



ELB Blogpost 50/2022, 15 November 2022

Tags: EU 2.0 – Article 50 TEU– Rule of law – Unanimity – Treaty amendment

Topics: ‘EU Constitutional Law’ / ‘Institutional Law’

EU 2.0 Revisited: Between Vetocracy and Rule of Law Concerns

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Introduction

On 14 September 2022, the European Parliament [declared](#) that Hungary can no longer be considered a full democracy. The adoption of this position was followed by the Commission’s [proposal for a Council implementing decision](#) that, if adopted, would trigger the measures envisaged in the [Conditionality Regulation](#) concerning the suspension of certain EU budgetary commitments towards Hungary.

While EU institutions keep looking to the EU Treaties for effective tools to address the rule of law crisis, Hungary and Poland exploit those very same Treaties to exercise their ‘vetocracy’ on multiple matters. In a nutshell, they rely on their veto power to block EU decision-making in a number of procedures which require unanimity. The EU then becomes a hostage of its own constitution and the unanimity requirements included therein. Remarkably, the [outcome](#) of the Conference on the Future of Europe offers quite an overview of how delicate this moment is for the fate of EU decision-making. The implementation of [more than 10% of the 178 recommendations](#) coming from the Citizens’ Panels would require Treaty change. This has resulted in the European Parliament’s urgent call for [‘reforming voting procedures in the Council to enhance the European Union’s capacity to act, including switching from unanimity to qualified majority voting’](#).

It is difficult to think of a better scenario for academics (and [politicians](#)) to unleash their imagination. Among the multiple proposals put forward within the last couple of years, the collective abandonment of the EU and the simultaneous creation of an “EU 2.0” without the rule of law non-compliant Member States ([Chamon](#) and [Theuns](#)) allows for fascinating thought experiments. In this post, I will engage in one of those experiments, assessing certain legal aspects of this ‘nuclear option’ that some Member States might consider triggering if the EU’s operations were to be irretrievably paralysed. In particular, I propose to adopt an approach that would, in the first place, consider the EU 2.0 as a leverage tool to strengthen EU decision-making. Here, a disclaimer applies: the aim of this blogpost is to take part in the speculative discussion concerning the creation of an EU 2.0. I am aware of the (current) political unlikelihood of an *en masse* withdrawal of all rule of law compliant

Member States. Nonetheless, the EU 2.0 is a thought-provoking concept. The analysis of its constitutional feasibility retains therefore a certain appeal among EU lawyers.

The ever closer union, taboo questions, and time concerns

The idea of an *en masse* withdrawal is nothing new: in the aftermath of the signing of the Maastricht Treaty, the negative outcome of the Danish referendum triggered rumours concerning a collective withdrawal of the other eleven Member States ([Curtin](#), pp. 67-68). Although such an action would be politically ground-breaking and would likely solve the issue of veto threats by rule of law non-compliant Member States, it would be problematic for a number of legal reasons.

First and foremost, although EU Member States can exercise their free will as regards withdrawal from the EU ([Wightman](#), para. 50, discussed by [Cotter](#)), simply planning the creation of an EU 2.0 while leaving certain countries behind would openly contradict the 'ever closer union' objective enshrined in Article 1 TEU. Instead, any strategy considered by the EU Member States should aim at upholding EU values and ensuring the functioning of the Union while, where possible, keeping all Member States onboard ([Bonelli](#)).

Second, merely creating an EU 2.0 identical to the EU would perhaps unblock the contingent deadlock caused by rule of law non-compliant Member States but would not *per se* ensure, in the long term, the closure of loopholes due to the unanimity requirements included in the EU Treaties. The '[inevitable debate](#)' concerns, thus, the 'taboo question': should the EU change the rules of treaty change ([de Witte](#))? Whatever the answer, to do so in the current legal framework the EU needs the common accord of 27 Member States. Instead, a new international organisation such as the EU 2.0 might envisage from the outset smoother rules allowing for treaty change through majority voting, for example.

Third, and linked to the previous point, to create an EU 2.0 and once and for all settle vetocracy issues, the treaty establishing the new international organisation – i.e. a new EU without certain current Member States – should be the result of careful political and legal engineering ([Theuns](#)); engineering which requires resources and, most prominently, time. Therefore, an ideal approach to tackle unanimity issues should show some degree of immediate effectiveness while simultaneously allowing time for deep and delicate reflection.

To address these three issues, this contribution proposes to adopt a strategy that combines EU law and international law tools to build a leverage mechanism capable of strongly discouraging veto-based threats.

The proposed mechanism

The envisaged mechanism would function as follows. All rule of law compliant Member States sign an international treaty outside of the current EU legal framework. Through such a treaty ('the Solemn Declaration') all the signatories commit to triggering collectively Article 50 TEU, if one EU Member State exercises its veto power more than a certain number of times within a certain period (e.g., three times in five years). 'Exercise of the veto power' shall refer to the negative vote of an EU Member State in an EU procedure which envisages unanimity and for which no more than a certain number (e.g., three) of Member States have casted a negative vote. Thus, it is crucial, albeit costly, to actually reach the

moment of voting in those circumstances where the Council and the European Council, in light of the absence of political chances of success, normally refrain from doing so ([De Búrca](#), p. 23). Only when concretely taking a vote, Member States are forced to effectively exercise their veto. To that end, the political willingness of the Council presidency and of the President of the European Council to push for voting in their own agenda proves key. Finally, as a safeguard to prevent potential abuse, two or more vetoes on proposals having the same content shall always count as one.

Next to the Solemn Declaration, its signatories also conclude another international agreement ('EU 2.0 Treaties') whose content essentially reproduces the EU Treaties and the EU Charter of Fundamental Rights. In doing so, the signatories explicitly agree to be bound by the *acquis communautaire*. The crucial difference between the EU 2.0 Treaties and the original EU Treaties lies in Article 48 TEU: the EU 2.0 Treaties provide for treaty change exclusively through "super-qualified majority voting", excluding any passerelle clause. In essence, the super-majority mechanism looks somewhat like the one envisaged in [Article 108 UN Charter](#) or the one proposed by a group of distinguished [scholars](#) in 2000, and only partially included in Commission Prodi's '[Penelope Draft](#)' ([Fabbrini](#), p. 36). The latter aimed at forcing all Member States to adhere to treaty change agreed at the European Council level through super-qualified majority voting. To that end, the Member States that had failed to ratify the agreement containing the amendments would have been 'deemed to have decided to leave the Union'. In essence, the Penelope Draft provided for a form of implicit withdrawal that may recall (albeit with fundamental differences) what has already been [proposed](#) for Poland after the judgment [K-3/21](#) of its Constitutional Tribunal. The design of the mechanism discussed in this post, instead, does not put at stake the EU membership of certain countries, but rather its intrinsic value; value which is reduced to zero in the event of the collective withdrawal of all the other Member States.

The described procedure to amend the EU 2.0 Treaties, moreover, can be activated also before their entry into force, allowing the Member States to modify all provisions except for those concerning treaty change and entry into force. The latter is conditioned upon the collective withdrawal of their signatories from the EU. In other words, the EU 2.0 Treaties automatically enter into force as soon as all their signatories cease to be part of the original EU.

Furthermore, all signatories agree to confer to the EU 2.0 all the assets that they have received from the EU pursuant to the agreement for their collective withdrawal. This agreement, indeed, simply reflects the outcome of negotiations exclusively held among the withdrawing Member States. This is possible because the qualified majority voting clause included in Article 50(2) TEU allows to outvote the rule of law non-compliant minority. As happened in the case of [Brexit](#), all the judicial and political institutional appointments related to the withdrawing States' memberships are ended on the date of withdrawal. The (original) EU institutions remain solely composed of members of the rule of law non-compliant countries, with no budget or infrastructures left. In that regard, it is in the best interest of the withdrawing Member States to also assume all the EU's liabilities, to preserve the financial credibility of the EU 2.0.

Finally, all the signatories agree to allow the rule of law non-compliant EU Member States that have not triggered the mechanism to join the EU 2.0 without being subject to any special condition.

Although this mechanism appears fairly solid from an international law perspective, one might wonder about the likelihood of it being upheld by the Luxembourg judges. The starting point for such an assessment is that, as observed above, Member States exercise their free sovereign will when they trigger Article 50 TEU. That is to say, they do not need to state reasons ([Frantziou](#), p. 73).

Moreover, the conclusion of the 'Solemn Declaration' arguably does not breach the principle of equality among Member States enshrined in Article 4 TEU. In fact, the mechanism envisaged therein is triggered even when one of the signatories, i.e. a rule of law compliant EU Member State, exercises its veto power the required number of times. In other words, there is no distinction between the behaviour of rule of law compliant Member States and other Member States. Furthermore, a rule of law non-compliant Member State will be left out from the EU 2.0 only if it is that State that triggers the mechanism. Otherwise, it will be granted the opportunity to join the EU 2.0 under equal conditions.

In the same vein, recourse to an *extra ordinem* instrument of international law rather than enhanced cooperation would not, in this case, be precluded by the principle of sincere cooperation. The latter principle has been interpreted as precluding the use of international law tools when a certain objective can be pursued through EU law instruments ([Rossi](#), pp. 22-23). However, the significant limitations included in Articles 20 TEU and 326 TFEU would arguably prevent enhanced cooperation from strengthening integration as effectively as the potential creation of an EU 2.0 freed by unanimity requirements.

Even when looking at [Pringle](#), it is difficult to see the Solemn Declaration as merely a way to circumvent EU law, and in particular Article 48 TEU. In fact, from a formal perspective, the EU 2.0 would not come into force until the *en masse* withdrawal is finalised. States that cease to be part of the EU are not bound to respect EU law, including Article 48 TEU, anymore. From a teleological perspective ([Craig](#)), the whole mechanism could be seen as a means to strengthen integration and give effectiveness to the 'ever closer union' clause by facilitating decision-making.

Conclusion: the rule of law riddle

It seems that the strategy proposed in this post would efficiently address some of the concerns linked to the creation of an EU 2.0. First, the mechanism in question would function as a strong deterrent for rule of law non-compliant Member States that excessively rely on their veto power as a political weapon to have EU decision-making in their pockets. They would incur, indeed, the concrete risk of being left alone 'in the empty useless shell of the original EU' ([Chamon and Theuns](#)). Faced with this threat, rule of law non-compliant Member States would probably be discouraged from deliberately paralysing and potentially reversing EU integration. In that sense, the EU 2.0 would, in the first place, work more as political leverage rather than a concrete legal solution. Second, should the threat not prove sufficient, the creation of a new international organisation as *extrema ratio* would provide European countries with the opportunity to address the 'taboo question': learn from experience and draft the EU 2.0 Treaties freed from unnecessarily cumbersome voting requirements. Last, the signatories of the EU 2.0 Treaties would have time to allow political and legal engineering. In fact, the EU 2.0 Treaties might be amended and adjusted through majority voting even before their entry into force, to

ensure that, should their activation prove necessary, they would include the most efficient decision-making schemes.

Although the readers of this blogpost were warned in the introduction of its speculative spirit, it is nonetheless worth mentioning some of the main legal issues that the proposed mechanism would not solve. To begin with, *legal feasibility* from an international and EU law perspective does not necessarily correspond to *legal feasibility* from a national constitutional perspective. Let's take, for instance, treaty change through majority voting: according to the current position of the German *Bundesverfassungsgericht*, as appears from its [Maastricht](#) and [Lisbon](#) decisions, any expansion of EU competence (and corresponding reduction of State authority) bypassing the German Parliament's oversight would amount to a breach of the national constitutional principle of democracy. Even if the interpretation of the *Bundesverfassungsgericht* were to change at some point in the future, at least two further sets of essential questions remain open: one of a more practical nature and the other more theoretical.

First, the transition of the institutional framework from the original EU to the EU 2.0 would offer a number of challenges. For instance, once the mechanism is triggered but withdrawal is not finalised, confusion may be ingenerated as to whether the same public officials are acting in the interest of the original EU or of the EU 2.0. Moreover, national constitutions and laws and several international agreements refer to the original EU. The EU 2.0 would not be able to amend them, at least not unilaterally. How could it ensure that they are updated and/or interpreted as referring to the EU 2.0? As for national constitutions and laws, the solution would entail further commitments by the withdrawing Member States. This would be burdensome and risky, especially in those countries where constitutional amendments require referenda. Regarding international agreements, the situation would be even more problematic, as no unilateral action would be sufficient.

Second, the CJEU might not uphold the legality of such a mechanism. One might argue that, to enforce such a ruling, the Commission would have to start infringement proceedings against a vast majority of the Member States. This would be, however, highly unlikely. Nonetheless, should the rule of law compliant Member States openly disregard a ruling of the CJEU, they would themselves become rule of law non-compliant. On a similar note, when drafting the current EU Treaties, all the Member States agreed upon the unanimity requirements. Limiting now the exercise of such veto power through recourse to mathematical thresholds established *ex post* could arguably amount to a breach of the rule of law. Finally, to put the mechanism in place, a clear and final definition of 'rule of law non-compliant' must be provided. But would such a definition of 'rule of law non-compliant' provided fifteen years after the entry into force of Article 2 TEU be itself rule of law compliant? If we are not prone to accept that 'to save the rule of law you must apparently break it' ([Alemanno and Chamon](#)), the EU 2.0 seems to pose an unsolvable riddle.