the aim of coming to an objective mathematical method. In particular:

- it remains unclear whether any of the mathematical models proposed was used
- if so, which one, chosen for which reasons
- whether any adjustments away from the result of such a method were made
- if so, with which aim and based on which criteria.

Slightly more can nevertheless be said on these points if one looks at the concrete seat distribution post-Brexit as it was decided and compares it to what the mathematical methods would have produced. In order to get a first impression, we set off the seat distribution against the so-called Cambridge Compromise and the so-called Power Compromise. Other methods proposed, like the FPS method mentioned in the explanatory statement, are typically a combination of elements of these two methods and their results would normally fall in between the results of the Cambridge Compromise and the Power Compromise.⁷² These two are therefore the natural choice for a first, overall impression.

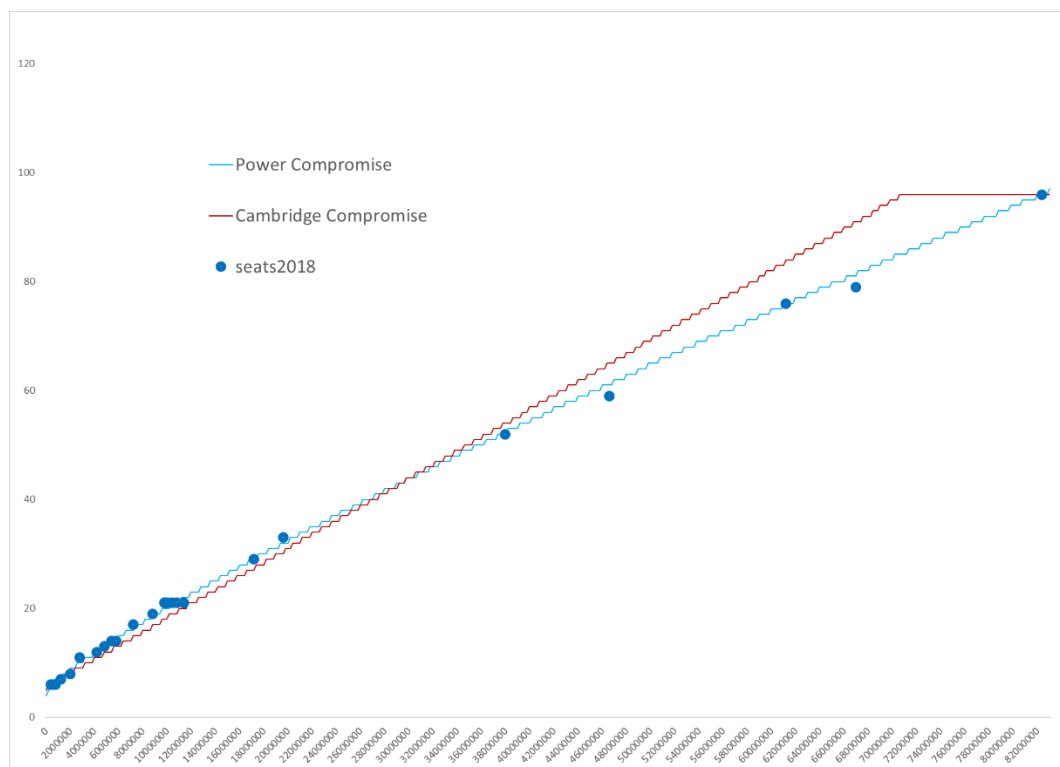


Figure 8: seats post-Brexit as decided in 2018 compared to two mathematical methods

This figure strongly suggests that the Power Compromise, or one of the other methods proposed very similar to it, was used. Much as the assessment in terms of the legal framework pointed to the important mile stone of first-time full conformity with Treaty requirements, the observation that the post-Brexit seat distribution is very close to an objective method can also be seen as a

⁷² Geoffrey Grimmett and others, 'The Composition of the European Parliament', In-depth analysis for the AFCO Committee, in *The Composition of the European Parliament, Workshop, 30 January 2017, Compilation: Two briefings and one in-depth Analysis*, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, February 2017, p. 9: 'the Cambridge Compromise and the Power Compromise yield seat allocations which for many data sets sandwich the allocations of other methods.'

significant achievement. It is, however, hard to pin down this achievement and put it into words: because of the lack of transparency, we can hardly say more than that an objective method was probably used.

The figure also suggests that some ad hoc adjustments away from the result of such a method were made. A closer look at the numbers, as in the table below, reinforces this impression and hints to where, and to some degree also to why adjustments might have been made.

	Population 2018	Seats as decided 2018	Representation ratio 2018	Δ Power Com- promise	Seats under Power Compro- mise	Representa- tion ratio under Power Compromise	Seats 2014
Germany	82437641	96	858725	0	96	858725	96
France	67024633	79	848413	-2	81	827465	74
United Kingdom	65808573						73
Italy	61219113	76	805515	0	76	805515	73
Spain	46528966	59	788627	-2	61	762770	54
Poland	37972964	52	730249	0	52	730249	51
Romania	19638309	33	595100	1	32	613697	32
Netherlands	17220721	29	593818	0	29	593818	26
Belgium	11365834	21	541230	-1	22	516629	21
Greece	10757293	21	512252	0	21	512252	21
Czech Republic	10467628	21	498458	0	21	498458	21
Portugal	10309573	21	490932	0	21	490932	21
Sweden	10080000	21	480000	1	20	504000	20
Hungary	9797561	21	466551	1	20	489878	21
Austria	8752500	19	460658	1	18	486250	18
Bulgaria	7101859	17	417756	1	16	443866	17
Denmark	5743947	14	410282	0	14	410282	13
Finland	5499447	14	392818	0	14	392818	13
Slovakia	5435343	14	388239	0	14	388239	13
Ireland	4774833	13	367295	0	13	367295	11
Croatia	4154213	12	346184	0	12	346184	11
Lithuania	2847904	11	258900	1	10	284790	11
Slovenia	2065895	8	258237	-1	9	229544	8
Latvia	1950116	8	243765	0	8	243765	8
Estonia	1315635	7	187948	0	7	187948	6
Cyprus	854802	6	142467	0	6	142467	6
Luxembourg	589370	6	98228	0	6	98228	6
Malta	440433	6	73406	0	6	73406	6
		705			705		751

Table 11: Comparison of EP seats decided in 2018 with Power Compromise and seats 2014

In several places the distribution of seats post-Brexit as decided in 2018 diverges from what the Power Compromise method would have produced. We make the following observations:

- the Power Compromise would have resulted in a loss of seats for some Member States and there seem to have been adjustments made to avoid this (blue highlights);

- where the Power Compromise would have produced degressive proportionality only up to rounding to whole numbers (orange highlights), adjustments seem to have been made so the seat distribution is perfectly proportionally degressive;
- Spain and France are underrepresented compared to the Power Compromise, which raises a question of fairness; Italy, in the same size range, is not underrepresented in this way, which fits into the historical pattern of special accommodation being made for Italy.

Without possessing information on the prior question which mathematical method was used, if any, such observations can only be tentative, indeed to a large degree speculative.

To summarise, the 2018 Decision on the distribution of seats in the 2019–2024 Parliament post-Brexit is another important step towards a stable mechanism on the basis of a mathematical method; how far that step went towards achieving objectivity and fairness is hard to assess, because a transparent explanation of what was done is lacking.

Two of the experts consulted on possible mathematical methods by the Parliament’s AFCO come to this overall assessment: ‘In their debates neither AFCO nor the EP cared to enlighten the public how they arrived at their conclusion. Their motives remain obscure. Parliament missed this opportunity to proceed from the dark ages to an era of enlightenment.’⁷³ It is our view that the blame for a lack of transparency ultimately lies with the European Council as the institution taking the decision, even if the Parliament has the right of initiative and the power to withhold its assent. Indeed, there is every reason to believe that it were Member State representatives that caused the shortcomings of the 2018 Decision.

3.4.3. The wish not to lose seats and the influence of Brexit

The explanatory statement of the AFCO report is very transparent about the wish, on the side of Member States, not to lose seats compared to the current 2014–2019 term. This is made explicit in the form of one of the principles that has been leading in the process of preparing the Decision.

Under usual circumstances, if the maximum of 751 seats overall is already exhausted, the wish for no Member State to lose seats cannot be accommodated within the system of the Treaties. That system is predicated on periodic revisions, necessary to maintain the relation between Member States’ sizes in terms of population and the number of representatives elected in these States. Losing seats is as much an integral part of this as gaining seats.

But circumstances in 2018 were not usual: with Brexit approaching, the overall maximum of 751 seats was no longer to be exhausted. A seat distribution that is in perfect conformity with degressive proportionality could, therefore, be found without any Member State losing seats. The influence of Brexit on the quest towards a transparent, objective and fair, stable mathematical method is that it provided considerable room for manoeuvre in the form of 73 seats falling open. This significantly eased the political difficulties.

Looking forward, this room for manoeuvre will persist for some time after Brexit. States in the course of becoming Member States of the EU are much smaller than the UK, so that additional seats will still be available even after their accession.

⁷³ Friedrich Pukelsheim and Geoffrey R. Grimmett, ‘Degressive Representation of Member States in the European Parliament 2019–24’, *Representation*, 2018, <https://doi.org/10.1080/00344893.2018.1475417>, p. 2.

3.5. Summary: the influence of brexit on representation in the European Parliament

The prospect of Brexit meant that representation in the Parliament in terms of seats per Member State had to be set for both the post-Brexit situation and for the eventuality of a Brexit delay reaching into the next parliamentary term.

For the time post-Brexit, the European Council Decision of 28 June 2018 establishes a seat distribution that is in conformity with Treaty requirements, including the requirement of degressive proportionality. This is the first time conformity with these requirements, spelled out since the Lisbon Treaty, is fully achieved and an important step within the historical trajectory of representation in the Parliament. Another important achievement was that probably a more objective method was used; the situation in that regard is, however, unclear because of a lack of transparency. The aim of introducing a stable mathematical method for distributing seats over Member States remains unfulfilled, but with Brexit and the consequent falling open of UK seats there is additional room for manoeuvre that can make further progress towards this aim easier to achieve by 2024 and beyond.

For the eventuality of Brexit being delayed, the European Council Decision of 28 June 2018 provides for a seat distribution that does not conform to Treaty requirements. Should that eventuality materialize and Brexit be delayed into the new parliamentary term, which starts on 2 July 2019, this can cast a shadow on the democratic legitimacy of the new Parliament.

4. IS THERE REASON FOR CHANGE?

In this chapter, we consider whether the UK withdrawal makes changes in institutional rules necessary or desirable, distinguishing between change of primary law and of secondary law. We divide this chapter into three parts. These address the voting rules in the Council, the composition of the Parliament and the inter-institutional balance respectively.

In assessing the need or desirability of change, several considerations enter into play. One concerns history versus constitutional principle. The importance of path dependency leads us to take certain decisions on constitutional principles of representation of Member States in the institutions for what they are, in particular the mixed nature of representation of both Member States and citizens in the Council and the Parliament. We explain this as follows.

Path dependency – and hence history – is an unavoidable element in the shaping of political life. For instance, the position a Member State has had within an institution, may play a role in any decision of an institutional nature that may or will affect that position. The legitimacy of the status quo has to be balanced against the changes of circumstances and their importance from a more general institutional perspective, including the aims and purposes served by the constitutional design. These aims are as such contestable, and necessarily also their balancing against historical states of affairs. So self-evident answers to the question whether there is reason for change are few. And yet, there is a point in taking certain principles for what they are.

Constitutional principles are prominent when designing the representative architecture of political institutions. Thus, the Americans decided to have each of the States being represented equally in terms of seats and votes in the Senate, notwithstanding the huge differences in size between states. Citizens, as opposed to their states, were represented on a national scale within single seat constituencies (of roughly equal size) in the House of Representatives.

The European Union decided to have Member States represented in the Council, on the basis that each Member State has one vote which is weighted in accordance with the size of the population of that state. On the other hand, the representative assembly, the Parliament, represents the citizens of the Union, the seats being determined per Member State in a certain relation to their respective populations, as was discussed above. So the system of representation of states and people is more mixed in the European Union than the purity of the United States of America.⁷⁴

It is possible to change the present system of this representation in the Union's institutions in line with the distinction between Member States and citizens. It is in theory conceivable to give each Member State an equal vote in the Council, and one could give up on allocating seats in the Parliament on the basis of the size of Member State constituencies, have elections based on purely transnational European (i.e. non-nationally based) lists of candidates without all the complications of maximum and minimum seats per Member State constituency (such as the complication of 'degressive proportionality'). But this does not seem to reflect the present state of European integration, and no support for this kind of purity of constitutional principle exists.

In this chapter, we therefore take this mixed system of the constitutional design for granted in what follows. We analyse to what extent the UK's exit specifically may make changes necessary or desirable. Without going engaging in in-depth discussion of necessary or desirable changes in general, we do afford to consider only on a few limited points the effects of further withdrawals, or their counterpart: accessions to the Union, points to which our previous analyses gave rise.

⁷⁴ Pleading for introducing the American system in the Union, see Lamassoure, *l'Histoire secrete*, above footnote 2.

4.1. Voting rules in the Council

As we saw above,⁷⁵ the double requirement of a minimum number of Member States (which is an absolute criterion) and of a minimum percentage of the Union's population (which is a relative criterion) for qualified majority voting, was inspired by the intention not to let small Member States dominate and, perhaps more exactly, frustrate the efficacy of EU decision-making. However, the very nature of the shift from unanimity to majority voting entails a loss of voting power for Member States who found themselves in the minority. With the introduction of the population size as a relevant voting weight, replacing the earlier system of weighted voting, the smaller Member States would be affected in terms of decision-making power as soon as, in terms of population, a larger or smaller Member State withdraws (or for that matter: accedes) to the Union.

The analysis in Chapter 2 led to the conclusion that as regards the ordinary qualified majority rule, the voting power of smaller Member States is reduced arithmetically by the withdrawal of the UK, but would increase again with the subsequent accession even of a smaller new Member State. In itself the withdrawal of the UK does not create a need to amend the present qualified majority voting arrangements in the Council, as the shifts, mathematically speaking are not so major as to put the functionality of the qualified majority voting system in doubt. The impact of Brexit on Member State representation in Council does in itself not lead to an immediate need for treaty change on qualified majority voting. Brexit alone does not necessitate change in this regard. Similarly, when a new Member State would accede, this would lead to some shift in the power distribution within the Council, but not of such a nature as to provide sufficient reason to reconsider the architecture of the voting system. Changes of this kind do not compromise the voting system as such.

However, high numbers of withdrawals and accessions might lead to a need to reconsider certain aspects of voting mechanisms in the Council. This applies to the absolute criteria of a minimum number of Member States (i.e. fifteen) to adopt a proposal, as well as the blocking minority requirement of at least four Member States.

As regards the requirement in the ordinary qualified majority rule of at least *fifteen* Member States in relation to the requirement of 55% of the Member States, Table 1 above has shown that the number fifteen is actually meaningless in a Union of more than 27 Member States, and becomes a significantly higher hurdle than the 55% when the Union would shrink to 20 members (it would become actually a requirement of 75% of the Member States approving) and unanimity in a Union of 15 Member States. This shows that the logic of a smaller Union that goes in the direction of 'deeper' integration would not be matched by a voting rule facilitating decision-making. Overall, the requirement of a minimum of 15 Member States consenting to a proposal is not very meaningful and might be a good candidate for reconsideration, should there be a Treaty overhaul.

The same may apply to the blocking minority rule requiring a minimum of four Member States. This would need to be re-calibrated in a smaller Union in order to take two elements into account: the number of large Member States that can comprise the 35% population that can block a decision; the requirement of *four* members under the ordinary qualified majority rule. Instead of fixing the number on four, the requirement may need to be reformulated in order to express that idea that the minimum number of Member States that can comprise that 35% plus one Member State (compare the present rule in case of non-participating Member States). However, a more profound rethinking may need to occur in connection with the situation that either the Union becomes larger as a consequence of accession of current candidate Member States, or the Union becomes smaller due to further Member States withdrawing from the Union. In the first case, the

⁷⁵ See page 11 and following.

number and formal voting weight of smaller Member States increases. This means that the need to have an extra requirement for a blocking minority less urgent than it was when it was introduced. The requirement of an extra Member State to form a blocking minority was introduced to restrain the power of large Member States to block decision-making, and to offset the reduction of the voting power of small Member States as a consequence of the introduction of the double minority requirement in the Lisbon Treaty to the advantage of the large Member States.

Should the large states versus small states controversy play up, this may rekindle criticism of the present voting rules on qualified majority voting as unequally representing citizens in the Member States. Barring a recasting of Member State representation in the Council as representative of the states (as opposed to the citizens, which are primarily represented in the Parliament) by giving equal votes to Member States, like the American Senate, alternatives that entered into the debate at an earlier stage might resurface.

A likely candidate among these is the proposal to weigh the votes of the Member States in proportion to the square root of their respective populations.⁷⁶ From a constitutional point of view this may be a legitimate method in as much as it does justice to the equality of representation of citizens through Member State governments in the Council. Its persuasiveness depends to a largely on the extent to which one is willing to go along with concepts of representation and power underlying the mathematical approach of the square root method. As was remarked above,⁷⁷ mathematical models of power inevitably simplify reality. The square root method is based on the assumption that a Member State in the Council represents the actual view of (the majority) of its citizens.⁷⁸ However, in reality this is not necessarily the case. Even if the position a Member State government takes in the Council has the support of its national parliament in concrete cases (e.g. if the government has explicitly been mandated to take that position and not any other position, which in practice is rarely the case), this still does not need to reflect the actual opinion of a majority of the citizens, let alone the population – this is so by virtue of the important principle of the free mandate of parliamentary representatives. Just as a member of parliament is a representative and not a delegate of the people, a Member State government is not the delegate but can at best be said to be indirectly representing citizens. As we remarked above, there is a difference between mechanistic reproduction and political representation.⁷⁹ Such considerations may make the underlying justification for the square root method as a superior voting system in the Council questionable. An exhaustive discussion on the benefits and drawback of the square root method as opposed to the current qualified majority voting system in the Council is however outside of the scope of this report, as the exit of the UK does not itself prompt rethinking of the current system.⁸⁰

⁷⁶ Werner Kirsch and Jessica Langner, *Invariably Suboptimal: An Attempt to Improve the Voting Rules of the Treaties of Nice and Lisbon*, JCMS 2011 Volume 49. Number 6. pp. 1317–1338, at 1319-1320 mention proposals and suggestions from Sweden and Ireland in 2003 and 2004, as well as the well-known proposal of Poland during the IGC negotiating the Lisbon Treaty; with a full overview of the scholars promoting the square root approach in the literature.

⁷⁷ See p. 10 ff. above.

⁷⁸ W. Kirsch, *A Mathematical View*, 2016a (see footnote 39 above), at pp. 19-22.

⁷⁹ See above, p. 31; somewhat less sophisticated is the criticism of Piris of member state '[d]iplomats try[ing] to turn themselves into mathematicians', in which context he refers to the Polish proposals on the square root method, see Piris 2010 (above footnote 49), p. 221.

⁸⁰ For an eventual introduction of the square root method Article 16(4) TEU as well as Article 238 TFEU and the Ioannina compromise would need to be amended.

4.2. Apportionment of seats in Parliament

In the previous chapter we concluded that, unlike in previous Parliaments, in the ninth Parliament (2019–2024) post-Brexit, the apportioning of the seats complies with the requirements of Article 14(2) TEU. In this respect, the UK's withdrawal facilitated compliance with treaty requirements, due to the possibilities the redistribution of the 73 previous UK seats created for accommodating certain political desiderata, like the wish for no Member State to lose seats. The actual distribution is close to the so-called Power Compromise, which is an objective method for allocation of seats. However, there are strong indications that certain adjustments have been made, negotiated behind closed doors and leading to a number of adaptations of which the justification remains unknown. This is in conflict with the legal principle of transparency and the duty to state reasons (Article 296(2) TFEU). This is of particular importance as regards the different treatment of citizens in the context of parliamentary democracy and may negatively affect the democratic legitimacy of the composition of the Parliament.

While the UK's withdrawal may have contributed in one respect to compliance with the Treaty provision on the composition of Parliament, there are two future situations in which this is not guaranteed. These may make it urgent to come up with more objective, principled and more transparent decisions on the future composition of the Parliament.

The first is in case of a postponement of Brexit beyond the date on which the ninth Parliament is to convene, or of the UK withdrawing its notification under Article 50 TEU.⁸¹ Secondly, the future accession of new Member States may necessitate the need to apply an objective, transparent method which does not depend on bartering behind closed doors, and can stand the test of time as well as the test of the Parliament's democratic legitimacy.

4.3. Interinstitutional balance

The representation of Member States in the institutions of the Union has so far been analysed in terms of the balance between Member States within the respective institutions of the Council and the Parliament separately. We briefly make some remarks on the balance between the political institutions. Such a link between the composition of the Parliament and of the Council was made explicitly in the 2013 Decision on the composition of European Parliament, by placing the criteria of Article 14(2) TEU in the context of the provision on democratic representation of Article 10 TEU:

'Article 10 of the Treaty on European Union provides, inter alia, that the functioning of the Union shall be founded on representative democracy with citizens being directly represented at Union level in the European Parliament and Member States being represented by their governments, themselves being democratically accountable to their national Parliaments or citizens, in the Council. Article 14(2) of the Treaty on European Union on the composition of the European Parliament therefore applies within the context of the wider institutional arrangements set out in the Treaties, which also include the provisions on decision making in the Council'.⁸²

This was repeated in the 2018 Decision on the composition of the Parliament.⁸³

⁸¹ See p. 43 above.

⁸² European Council Decision 2013/312/EU of 28 June 2013 establishing the composition of the European Parliament (OJ L 181, 29.6.2013, p. 57), recital 5.

⁸³ European Council Decision (EU) 2018/937 of 28 June 2018, OJ L 165 I/1, establishing the composition of the European Parliament, recital 3: 'Article 14(2) TEU therefore applies within the context of the wider institutional arrangements set out in the Treaties, which also include the provisions on decision making in the Council'.

We should include in the interinstitutional balance not only Parliament and Council, but also the Commission. The negotiating histories of the Nice Treaty, the Constitutional Treaty and the Treaty of Lisbon document the link that Member States have always made between the voting arrangements in the Council, the seats per Member State constituency of the Parliament and the number of members in the Commission per Member State.⁸⁴ Evidently, the idea is that the extent to which commissioners come from Member States makes the Commission – which decides as a college – more aware of the interests respective Member States may have. Only in this sense Member States are ‘represented’ in the Commission, the members of which, of course, act totally independently from their Member States.

Although since Lisbon the Treaty on European Union the number of the Commission’s members can be reduced to two thirds of the number of Member States or less, the European Council has decided to determine the number of Commission members to be equal to the number of Member States.⁸⁵

The Commission has been viewed as the counterbalance for the smaller Member States, in particular through its near-exclusive right of initiative, the necessity of unanimity in the Council to amend a Commission proposal against its will, as well as the reinforced majority that is required in the Council when it acts without a Commission proposal.⁸⁶ This can only be reinforced since the Commission is composed of one member per Member State.⁸⁷

As to the Council one may say that in the main, qualified majority voting since Lisbon has made the large Member States relatively more important, and this was intentional as we saw.

As regards the Parliament, to the contrary, the principle of degressive proportionality with a minimum number of seats for the smallest states and a capping on the number of seats for the largest states imply a relative overrepresentation of the smallest Member States.

So the overall interinstitutional balance seems on this account to give a relatively greater weight to large Member States in the Council, and to smaller States in the Parliament, whereas – somewhat more indirectly – the equality of Member States, in particular also the smaller states, is guaranteed in the composition of the Commission.

This is an overall and abstract picture of the interinstitutional balance, because on specific policies, themes and topics different coalitions of Member States in the Council and of political groups elected within specific Member States for particular groups can occur which can make these abstractions less significant, while the Commission input is always dependent on decision-making within the Commission.

⁸⁴ See e.g. the Protocol on the institutions with the prospect of enlargement of the European Union to the Treaty of Amsterdam, Article 1: ‘At the date of entry into force of the first enlargement of the Union, notwithstanding Article 157(1) of the Treaty establishing the European Community, Article 9(1) of the Treaty establishing the European Coal and Steel Community and Article 126(1) of the Treaty establishing the European Atomic Energy Community, the Commission shall comprise one national of each of the Member States, provided that, by that date, the weighting of the votes in the Council has been modified, whether by re-weighting of the votes or by dual majority, in a manner acceptable to all Member States, taking into account all relevant elements, notably compensating those Member States which give up the possibility of nominating a second member of the Commission.’

⁸⁵ Art. 17(5) TEU.

⁸⁶ See e.g. Piris 2010 (supra note 49) at p. 216.

⁸⁷ This equal membership of the Commission has not always been the case. Until the 1995 enlargement to an EU15, not only did the large member states have two members of the Commission, they could also outvote the other commissioners. With the Treaty of Amsterdam (concluded in 1997, entered into force in 1999) the principle of one commissioner per member state was to be introduced upon the first enlargement, conditional on an agreement on weighted voting in the Council, see Protocol on the institutions to the Treaty of Amsterdam.

However that may be, Brexit teaches us that this balance is not significantly upset by the withdrawal of a large Member State like the UK from the Union. One can say that the larger Member States gain in importance within the Council, but this can hardly be said to upset the interinstitutional balance, to the extent that smaller Member States are sufficiently protected by interinstitutional counterbalances. Nevertheless, the above sections also show that within institutions both further withdrawals and future accessions might create situations in which certain elements will need reconsideration. In this regard, the Council seems more resilient to changes in the Union's membership than the Parliament. The Council can pretty much accommodate another four to five withdrawals and limitless accessions before it can be said to have become internally 'unbalanced'. The Parliament, to the contrary, has to shuffle and reshuffle things ad hoc politically all the time, risking non-compliance with important constitutional principles whenever a change in Union membership occurs. Should the Parliament and European Council, however, come to a decision on the composition of the Parliament based on objective criteria that can remain valid and be applied on the long term for future Parliaments, this would be a moment at which the interinstitutional balance would enter into the debate. Similarly, should the composition of the Commission be reconsidered with a view to reducing its size, this will almost certainly be a quite sensitive matter among the smaller Member States, of which there are a large number. These two examples concerning the composition of the Parliament and the Commission are a matter of secondary EU law, but clearly are of a constitutional nature. It may affect the overall institutional design.

5. PARTICIPATION OF NON-MEMBER STATES IN EU POLICIES

Finally, we have been asked to reflect on participation of non-Member States in EU policies. This concerns such participation beyond the transitional phase which applies under a withdrawal agreement.⁸⁸ The matter of the form and the constitutional and legal requirements that such participation can take, deserves a much more profound analysis than we can offer in the context of this report. We limit ourselves to some considerations of a constitutional nature.

5.1. Constitutional parameters

The constitutional parameters of participation of non-Member States are determined by the principle of autonomy of the EU legal order, as established in the case law of the Court of Justice. This autonomy is an axiomatic postulate of EU law.

It is closely linked to the fundamental difference that must exist between being inside the Union or outside the Union; being a member or being a non-member of the Union; between being 'in' or being 'out'.

The principle of autonomy implies the principle of protecting the integrity of the EU legal order. In this regard, the principle of autonomy extends to the operation of EU law outside the material scope of EU law,⁸⁹ as well as to EU law that is to apply outside the territorial scope of EU law.⁹⁰ Non-Member State participation in a Union policy area cannot detract from the Union's autonomy also in that particular policy area.

The integrity of the Union's legal order must be respected not only in terms of the interpretation and application of EU law, but also, and quite importantly in the context of British participation in elements of EU policies post-Brexit, *decisional* autonomy. This means that the difference between being a member or not being a member of the Union entails that only members can participate in the Union's decision-making properly speaking, in particular through the Council. Only Member States can have a decisive vote, non-Member States cannot.

This principle of decisional autonomy is a legal principle that is normative in nature; it is about normative power. This must be distinguished from factual power. Factual power configurations may mean a factual constraint on the normative principle of decisional autonomy. Large scale factual participation and cooperation may mean factual mutual influence, rather than factual mutual autonomy. In this context, the notion of 'Normative Power Europe' has been coined.⁹¹ This refers to the power of the EU to set standards that are global accepted, due to the size of the EU market and the quality and sophistication of its regulatory standards. As a consequence third countries are 'norm-takers'. This can also work the other way round in the context of post-Brexit UK/EU relations, in areas of future cooperation in which the factual political, e.g. military or intelligence power of the UK may be of such importance to the Union, that the UK's factual influence extends to the substance of EU decisions, even if they formally are autonomously taken.

⁸⁸ On the application of EU law in a transitional (albeit in some respects indefinite) phase as a consequence of withdrawal of the UK, see Editorial Comments, Polar exploration: Brexit and the emerging frontiers of EU law, CMLRev 55: 1–16, 2018, especially the section on *Obligations of EU membership after EU membership*, at pp. 9ff.

⁸⁹ Hence the duty for member states that unilaterally apply EU law in domestic law that is outside the scope of EU law, to refer issues of interpretation to the Court of Justice; see ECJ, C-297/88 *Dzodzi*.

⁹⁰ See in particular Opinion 1/91, EEA Agreement I, EU:C:1991:490 and Opinion 1/92, EEA II, EU:C:1992:189 in terms of – among other things – the required homogeneity of EU law under dispute settlement arrangements with third parties.

⁹¹ A seminal text in this regard is Ian Manners, Normative Power Europe: A Contradiction in Terms?, JCMS 2002 Volume 40. Number 2. pp. 235–58.

5.2. Forms and varieties of cooperation with non-Member States

The cooperation partnership envisaged between the Union and the UK after Brexit is unprecedented in the extent of the number of areas, as is evident from the Political Declaration on the future relationship.

‘Participation of non-members’ may exist in different degrees, encompassing purely in theory:

- the right to listen to the debate but no vote;
- the right to participate in the debate but no vote;
- the right to participate in the debate and vote but only on non-binding instruments;
- the right to participate in the debate and vote on all instruments, including binding ones.

Obviously, the right to cast a vote on proposals concerning binding instruments would need to be reserved to Member States only. Otherwise the decisional autonomy of the Union would be interfered with.

These forms of participation that remain, may apply differently to different manners of cooperation. For instance, the very technical area of standardization within agencies or standardization bodies might in theory allow for further degrees of participation than more highly politicized decision-making areas, such as migration, defence and security.⁹² On the other hand, participation, for instance, in civil and military EU missions exist on the basis of separate participation agreements, as well as participation in the European Defence Agency on the basis of Administrative Arrangements.⁹³ These examples of participation concern third countries that have at least the status of ‘potential candidates’ for accession to the EU – so the inverse of a status of a third state that has withdrawn from the EU. The ‘being in’ or ‘being out’ perspective may make a difference to the kind of participation or cooperation arrangements and the pertaining rights and obligations of third state participation.

5.3. Need for change?

The axiom of EU autonomy being what it is, there is no reason to amend the Treaties in order to accommodate UK participation in a policy, policy areas, agency or other Union arrangement. Existing forms of non-member participation in Union policies did not require such amendment and even though none of them were former members, this remains the situation. Also, the Draft Withdrawal Agreement and Political Declaration on future relations recognize autonomy of the Union and the sovereignty of the UK. The draft Withdrawal Agreement stipulates autonomy in the sense of the integrity of the Union’s legal order in the context of dispute settlement.⁹⁴ The Political Declaration refers in particular (but not only) to the decisional and regulatory autonomy.⁹⁵

⁹² An example may be the ‘affiliates’ to the European standardization agencies CEN and CENELEC, which are supposed to make a ‘meaningful contribution’ to the development of standards to be agreed upon, available at: <https://standards.cen.eu/dyn/www/f?p=CENWEB:9:::NO> and <https://www.cenelec.eu/dyn/www/f?p=WEB:9:766235102185901>

⁹³ E.g. Serbia participated in four EU missions, among which the NAVFOR Atalanta Mission off the coast of Somalia; it also participates in the European Defence Agency.

⁹⁴ Draft Withdrawal Agreement, 14 November 2018 TF50 (2018) 55 – Commission to EU27, eleventh recital of Preamble: ‘CONSIDERING that in order to guarantee the correct interpretation and application of this Agreement and compliance with the obligations under this Agreement, it is essential to establish provisions ensuring overall governance, in particular binding dispute-settlement and enforcement rules that fully respect the autonomy of the respective legal orders of the Union and of the United Kingdom as well as the United Kingdom’s status as a third country’. It makes no other mention of ‘autonomy’.

⁹⁵ Political Declaration, 22 November 2018, Council document XT 21095/18 BXT 111 CO EUR-PREP 54, point 4: ‘The future relationship will be based on a balance of rights and obligations, taking into account the principles of each Party. This

Nevertheless, one could raise the question whether it might be useful to codify the principle of autonomy, and its corollaries of integrity and decisional autonomy, identified above, in primary law.

In this regard, it should be remarked that the principle of autonomy was articulated in the case law of the Court of Justice in a manner in which it is an absolute value that governs obligations under primary law. This was so in the context of *Van Gend en Loos* and *Costa v ENEL*, and remained evident in *Opinion 2/13* which concerned the primary law obligation to accede to the European Convention of Human Rights. In the view of the Court of Justice the principle is evidently a supra-constitutional one. A consequence of this supra-constitutional status of the principle is that its codification could not provide extra guarantees, as such codification can at best be of constitutional rank.

Nevertheless, at the moment there is no general framework in primary law that governs the institutional design that association agreements and other cooperation agreements with third states can or should have. In this respect, further research into existent arrangements could provide further guidance as regards the desirability of the introduction of rules in this respect.

balance must ensure the autonomy of the Union's decision making and be consistent with the Union's principles, in particular with respect to the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms. It must also ensure the sovereignty of the United Kingdom and the protection of its internal market, while respecting the result of the 2016 referendum including with regard to the development of its independent trade policy and the ending of free movement of people between the Union and the United Kingdom.' The Declaration mentions 'autonomy' another 12 times.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1. The voting balance in the Council

Over the last two decades, the United Kingdom (UK) has supported the vast majority of measures adopted by the Council. Still, the UK has been the most active veto player (and has had the highest abstention rate) compared to other Member States. In this regard, it is followed by Germany. However, Germany has most often done so on different decisions from those to which the UK objected. The UK's allies substantively, and also in voting behaviour, have been Sweden, the Netherlands and Denmark. New coalitions will be sought by traditional UK allies, though the expectation is that these cannot easily form a sufficient majority or blocking minority in terms of the population requirement.

The UK's withdrawal has some consequences for the power relations within the Council under the ordinary qualified majority rule (Article 16(4) TEU). First of all, the required number of Member States voting in favour (55%) goes from 16 to 15 Member States and under the present Treaty provisions cannot go lower than that. This means that should the EU shrink further, the required number of Member States will be gradually higher than 55%.

The population percentages of France and Germany will go up (to just over 33%), as a consequence of which there are more theoretical possibilities of blocking decision-making. However, France has a tradition of rarely voting against a proposal, which in practice means the chances do not significantly change. Nevertheless, the potential of forming a blocking minority can be a powerful bargaining chip prior to taking a vote, and hence the bargaining power of France may increase, as may be the case for Germany and the smaller countries that ally with them.

In qualified majority voting, overall the larger Member States gain numerical voting power, whereas the smaller and smallest lose some. Poland, Spain, France and Germany are gainers in voting power; the smallest Member States of the population size of Croatia and smaller will be the losers, with the loss increasing as the Member State is smaller, and Member States of the population size of Ireland being the turning point between gaining and losing. Should a small Member State of the size of Montenegro accede to the EU, this would lead to gains in the formal voting power of the small Member States.

The UK's withdrawal will have no consequences for the voting balance under the slightly different qualified majority rule in case of non-participating Member States, because the UK itself is a non-participating Member State (or will withdraw from the relevant enhanced cooperation with Brexit), with the exception of the theoretical possibility of a Council vote under Article 7 TEU.

Under the reinforced qualified majority rule (Article 238(2) and (3) (b) TFEU), Brexit will increase the voting power of all Member States in proportion to the differences in population size, larger Member States gaining more power than smaller Member States.

6.2. The institutional balance within the European Parliament

An estimate of impact of Brexit on the future political dynamics in the European Parliament (Parliament) can only be made *ceteris paribus*. However, the elections in May 2019 will necessarily mean that the circumstances change, which makes an overall assessment of that impact impractical.

The use of population data in terms of habitual residents in the constituencies of the Parliament for determining its composition is justifiable both constitutionally, historically and practically. There is

no compelling constitutional ground to base the composition of the Parliament on formal citizenship rather than population.⁹⁶

The distribution of seats in the Parliament must comply with the (justiciable) Treaty requirements of degressivity (Article 14(2) TEU), the general principle of transparency and the duty to state the reasons on which a legal act is based (Article 296(2) TFEU). It is reasonable to take as the basis for the decisions on the distribution of seats the population data available at the time of decision-making. Various objective methods can be used to comply with the Treaty requirements, and it should therefore be clear and explicit which of them is used in order to arrive at an allocation of seats that is objective, fair, durable and transparent.

However, Article 14(2) does not specify how exactly the principle of degressive proportionality should be respected. Employing an objective method for distributing seats is the best guarantee for objectivity and fairness, to which a stable mathematical method could contribute.⁹⁷

The composition of the Parliament of 2019–2024, based on the European Council Decision of 28 June 2018⁹⁸, for the first time since introduction of the present legal framework under the Lisbon Treaty, conforms fully to the requirement of degressive proportionality under Article 14(2) TEU. The second achievement of the post-Brexit seat distribution is that it turns out to come very close to an objective mathematical method, namely that of the so-called Power Compromise.

However, this Decision leaves something to be desired in terms of the quest for an open and transparent, stable, fair and objective method. The mathematical method used is not apparent from the explanatory statement attached to the report P8-A(2018)0007 of the Committee on Constitutional Affairs (AFCO) on the composition of the European Parliament.⁹⁹ The small deviations from that method it comes closest to can only be second-guessed, by reference to the principle that no member state shall lose seats as compared to the previous seat distribution – a principle that may not be sustainable with future accessions.

As explained above, unlike in previous Parliaments, in the ninth Parliament (2019–2024) post-Brexit, the apportioning of the seats complies with the requirements of Article 14(2) TEU. Should a postponement or a cancellation of Brexit lead to an extension of the composition of the Parliament 2014–2019 to that of 2019–2024 this would lead to an infringement of the Treaty requirements, which cannot sustain for a longer period.

6.3. Interinstitutional balance

The overall interinstitutional balance seems on this account to give a relatively greater weight to large Member States in the Council, and to smaller states in the Parliament, whereas – somewhat more indirectly – the equality of Member States, in particular also the smaller states, is guaranteed in the composition of the Commission. Brexit will, however, not upset the overall interinstitutional balance.

⁹⁶ Taking formal citizenship rather than population size as a basis was suggested as a possibility that needed further consideration in the *Report on the composition of the European Parliament* (2007/2169(INI)), Committee on Constitutional Affairs, Rapporteurs: Alain Lamassoure and Adrian Severin, EP A6-0351/2007, 3 October 2007, par. 21 at p. 18.

⁹⁷ The explanatory statement of the AFCO report recommends the so-called FPS method for the future composition as of 2024.

⁹⁸ European Council Decision (EU) 2018/937 of 28 June 2018 establishing the composition of the European Parliament, OJ L 165I, 2.7.2018, p. 1.

⁹⁹ (2017/2054(INL) – 2017/0900(NLE), Rapporteurs: Danuta Maria Hübner and Pedro Silva Pereira, available at: http://www.europarl.europa.eu/doceo/document/A-8-2018-0007_EN.html?redirect#title3.

6.4. Participation of non -member states in eu policies

Participation of the UK as a non-member-state in EU policies beyond transition must always respect EU decisional autonomy, as follows from the case law of the Court of Justice of the European Union (ECJ) on the autonomy of the Union's legal order.

The great variety in present forms of cooperation with non-member states would require a further categorization as to the institutional parameters and in particular the levels of cooperation that can be allowed to a former Member State that has decided to be essentially outside the Union. In this regard, it deserves further scrutiny to what extent the status of a former Member State is comparable to the status of a potential candidate state or a candidate state. However, participation in a Union policy area by a non- can never take the form of having a vote on legally binding instruments. This does not mean that the factual power of non-member states in certain areas cannot function as a factual constraint of the normative autonomy of the Union.

6.5. Recommendations

To gain more insight into the consequences of Brexit for the political dynamics within the Council, further research into coalition building in the Council in particular policy areas after Brexit is desirable.

The requirement of a minimum of 15 Member States consenting to a proposal seems not very meaningful in a Union of >27; it would run counter to the possible logic of deeper integration should the Union become smaller; it might therefore be a good candidate for reconsideration, should there be a Treaty overhaul.

The requirement of a minimum of *four* members to constitute a blocking minority under the ordinary qualified majority rule would need to be recalibrated in a <27 EU; it might be reformulated in order to express the idea that a blocking minority of Member States should comprise at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one additional member, as is presently the case of qualified majority voting in case of non-participating Member States.

From the point of view of constitutional principle, there is no need to follow up on the suggestion of the *Lamassoure/Severin* Report to change the basis from habitual residents to the number of European citizens in the formal legal sense.¹⁰⁰

Although there have been significant improvements, it remains urgent to further improve on objective, fairer and more transparent decisions on the future composition of the Parliament, in order not to undermine its democratic legitimacy. This urgency can only increase with the accession of new Member States.

A codification of the principle of autonomy at the constitutional level has no additional value given the supra-constitutional status in the case law of the ECJ. Further study and consideration should, however, be given to the question of the desirability of an institutional framework for participation and cooperation arrangements between the Union and third states.

¹⁰⁰ See footnote 57.

ANNEX

DEFINITIONS OF MAJORITIES

1. Council of the EU

Qualified majority

Ordinarily

Article 16(4) TEU¹⁰¹:

A majority of 55% of the Member States, being at least 15 of them, and representing 65% of the EU population.

Pre-Brexit 55% of the Member States = 16 Member States; after Brexit 55% of the Member States = 15 Member States

Blocking minority

Article 16(4) TEU¹⁰²

In the context of ordinary qualified majority voting, a blocking minority must comprise at least four Council members.

Non-participating Member States

Article 238(3)

In cases where, under the Treaties, *not all the members of the Council participate* in voting [e.g. non-Eurozone countries in Euro related matters (third phase of the economic and monetary union, i.e. UK and Denmark, (Protocols 15 and 16 TEU), and Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania and Sweden as Member States with a derogation in the sense of Art. 139 TFEU); Member States that do not participate in enhanced cooperation (in conjunction with 329, 330 TFEU); certain Schengen measures (cf art. 5 of Protocol 19 on the Schengen Acquis); certain AFSJ measures as regards UK and Ireland (Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice; (Part III Title V TFEU) as regards Denmark (cf Art. 1 and 5 Protocol 22)],

Art. 7 TEU voting, permanent structured cooperation in the sense of Art. 42(6) jo 46 TEU and Art. 50 TEU voting¹⁰³, a qualified majority shall *not require the minimum of 15 Member States*; i.e. 55% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these States.

¹⁰¹ Art. 16(4) TEU, first subparagraph: 'As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.'

¹⁰² Idem, second subparagraph: 'A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.'

¹⁰³ Note the special voting procedure under Article 7 TEU defined in Art. 354 TFEU.

Blocking minority

In the context of *non-participating Member States*, a blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained.

Reinforced qualified majority

Article 238(2) and (3) (b) TFEU¹⁰⁴

- Whenever the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union.

Pre-Brexit 72% of 28 = 21 Member States

Post-Brexit 72% of 27 = 20 Member States

Simple majority

Article 238(1)

Where it is required to act by a simple majority, the Council shall act by a majority of its component members.

Unanimity

Article 238(4)

Abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity.

¹⁰⁴ Article 238(2): By way of derogation from Article 16(4) of the Treaty on European Union, as from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions.

Ioannina Compromise / Declaration nr 7 to Lisbon Treaty¹⁰⁵

(a) at least 55 % of the population,

Under 16(4) TEU and 238(3) TFEU = 55% of 35% = 19,25% of the EU population both pre- and post-Brexit; or

(b) at least 55 % of the number of Member States

Under 16(4), first subparagraph, TEU and under 238(3) TFEU = 13 x 15% = 8 Member States both pre- and post- Brexit [the number of states that can block under the *first* subparagraph remains 13 in an EU that is reduced from 28 to 27 Member States!].

necessary to constitute a blocking minority resulting from the application of Article 16(4), first subparagraph, of the Treaty on European Union or Article 238(2) of the Treaty on the Functioning of the European Union

2. European Banking Authority

Double majority voting in the Board of Supervisors

A qualified majority as defined in Art. 16(4) TEU (Council) which shall include at least a simple majority of members participating in the Single Supervisory Mechanism (SSM), as well as a simple majority of members not participating in the SSM.¹⁰⁶

¹⁰⁵ Declaration 7, on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union [setting out a draft Council decision, in an 'effort to strengthen the democratic legitimacy of qualified majority voting', subsequently adopted as Council Decision 2009/857, OJ [2009] L 314/73:

Article 4

As from 1 April 2017, if members of the Council, representing:

(a) at least 55 % of the population, or

(b) at least 55 % of the number of Member States necessary to constitute a blocking minority resulting from the application of Article 16(4), *first* subparagraph, of the Treaty on European Union or Article 238(2) of the Treaty on the Functioning of the European Union,

indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue.

Article 5

The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in Article 4.

Article 6

To this end, the President of the Council, with the assistance of the Commission and in compliance with the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her their assistance.

¹⁰⁶ EBA Regulation, Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010, OJ L 331, 15.12.2010, Article 44:

1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote.

With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of Protocol No 36 on transitional provisions, which shall include at least a simple majority of its members from competent authorities of Member States that are participating Member States as defined in point 1 of Article 2 of Regulation (EU) No 1024/2013 (participating Member States) and a simple majority of its members from competent authorities of Member States that are not participating Member States as defined in point 1 of Article 2 of Regulation (EU) No 1024/2013 (non-participating Member States).

With regard to decisions in accordance with Articles 17 and 19, the decision proposed by the panel shall be adopted by a simple majority of the voting members of the Board of Supervisors, which shall include a simple majority of its members from competent authorities of participating Member States and a simple majority of its members from competent authorities of non-participating Member States.

By way of derogation from the third subparagraph, from the date when four or fewer voting members are from competent authorities of non-participating Member States, the decision proposed by the panel shall be adopted by a simple majority of the voting members of the Board of Supervisors, which shall include at least one vote from members from competent authorities of non-participating Member States.

Each voting member shall have one vote.

With regard to the composition of the panel in accordance with Article 41(2), the Board of Supervisors shall strive for consensus. In the absence of consensus, decisions of the Board of Supervisors shall be taken by a majority of three quarters of its voting members. Each voting member shall have one vote.

With regard to decisions adopted under Article 18(3) and (4), and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a simple majority of its voting members, which shall include a simple majority of its members from competent authorities of participating Member States and a simple majority of its members from competent authorities of non-participating Member States.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the impact of Brexit on the institutional balance within the Council and European Parliament, on the interinstitutional balance and on the necessity of Treaty changes, and delineates constitutional limits on the participation of non-Member States in EU policies.

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