



# The Future of the EU

Compromises for expanding ordinary legislative procedure and majority voting in climate and energy policies

Background Paper

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## 1. Summary

The EU usually adopts climate policies and laws by ordinary legislative procedure: Council and European Parliament are co-legislators, and the Council *can* decide by majority vote. This system has many benefits. It has helped adopt relatively ambitious policies, and it has supported democratic and transparent decision making in the EU. However, a number of essential climate issues – such as carbon taxation – are not adopted by ordinary legislative procedure but by special legislative procedures. In these areas, the Parliament is not an equal co-legislator and the Council decides by unanimous vote, providing each Member State with a veto.

This is a big problem because the urgency of climate action requires swift and bold EU action. EU climate action cannot afford a governance structure that allows one Member State to hold all others hostage in essential areas of climate action, and that leads to blockage or false compromises at the lowest common denominator, as exemplified in the negotiations on energy taxation that have dragged on for many years without yielding results. In addition, democracy and transparency in the EU benefit from the full involvement of Parliament in all policies relevant for EU climate action.

The EU has specific mechanisms to address this problem. The so-called “passerelle clauses” allow the Council or – respectively – the European Council to expand the ordinary legislative procedures without changing the treaty. These clauses vary in detail but have one thing in common: all of them require a unanimous vote – in either the Council or the European Council. Currently, however, there is no unanimity in either institution. A number of Member States are against expanding the ordinary legislative process for various reasons.

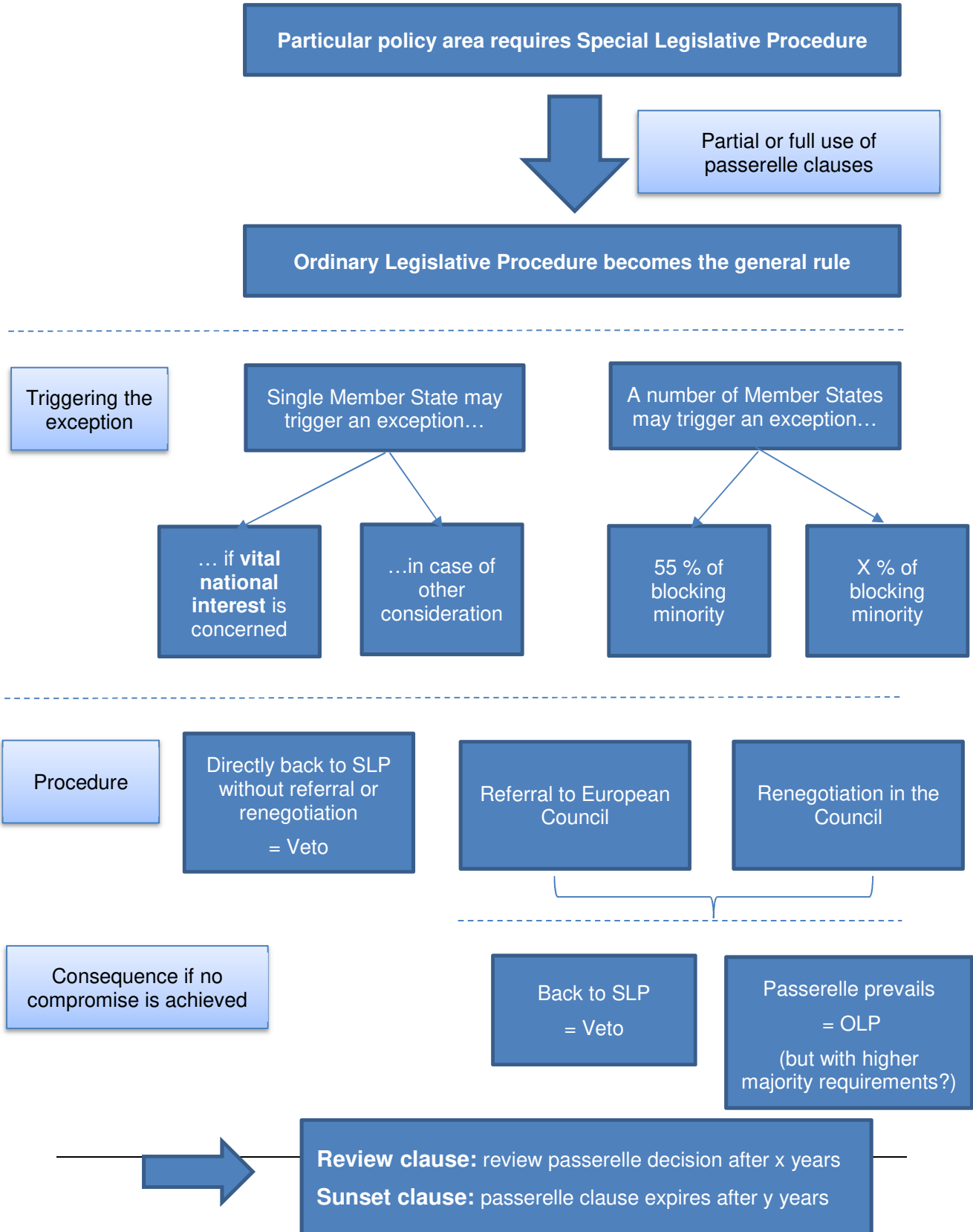
This is why there is a need for a **compromise**. Fortunately, there are several options to strike a balance between enhancing effective EU climate action through more ordinary legislative procedures and concerns of national sovereignty.

- **Option 1 – The ordinary legislative procedure is expanded in principle, but exceptions are possible:** Under this option, the passerelle clauses would be used to expand the ordinary legislative procedures to new policy areas, but only in principle. This means that the ordinary legislative procedure would become the rule, but there would be a possibility for Member States to trigger an exception in specific cases. This exception would have to be defined with regard to who triggers it, which procedure follows, and the consequences. The **trigger** could be that a certain number of Member States request to suspend the ordinary legislative procedure. Alternatively, the exception could be triggered by a single Member State if it invokes important national concerns or a similar vital interest. The **procedure** following this trigger could be that the decision on the legislative act in question is suspended for a certain time and the Council has to re-negotiate it. Alternatively, the item could be referred to the European Council. The treaties already provide for similar options in specific areas, such as

judicial and police cooperation. If there is no solution at the Council or the European Council, the **consequence** would also have to be defined: One option is that despite the decision to apply the passerelle clause, unanimity is required for the individual legislative act in question. The other option is that the passerelle clause prevails and no exception is made in the particular case. Finally, the trigger could directly lead to the special legislative procedure being reinstalled without any re-negotiating. In addition, and in order to further facilitate agreement on derogating from unanimity, this option could be combined with a sunset or a review clause, whereby the expansion of the ordinary legislative procedure expires after a certain period or is reviewed after a specific time.

- **Option 2 – Limited scope of the passerelle clause:** The Council could make only partial use of the passerelle clauses. For example, instead of deciding to apply the ordinary legislative procedure to *all* "provisions primarily of a fiscal nature", the Council could apply it only to *certain* fiscal measures such as carbon taxation. As in option 1, this could be combined with a sunset or review clause in order to further facilitate agreement on derogating from unanimity.
- **Option 3 – revision of the ‘ever closer union clause’:** To address concerns that the EU is effectively on a path to a European state when it expands the ordinary legislative procedure, the ever-closer union clause could be revised. The revised clause could explicitly state that the EU does not intend to become a state. As an alternative to a treaty amendment, the EU could adopt a declaration clarifying that it does not aim to become a European state, and that more decision-making by ordinary legislative procedure solely serves the purpose of improving the EU’s ability to help solve problems in areas where it already has competences.

**Options for compromise: How to use passerelle clauses to expand ordinary legislative procedures in EU climate policies, while respecting concerns of national sovereignty**



## 2. Background: Why more ordinary legislative procedure in EU climate policies?

Since the **Treaty of Lisbon**, the EU's 'Ordinary Legislative Procedure' (OLP) has been the standard way for passing laws in the EU. Under the OLP, the Council of Ministers and European Parliament adopt laws – following a proposal from the Commission. Council and Parliament are equal co-legislators, and – importantly – the Council can adopt laws by qualified majority.<sup>1</sup> However, a number of issues are still subject to the so-called special legislative procedure (SLP), where the Council adopts laws unanimously and Parliament is only consulted instead of being an equal co-legislator. Although small in number, the matters that are decided by SLP are of particular political importance. Policies as essential as taxation, social affairs or foreign and defence policies are still subject to SLP.

On various occasions, **SLP has caused problems**. SLP and the resulting veto power of every single Member State has undermined constructive negotiations because it does not require Member States to compromise and to build alliances. Simple blockage is a possible, but rare strategy. Reform of the energy taxation directive, for example, was not possible because individual Member States vetoed the main elements of the reform. SLP and its unanimity requirement has also undermined the EU's ability to speak with one voice. The EU, for example, was not able to condemn China or Israel in the Human Rights Council because of the veto of one Member State. Last but not least, the European Parliament – the EU's only directly elected institution – is only consulted in SLP areas. This has weakened democracy in the EU and undermined transparency. It also has weakened EU environmental policies, because Parliament – usually a driver for environmentally more ambitious policies – is only consulted and has no power to block or force amendments.

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<sup>1</sup> Although majority voting is possible, consensus remains the norm.

### 3. How to expand ordinary legislative process?

Treaty changes are one way how to expand OLP, but this is cumbersome and unlikely to happen any time soon. Because treaty changes are burdensome, the EU has specific mechanisms that allow to expand the OLP without changing the treaty – **the so-called “passerelle clauses”**. There are two different types of passerelle clauses:

- **Specific passerelle clauses:** For specified policy areas – such as the environment, the Common Security and Defence Policy, judicial cooperation concerning family law, or social affairs – the treaty allows the Council to move certain measures from the SLP to the OLP. To this end, the Council must take a unanimous decision – on the basis of a proposal from the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions.
- **General passerelle clause:** The general passerelle clause allows the European Council to authorise the Council to act by majority where the Treaty on the Functioning of the EU (TFEU) provides for the Council to act by unanimity in “a given area or case”. The European Council may also expand OLP where the Council adopts laws in accordance with the SLP. As an important requirement of the general passerelle clause, the European Council may not expand OLP if one national Parliament opposes within six months. Otherwise the European Council may adopt the decision by unanimity – after obtaining the consent of the European Parliament.

According to Article 192 (1) of the TFEU, climate action is subject to the OLP, but there are important exceptions. The following **measures with great significance for climate action are subject to the SLP**:

- measures that are primarily of a fiscal nature,
- measures that affect town and country planning and land use, and
- measures that significantly affect a Member State's choice between different energy sources and the general structure of its energy supply.

The treaty allows moving these areas from the SLP to the OLP through the **specific passerelle clause in Article 192 (2)** of the TFEU. According to this clause, the Council can expand the OLP to these areas by a unanimous decision – based on a proposal from the Commission and after consulting the European Parliament. This provision could be used to apply OLP in essential areas of climate action, such as carbon taxation or spatial planning.

It is important to note that **Article 192 (2) TFEU pertains only to environmental policies**, which includes climate action. The provision does not apply to other policy areas, such as energy regulation. For this reason, it is not possible to use the special passerelle clause in Article 192 (2) for expanding OLP to new taxation rules that tax energy consumption *per se*. Accordingly, only the general passerelle clause in Article 48 (7) of the Treaty on the EU (TEU) could be used to expand OLP in the area of energy taxation.

## 4. Who supports expanding ordinary legislative procedure, who is against it?

The passerelle clauses require unanimity in the Council or in the European Council respectively, but currently the positions of Member States do not indicate that this is possible in either institution. Various Member States are against expanding OLP, either in principle or in specific thematic areas. They are concerned that majority voting undermines unity and that smaller Member States are outvoted. For different reasons, Ireland, the Netherlands, Malta, Sweden and Cyprus have argued against the expansion of the OLP. Emphasizing the benefits of cooperation at the intergovernmental level in the EU and national sovereignty, Poland and Hungary have argued against more OLP out of principle.

On the other hand, a number of players support more OLP. The Commission has supported it several times. Following various calls from its President Jean-Claude Juncker, it issued communications on expanding ordinary legislative procedures in foreign policy (human rights, sanctions, EU civilian missions)<sup>2</sup>, tax policy<sup>3</sup> as well as climate and energy policies<sup>4</sup>. The European Parliament has also called for expanding the OLP, and so have a number of countries. In general, Germany, France, Spain, Italy and Portugal are in favour.<sup>5</sup> A number of civil society groups has also supported more OLP.

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<sup>2</sup> European Commission (2018): A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy. COM(2018) 647 final, [https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-efficient-decision-making-cfsp-communication-647\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-efficient-decision-making-cfsp-communication-647_en.pdf)

<sup>3</sup> European Commission (2019): Towards a more efficient and democratic decision making in EU tax policy. COM(2019) 8 final, [https://ec.europa.eu/taxation\\_customs/sites/taxation/files/15\\_01\\_2019\\_communication\\_towards\\_a\\_more\\_efficient\\_democratic\\_decision\\_making\\_eu\\_tax\\_policy\\_en.pdf](https://ec.europa.eu/taxation_customs/sites/taxation/files/15_01_2019_communication_towards_a_more_efficient_democratic_decision_making_eu_tax_policy_en.pdf)

<sup>4</sup> European Commission: A more efficient and democratic decision making in EU energy and climate policy COM(2019) 177 final, [https://ec.europa.eu/commission/sites/beta-political/files/communication-efficient-democratic-decision-making-eu-energy-climate-april2019\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/communication-efficient-democratic-decision-making-eu-energy-climate-april2019_en.pdf)

<sup>5</sup> Cf. <https://www.politico.eu/article/brussels-bid-to-kill-tax-veto-faces-uphill-battle/>.

## 5. Options for compromise: How to strike a balance between effective EU climate action through more ordinary legislative procedures and concerns of national sovereignty

Against this background, there is a need to discuss possible compromises that enhance the ability of the EU to act swiftly and effectively on climate action, while addressing concerns of national sovereignty. Fortunately, there are a number of options:

- **The ordinary legislative procedure is expanded in principle but exceptions are possible:** Under this option, the passerelle clauses would be used to expand the ordinary legislative procedures to new policy areas only in principle. This means that the ordinary legislative procedure would become the rule, but there would be a possibility for Member States to trigger an exception in individual cases. There are various ways how to design this exception. It would have to be defined with regard to who triggers it, which procedure follows, and the consequences.
  - **Veto majority voting or request renegotiations in the Council:** Similar to the Ioannini compromise, a minority that accounts for 55% of what is usually necessary for a blocking minority can request the Council to renegotiate the topic or veto majority voting.<sup>6</sup> This would enable small groups to raise their concerns. It is possible to adjust the threshold for a necessary minority. Alternatively, a single Member State can demand renegotiation of the topic or veto majority voting if the adoption of a specific act affects “very important national concerns”. This alternative would be similar to the Luxembourg compromise. The definition of what qualifies as such a concern remains to be discussed. If renegotiation in the Council does not lead to a compromise, there are two options. One option is that despite the decision to apply the passerelle clause, unanimity is required for the individual legislative act in question. The other option is that the passerelle clause prevails and no exception is made in the particular case. However, a possible consequence could be that OLP is applied with higher majority requirements.
  - **Referral to the European Council:** As another option, a single Member State or a specified group could request referral of the subject matter to the European Council for further consideration if this matter affects “vital and stated reasons of national policy” resp. “important” or “fundamental” aspects of its national legal system. The Member States usually have a margin of appreciation to assess this issue since this concerns their national sovereignty. This option is informed by a number of provisions of the TFEU, which pertain to foreign policy matters

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<sup>6</sup> The practical experience with this clause is low, it has only been invoked once. Calliess, Art. 16 EUV, Rn. 25 Fn. 60; see also <https://www.dw.com/en/the-eu-treaty-the-ioannina-compromise-explained/a-2827025>



(Article 31 (2) TEU), social security (48 (2) TFEU), judicial cooperation (Articles 82 (3) and 83 (3) TFEU) or police cooperation (Article 87 (3) TFEU). However, it would also be possible to transfer the power of decision to the European Council or the ECJ.

- **Review and sunset clause:** To facilitate compromise, it is possible to combine these options with a review clause or a sunset clause, whereby the expansion of the ordinary legislative procedures expires after a certain period or is reviewed after a specific time.
- **Revise or clarify the ‘ever closer union’ clause:** Some players believe that expanding OLP is only another milestone on the road to a European State or a European Republic. For them, majority voting is part of a hidden agenda to build a European State. In order to clarify that this is not the case, the ever-closer union clause in Article 1 of the TFEU could be revised. The revised Article 1 could state that the EU – while further deepening cooperation between Member States– does not intend to become a state. It should be noted, however, that this requires a revision of the treaty. Since this is cumbersome and raises political difficulties, the EU could alternatively adopt a declaration clarifying that it does not aim to become a European state, but that more OLP exclusively serves the purpose to improve the EU’s ability to help solve problems in areas where it already has competences.
- **Limit the scope of the matter for which OLP is expanded:** In line with the specific passerelle clause in Article 192 (2) TFEU, the Council can expand OLP to measures that are primarily of a fiscal nature; that affect town and country planning and land use; or that significantly affect a Member State's energy mix or the general structure of its energy supply. But the Council does not have to expand OLP to these matters completely. It is possible that the Council only makes partial use of this clause. A compromise between unanimity and OLP for the whole matter could be that OLP is extended to part of the matter only. The decision could provide that OLP applies only to specified fiscal measures, such as carbon taxation, or specific land use measures, such as enhancing natural sinks, while all the other measures listed in Article 192 (2) TFEU remain subject to SLP. A decision using the general passerelle clause could limit its scope in a similar way.