

The EU's desire for sovereignty lays it open to blackmail A Contribution to the Debate on the Withdrawal or Expulsion of Member States and an "EU 2.0"

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In the midst of geopolitical conflicts, the EU is fighting for sovereignty on foreign policy, which depends crucially on its internal ability to act. However, the inclinations of the Member States vary significantly on important issues such as immigration and defence. In addition, certain governments bring their populism to Brussels and, on important aspects of sovereignty, deliberately use the unanimity principle to block decisions. External political sovereignty thus comes into conflict with internal institutional governance.

In addition to the so-called market freedoms, e.g. the free movement of goods and services, the Member States have agreed on values such as freedom, democracy, equality and the rule of law [Art. 2 TEU]. Safeguarding these values is a fundamental task of the EU legal system. Recent legislative changes in some Member States (e.g. Hungary and Poland) run counter to these values, giving rise to numerous areas of conflict and leading to debates on the withdrawal and expulsion of Member States from the EU and the establishment of an "EU 2.0". In order to bring these debates onto a more rational level, this article looks at procedural and legal issues surrounding withdrawal and expulsion from the EU, and analyses them from the perspective of *realpolitik*. The following points should be noted:

- ▶ **Withdrawal from the EU:** Despite the political rhetoric, Member States like Hungary are currently unlikely to take such a step of their own volition. Hungary, for example, is the third largest recipient of funds from the EU budget and has close economic ties to the EU.
- ▶ **Expulsion from the EU:** There is some doubt about whether it is legally possible to expel a Member State from the EU. This would be conceivable under customary international law if a Member State were to stray from the path of democracy or persistently disregard EU law. Prior to expulsion, however, a procedure under Art. 7 TEU must have been enacted and sanctions imposed.
- ▶ **Establishment of an "EU 2.0":** Establishing an "EU 2.0" is theoretically possible but would face many problems, including the fact that the international treaties, e.g. free trade agreements, and the EU's assets, such as land and buildings, would not devolve to an "EU 2.0". In view of these obstacles, the establishment of an "EU 2.0" is de facto impossible.

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1 A tale of difficult and damaged relationships

In addition to the so-called market freedoms¹, without which a European single market would not even get off the ground, the EU Member States have also agreed on values such as freedom, democracy, equality, the rule of law and respect for human rights [Art. 2 TEU]. Safeguarding these values is now a fundamental task of the EU legal system. Individual violations will not trouble a European community; they are, in fact, inherent in any legal system.² However, if repeated and systematic violations of rights by a Member State cannot be resolved, they may give rise to a crisis of confidence in that community's ability to act.³

Since 2010, for example, numerous legal developments⁴ have been identified in Hungary whose compatibility with the aforementioned values is at least questionable. The Hungarian government and above all Prime Minister Viktor Orbán are currently coming under severe criticism from the EU Commission, the EU Parliament and numerous Member States, who want to prevent a crisis of confidence. This analysis sets out the most important areas of conflict between Hungary and the EU as an example that may be applied to other Member States.

1.1 Areas of conflict

Area of conflict: Rule of law

The first criticism levelled at the Hungarian government is that it is in violation of the principles of the rule of law due to the major restructuring of the political system undertaken by Orbán since his election as Prime Minister on 29 May 2010. Many aspects, which by Western European standards are an inherent part of a democracy and the rule of law, have been gradually dismantled. Among other things, the EU criticises

- the lack of judicial independence,⁵
- the insufficient transparency of party and campaign financing,⁶
- the lack of control mechanisms for detecting corruption,⁷
- the insufficient editorial and financial independence of public service media and the surveillance of investigative journalists,⁸
- the extensive use made by the Hungarian government of its emergency powers,⁹

¹ Also known as "fundamental freedoms", i.e. the free movement of goods, persons, services and capital.

² Leyrer Leifer Nunes, K. (2023), Die rechtliche Entwicklung Ungarns seit 2010 aus europarechtlicher Sicht, p. 289.

³ Also the reasoning of Leyrer Leifer Nunes, K. (2023), Die rechtliche Entwicklung Ungarns seit 2010 aus europarechtlicher Sicht, p. 289 f.

⁴ See also Leyrer Leifer Nunes, K. (2023), Die rechtliche Entwicklung Ungarns seit 2010 aus europarechtlicher Sicht, p. 38-287.

⁵ Cf. European Commission (2022): Recommendation for a Council Recommendation on the 2022 National Reform Programme of Hungary and delivering a Council opinion on the 2022 Convergence Programme of Hungary, COM (2022) 614, pp. 9 f.

⁶ Cf. European Commission (2021): Rule of Law Report 2021 - Country Chapter on the rule of law situation in Hungary, SWD(2021) 714, pp. 13 f.

⁷ Cf. European Commission (2022): Rule of law Report - Country Chapter on the rule of law situation in Hungary, SWD(2022) 517, p. 14.

⁸ Cf. European Commission (2022): Rule of law Report – Country Chapter on the rule of law situation in Hungary, SWD(2022) 517, pp. 20 ff.

⁹ Cf. European Commission (2022): Rule of law Report – Country Chapter on the rule of law situation in Hungary, SWD(2022) 517, p. 25.

- the ineffective implementation of judgements of European and national courts in Hungary,¹⁰ and
- the inadequacies in the investigation and prosecution of alleged criminal activity as well as the in-adequate organisation of the Hungarian prosecution service.¹¹

The inadequate rule of law has prompted the EU Commission and Council to freeze EU funds intended for Hungary. This consists of € 22 billion in funding from the Cohesion Fund plus € 5.8 billion in grants and € 6.6 billion in cheap loans from the post-Covid recovery fund Next Generation EU.¹²

Area of conflict: Dealings with Russia

Secondly, the EU criticises the Hungarian government's attitude towards Russia. This is because Hungary, which does not itself supply weapons to Ukraine¹³, is using conduct which makes it more difficult for other states to support Ukraine. For example, the country is making it more difficult for the EU to finance arms deliveries¹⁴ and, in the Council, it has blocked € 18 billion of planned EU financial aid to Ukraine. The other Member States had to take a circuitous route to ensure that the financial aid could nevertheless be granted which meant that the loan was guaranteed not by the EU budget but by all 26 Member States except Hungary.¹⁵

In addition, unlike most other Member States, Hungary has not reduced its dependence on Russian gas. On the contrary: As early as August 2022, following negotiations with the Hungarian government, Gazprom began to supply even more gas to Hungary than hitherto contractually agreed.¹⁶ Recently, at a meeting in Moscow, a further expansion of the supply volumes of Russian gas was agreed.¹⁷ In the context of its NATO membership, the country is also putting the brakes on efforts to form a stronger front against Russia. Thus, the Hungarian government sympathised with Turkey's negative stance on the issue of Sweden's NATO membership,¹⁸ even though it officially supported the accession itself. The Hungarian Parliament has still not ratified Sweden's accession.¹⁹ After Turkey's approval of Sweden's accession NATO, Hungary now also seems to be giving in.²⁰

Hungary also took a different position from the rest of the EU on the arrest warrant issued against Vladimir Putin by the International Criminal Court in The Hague. Prime Minister Orbán's chief of staff declared at a press conference that he would not execute the arrest warrant - officially because it was

¹⁰ Cf. European Commission (2022): Rule of law Report – Country Chapter on the rule of law situation in Hungary, SWD(2022) 517, p. 1.

¹¹ Cf. European Commission (2022): Proposal for a Council implementing decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM(2022) 485, Recital 5 ff.

¹² See Tamma, P. (2023), Hungary embarks on judicial reform hoping to unlock EU cash, [https://www.politico.eu/article/hungary-embarks-on-judicial-reform-hoping-to-unlock-eu-cash/#:~:text=The Hungarian parliament on Tuesday,low growth and high prices](https://www.politico.eu/article/hungary-embarks-on-judicial-reform-hoping-to-unlock-eu-cash/#:~:text=The%20Hungarian%20parliament%20on%20Tuesday,low%20growth%20and%20high%20prices). (8 May 2023).

¹³ Cf. Euractiv (2023). [Austria, Hungary agree on not sending weapons to Ukraine](#).

¹⁴ Cf. FAZ (2023). [Pistorius ist von Ungarn „enttäuscht“](#).

¹⁵ European Parliament (2022), Parliament agrees to adapted €18 billion loan to Ukraine, <https://www.europarl.europa.eu/news/en/press-room/20221212IPR64529/parliament-agrees-to-adapted-EU18-billion-loan-to-ukraine> (15.05.2023).

¹⁶ ntv (2022). „Sichere Versorgung des Landes“ – Russland liefert Ungarn mehr Gas.

¹⁷ Tagesschau (2023). [Ungarn setzt weiter auf russisches Erdgas](#).

¹⁸ Euronews (2023). [Hungary says Sweden should 'act differently' if it wants to join NATO](#).

¹⁹ Handelsblatt (2023). [Ungarn lässt Schweden bei Nato-Norderweiterung warten – mit immer neuen Begründungen](#).

²⁰ Neumaier, N. (2023), Orbans leichte Kehrtwende, <https://www.tagesschau.de/ausland/europa/ungarn-schweden-nato-tuerkei-100.html> (17. Juli 2023).

not enshrined in Hungarian law.²¹ Recently, the dispute over Hungary's OTP bank, which is on a blacklist of companies operating in Russia, led to Hungary blocking further EU military aid to Ukraine.²²

Area of conflict: Asylum policy

Thirdly, since the refugee crisis of 2015/2016, there have been repeated disputes between Hungary and the EU, most of them over how to deal with asylum seekers. Thus, in September 2015, the Council adopted a decision, applicable for two years, to relocate 120,000 asylum seekers from Italy and Greece to other Member States. Hungary and Slovakia were unwilling to accept this decision and appealed to the Court of Justice of the European Union (CJEU), but - from their point of view - without success.²³ Subsequently, the EU Commission brought actions against Hungary, Poland and the Czech Republic for violating resettlement obligations and failing to accept asylum seekers from Greece and Italy. The CJEU upheld the claims to that effect, in other words: the EU Commission was - from its point of view - successful.²⁴ The CJEU saw a further violation of EU law in the fact that Hungary allowed asylum applications to be declared inadmissible on the grounds that the applicant entered Hungary via a state in which he or she was not subject to persecution and in which he or she was not at risk of suffering serious harm or in which an adequate level of protection was guaranteed.²⁵

Another legal dispute concerned the establishment of so-called transit zones. Hungary enacted laws under which an asylum application had to be submitted in person to the competent authority and exclusively in two transit zones on the border with Serbia. At the same time, only a small number of people were allowed to enter these transit zones. During the entire asylum procedure, people were not allowed to leave the transit zone (except in the direction of Serbia, i.e. to leave Hungary). Third-country nationals not legally resident in Hungary were to be brought without trial to a narrow strip between the Hungarian border fence and the actual border, where there was no infrastructure whatsoever and no possibility of entering any other part of Hungarian territory. The CJEU ruled that Hungary had thereby violated EU law.²⁶ Over a year after this ruling, the EU Commission filed an action claiming that Hungary had not sufficiently implemented the ruling.²⁷ This action is still pending so no judgement has been passed as yet.

The CJEU has also found a violation of EU law regarding access to asylum procedures. According to a Hungarian law, people who want to apply for asylum in Hungary must first submit a declaration of intent at the Hungarian embassy in Kyiv or Belgrade. Only when this has been positively assessed and the person has received an entry permit can they travel to Hungary to apply for asylum. The CJEU considered this to be a violation of the Asylum Procedures Directive.²⁸

²¹ Tagesschau (2023). [Ungarn würde Putin nicht festnehmen](#).

²² Deutsche Presse Agentur (dpa). (17.05.2023). 500 Millionen für Waffen: Ungarn blockiert Militärhilfe für Ukraine. *ZDF Heute*. <https://www.zdf.de/nachrichten/politik/ungarn-militaerhilfe-ukraine-krieg-russland-100.htm>.

²³ CJEU, Joined Cases C-643/15 and C-647/17 (Slovakia and Hungary v Council), Judgement of 6 September 2017, [ECLI:EU:C:2017:631](#).

²⁴ CJEU, Joined Cases C-715/17, C-718/17 and C-719/17 (Commission v Poland, Czech Republic and Hungary), Judgement of 2 April 2020, [ECLI:EU:C:2020:257](#).

²⁵ CJEU, Case C-564/18 [Bevándorlási és Menekültügyi Hivatal (Tompai)], Judgement of 19 March 2020, [ECLI:EU:C:2020:218](#); Case C-821/19 (Commission v Hungary), Judgement of 16 November 2021, [ECLI:EU:C:2021:930](#).

²⁶ CJEU, Case C-808/18 (Commission v Hungary), Judgement of 17 December 2020, [ECLI:EU:C:2020:1029](#).

²⁷ CJEU, Case [C-123/22](#) (Commission v Hungary).

²⁸ CJEU, Case C-823/21 (Commission v Hungary), Judgement of 22 June 2023, [ECLI:EU:C:2023:504](#).

LGBTIQ policy

Fourthly, Hungary is also currently in conflict with the EU over its LGBTIQ policy. Specifically, this concerns a law that restricts access by under-18s to content relating to homosexuality and gender reassignment. It also restricts access by under-18s to content about "divergence from self-identity corresponding to sex at birth".²⁹ The law is similar to a Russian anti-LGBTIQ propaganda law³⁰ and the EU Commission is of the opinion that it breaches EU law in several respects. As Hungary refused to withdraw the law, the EU Commission brought an action against the country in the CJEU. The action was joined by 15 Member States and the EP³¹ which is an unusual step. The case is still pending so no judgement has been passed as yet.

1.2 Escalation in political discourse: Discussions on withdrawal, expulsion and "EU 2.0"

All these conflicts between Hungary and the EU contributed to Orbán hinting at Hungary leaving the EU in his State of the Nation address in February 2022.³² In this speech, which has to be considered against the background of the parliamentary elections on 3 April 2022³³ and the CJEU ruling on the rule of law mechanism³⁴, which was still pending at the time, Orbán said that the EU was waging "a holy war, a jihad" under the mantra of the rule of law. He also said: "For them [the EU], the rule of law is a tool to mould us in their own image".³⁵ He added that Hungary did not want to become like Western Europe. Conversely, the country did not expect the other EU states to adopt Hungarian asylum or family policies. Hungary wanted to keep the EU together "despite growing cultural estrangement". For this reason, the Hungarian government had repeatedly "made offers of tolerance" both to the European Parliament and the German government. He said: "There is no other solution, only tolerance. This is the only way we can find a common path." Continuing that, otherwise, it would not be possible to continue on a common path. Later, the Hungarian government denied that Orbán was considering leaving the EU.³⁶

²⁹ Cf. European Commission (2021): EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people, Press release of 15 July 2021.

³⁰ Cf. European Commission (2021): Hungary: European Parliament vehemently opposed to Hungarian anti-LGBTIQ law, <https://www.europarl.europa.eu/news/en/press-room/20210701IPR07502/european-parliament-vehemently-opposed-to-hungarian-anti-lgbtqi-law>.

³¹ Cf. Euronews (2023): 15 EU countries, including Germany and France, join legal case against Hungary's anti-LGBT law: <https://www.euronews.com/my-europe/2023/04/07/15-countries-including-germany-and-france-join-legal-case-against-hungarys-anti-lgbt-law>.

³² Cf. Zeit (2022): Viktor Orbán droht mit EU-Austritt, Article dated 12 February 2022, online at: <https://www.zeit.de/politik/ausland/2022-02/ungarn-victor-orban-eu-austritt-androhung>.

³³ Prime Minister Viktor Orbán's ruling Fidesz party won an absolute majority of votes in an electoral alliance with the Christian Democratic KDNP, and once again secured a two-thirds majority in parliament.

³⁴ The Court of Justice dismissed the actions brought by Hungary and Poland against the conditionality mechanism. See on this: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-02/cp220028en.pdf>. See also Section II.1 on the "Rule of law mechanism".

³⁵ Cf. Zeit (2022): Viktor Orbán droht mit EU-Austritt, Article dated 12 February 2022, online at: https://www.zeit.de/politik/ausland/2022-02/ungarn-victor-orban-eu-austritt-androhung?utm_referrer=https%3A%2F%2Fwww.google.com%2F.

³⁶ Cf. Euractiv (2022): Hungarian government denies Orban hinted at Hungary's EU exit, online at: https://www.euractiv.com/section/politics/short_news/government-denies-orban-hinted-at-hungarys-eu-exit/. It should be noted that the Hungarian politician János Volner announced in May 2022 that he would rename his "Volner Party" (a one-man party) the "Huxit Party", cf. https://www.euractiv.com/section/politics/short_news/hungarys-anti-eu-party-re-branded-as-huxit-party/. The party's goal is Hungary's exit from the EU. The party is not currently represented in

The disputes between the EU and Hungary recently led to the European Parliament voting to strip Hungary of the Council Presidency in 2024.³⁷ In addition, there have been noisy discussions about expelling Hungary from the EU.³⁸ The idea of an "EU 2.0", i.e. a withdrawal of the majority of Member States and the founding of a new Union, has also been doing the rounds at the political level.³⁹

1.3 Objective of the input

This input aims to bring the debate on withdrawal and expulsion onto a more rational level. Since both withdrawal and expulsion as well as an "EU 2.0" are being discussed, we will first look at the procedural and legal issues of withdrawal, expulsion and "EU 2.0" (Chapter 2) and then analyse the scenarios on the basis of *realpolitik* (Chapter 3). The report ends with a summary of the findings and a perspective on the way forward (Chapter 4).

It should be noted at this point that the authors of this study do not consider either withdrawal or expulsion of a Member State to be a desirable outcome. It is more important that all actors and institutions exhaust all possibilities for re-establishing a "common ground" for the EU and its Member States and ensure that European values are respected and common rules are adhered to. This is the only basis for strengthening European sovereignty externally.

the Hungarian Parliament. Volner was appointed Foreign Trade Attaché to the Hungarian Embassy in Singapore by the Hungarian government in December 2022; cf. https://en.wikipedia.org/wiki/J%C3%A1nos_Volner.

³⁷ Cf. Süddeutsche Zeitung (2023). [EU-Parlament will Ungarn die Ratspräsidentschaft nehmen](#).

³⁸ Vgl. Moos Christian (2023) [Ungarn muss raus aus der EU](#), Die Zeit (2023) [Ein ernstes Problem](#) and Euronews (2022) [Ein Rauswurf aus der EU - ist er rechtlich möglich?](#).

³⁹ See Theuns, T. (2020), Could we found a new EU without Hungary and Poland? <https://euobserver.com/opinion/149470>, (17.04.2023), which references a remark to that effect by Dutch Prime Minister Mark Rutte, and Moos, C. (2023): Ungarn muss raus aus der EU, <https://www.euractiv.de/section/eu-innenpolitik/opinion/ungarn-muss-raus-aus-der-eu/>.

2 Withdrawal and expulsion from the EU: Procedure and legal issues

2.1 Withdrawal

Procedure under Art. 50 TEU and the "Brexit" test case

Since the Treaty of Lisbon and the introduction of Art. 50 TEU, primary EU law has contained a provision on the withdrawal of a Member State from the EU.⁴⁰ So far, the procedure has only been used once - when the United Kingdom left the EU, referred to as "Brexit"⁴¹. This test case has shaped the way in which this provision is interpreted.⁴² According to Art. 50 (1) TEU, every Member State has the unilateral right - in accordance with its own national constitution - to withdraw from the EU ("right of withdrawal").⁴³ The procedure is bindingly and conclusively⁴⁴ regulated in Art. 50 (2) - (4) TEU.⁴⁵ According to Art. 50 (2), sentence 1 TEU, the withdrawal procedure begins with notification of the intention to withdraw ("declaration of withdrawal") by the Member State concerned to the European Council^{46, 47}.

Declaration of withdrawal: Requirements and revocation

No conditions under European law are attached to the declaration of withdrawal; in particular, the Member State concerned does not have to give any reasons for the withdrawal - it is therefore a "free" right of termination.⁴⁸ The Member State concerned is free to choose the date of withdrawal.⁴⁹ Even after the declaration of withdrawal, the Member State concerned remains a Member State of the EU

⁴⁰ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 1.

⁴¹ "Brexit" influenced the political debate in Europe between 2016 and 2019. It took almost three years from the declaration of withdrawal (29 March 2017) for the withdrawal to come into effect (1 February 2020). It was agreed that there would be a transition period from 1 February 2020 until 31 December 2020. On 1 January 2021, the UK - after almost 50 years of membership - became a third country; see Art. 126 and 127 of the [EU-UK Withdrawal Agreement](#). On the timetable for "Brexit", see also Dörr, O. (2020) in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 53 ff. and Hermann C. / Abel, P. (2022), in: Krenzler, G. / Hermann, C. / Niestedt, M. / Abel, P. (Eds.), EU-Außenwirtschafts- und Zollrecht, 20th Update, 132c EU27-Vereinigtes Königreich Großbritannien und Nordirland, para. 1.

⁴² This refers to the process that accompanied the UK's withdrawal declared on 29 March 2017. Greenland's withdrawal in 1985 was a special case and did not constitute a "withdrawal". For full summary see Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 2 and 7 as well as Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 3.

⁴³ Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 3 and 17 f.; Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 4.

⁴⁴ Individual questions remain however. Thus, e.g., Art. 50 TEU does not regulate whether a Member State can revoke its declaration of withdrawal.

⁴⁵ Re-accession - Art. 50 (5) TEU - is not considered here. For full summary see Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 26 and 52.

⁴⁶ According to Art. 15 (2) TEU, the European Council is composed of the Heads of State or Government of the Member States and the President of the European Council (currently: Charles Michel) and the President of the Commission (currently: Ursula von der Leyen). The High Representative of the Union for Foreign Affairs and Security Policy (currently: Josep Borrell) takes part in its work.

⁴⁷ Specifically, to its president. For full summary see Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 7 and Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 27 f.).

⁴⁸ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 4; Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 19.

⁴⁹ Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 20.

- with all rights and obligations - until the conclusion of the procedure.⁵⁰ The declaration of withdrawal may be unilaterally revoked by the Member State concerned According to the CJEU's judgement in the case of *Wightman*⁵¹, revocation must be unambiguous and unconditional, and remains possible until conclusion of the procedure (either by entry into force of the withdrawal agreement or expiry of the withdrawal period).⁵²

Withdrawal negotiations and withdrawal agreement

Both the EU and the Member State concerned have a duty under European law to negotiate on a withdrawal agreement⁵³, but no duty to conclude such an agreement.⁵⁴ In other words: withdrawal is not conditional upon the conclusion of a withdrawal agreement.⁵⁵ The withdrawal agreement should also take account of the prospects for future relations. In the "Brexit" test case, this was implemented in the form of a political declaration of intent attached to the withdrawal agreement.⁵⁶

The representatives of the Member State concerned are excluded from all deliberations and decisions both in the European Council and in the Council concerning the withdrawal (Art. 50 (4) TEU).⁵⁷ However, the representatives of the Member State in the European Parliament are not excluded and continue to be entitled to vote.⁵⁸ This is relevant in particular because the EP must approve a withdrawal agreement (end of Art. 50 (2) TEU).

Timing and legal consequence of a withdrawal

The date on which the withdrawal becomes legally effective is determined in accordance with Art. 50 (3) TEU: where there is an agreement between the EU and the withdrawing state, it will be on the **mutually agreed date** contained in a withdrawal agreement; in the absence of an agreement, it takes place **automatically** two years after the **declaration of withdrawal** (so-called "*sunset clause*";

⁵⁰ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 7; Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 49.

⁵¹ CJEU, Case C-621/18 (*Wightman et al.*), Judgement of 10 December 2018, [ECLI:EU:C:2018:999](#), para. 74.

⁵² It is argued in some of the literature that there must at least be special circumstances for a withdrawal to be revoked, otherwise this could potentially be seen as a means of renegotiating the terms of membership. In his opinion in the *Wightman* case, Advocate General Sánchez-Bordona took the view that Art. 50 TEU did indeed permit unilateral revocation, but that this was subject to the condition that there was no abuse of legal rights. Although the CJEU largely went along with the Closing Submissions, it deviated on this material point and refrained from adopting this condition. This decision ranks as highly political. For full summary see Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 8 - 14 and Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 23.

⁵³ So far "Brexit" is the only precedent for this. For details on the EU-UK withdrawal agreement, see Hermann, C. / Abel, P. (2022), in: Krenzler, G. / Hermann, C. / Niestedt, M. / Abel, P. (Eds.), EU-Außenwirtschafts- und Zollrecht, 20th Update, 132c EU27-Vereinigtes Königreich Großbritannien und Nordirland.

⁵⁴ Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 5 and 16; Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 20 and 30.

⁵⁵ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 25. In the test case involving "Brexit", negotiations met with political discord in the United Kingdom, which blocked the conclusion of the agreement for many months; see also Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 7.

⁵⁶ See also Art. 50 (2), sentence 2 TEU and Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 22.

⁵⁷ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 20.

⁵⁸ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 20.

withdrawal period).⁵⁹ The two-year withdrawal period may be extended by agreement between the European Council and the withdrawing state, Art. 50 (3) TEU. Such an extension must be decided unanimously by the European Council. It can also be extended several times - as happened on three occasions in the "Brexit" test case.⁶⁰

The legal consequence of withdrawal is that the withdrawing state is no longer bound by European law - not even secondary law, e.g. regulations and directives. It is also no longer subject to the jurisdiction of the CJEU.⁶¹ National laws of the withdrawing state that served to implement European directives remain in force as national law but may then be adapted or abolished at will by the national legislator.⁶²

Negotiations on future relations

Once the state in question has effectively left the EU, future relations are negotiated in the light of a political declaration⁶³.⁶⁴ There are no requirements for this under European law. In principle, various forms of future relationship are conceivable:

- a bilateral free trade area ("Canadian Solution")⁶⁵;
- Integration into a multilateral free trade area, the European Economic Area (EEA) ("Norwegian Solution")⁶⁶;
- Integration into a multilateral free trade area, supplemented by bilateral agreements ("EFTA+" or "Swiss Solution")⁶⁷;

⁵⁹ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 24 f.; Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 22 and 40 f.

⁶⁰ The "Brexit" withdrawal agreement explicitly links both points in time, in that Art. 185 (2) of the [EU-UK Withdrawal Agreement](#) links entry into force of the agreement to the expiry of the extended period pursuant to Art. 50 (3), semi-clause 2 TEU. For full summary see Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 23; Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 22 as well as 40, 42 and 43.

⁶¹ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 39; Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 45.

⁶² Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 42; Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 51.

⁶³ At least this is what happened in the "Brexit" test case. The EU institutions decided from the outset that a formal agreement on future relations could only be concluded after the withdrawal had taken effect, i.e. when the former Member State had become a "third country". Therefore, only a "Political Declaration" was attached to the withdrawal agreement ("Separation Hypothesis"); see Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 70th Update, Art. 50 TEU, para. 35.

⁶⁴ Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 31.

⁶⁵ Structured by way of an economic and trade agreement - as compared with a single market, a bilateral free trade agreement is far less integrated economically and institutionally. For full summary see Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 33.

⁶⁶ This does not provide a customs union and requires border controls. The EEA is a connecting platform between the EU and the European Free Trade Association (EFTA) with common institutions. For full summary see Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 34.

⁶⁷ The withdrawing Member State could join EFTA, but not the EEA. The connection to the EU would then be secured through the conclusion of numerous, bilateral treaties. The state is not then part of the European customs union and can conclude its own free trade agreements. This route is time consuming and bound up with substantial red tape - see, for example, the years of negotiations between the EU and Switzerland. For full summary see Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 35. On this see also euractiv.com (2023), [Switzerland eyes return to EU talks](#).

- a customs union⁶⁸; or
- Relations based on WTO law⁶⁹.

2.2 Expulsion

No formal expulsion procedure exists in EU law

The EU Treaties do not contain any provision covering the expulsion of a Member State. Nevertheless, the idea of excluding a Member State is not new; it arose in the 1960s when France blocked decisions in the Council for some time.⁷⁰

Recourse to international law

A possibility for expulsion may at best arise from general international law, namely from the Vienna Convention on the Law of Treaties (VCLT⁷¹). VCLT provisions on which a Member State's expulsion could conceivably be based are Art. 60 VCLT (Termination or suspension of the operation of a treaty as a consequence of its breach) and Art. 62 VCLT (Fundamental change of circumstances):⁷²

- Art. 60 (2) (a) VCLT provides that a material breach of a multilateral treaty by one of the parties entitles the other parties to suspend the treaty in whole or in part or to terminate it by mutual consent, either as between all the parties or - of relevance for the purposes of this study - as between themselves and the defaulting state. According to Art. 60 (3) VCLT, a material breach is most notably a breach of a provision essential to the accomplishment of the object or purpose of the treaty.
- A fundamental change in the circumstances existing at the time of the conclusion of the treaty, in turn, authorises the termination of the treaty in accordance with Art. 62 (1) VCLT if⁷³
 - it was not foreseen by the parties,
 - the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty, and
 - the change in circumstances would radically transform the extent of obligations still to be performed under the treaty.

⁶⁸ A customs union is usually designed to be a "preliminary stage" to EU membership. It aims to push for the dismantling of tariffs and promote the free movement of goods, on an intergovernmental basis. For full summary see Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 36.

⁶⁹ Even after leaving the EU, the withdrawing Member retains its status as WTO member. For full summary see Calliess, C. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 50 TEU, para. 38.

⁷⁰ Volz, H.-P. (2001), Austritt und Ausschluss aus der Europäischen Union, in: Ginther, K. et al. (Eds.), Völker- und Europarecht, pp. 145-165 (147).

⁷¹ Vienna Convention on the Law of Treaties, [UNTS, Vol.1155, p. 331](#).

⁷² Stein, T. (1998), Die rechtlichen Reaktionsmöglichkeiten der Europäischen Union bei schwerwiegender und anhaltender Verletzung der demokratischen und rechtsstaatlichen Grundsätze in einem Mitgliedstaat, in: Götz, V. / Selmer, P. / Wolfrum, R. (Eds.), Liber amicorum Günther Jaenicke - Zum 85. Geburtstag, pp. 871-898 (p. 888) rejects the possibility of an expulsion per se based on Art. 62 VCLT because this provision only allows for the adaptation or termination of the Treaty, not continuation without the expelled member.

⁷³ Art. 62 (2) refers to treaties that are not relevant here and cannot be terminated by invoking Art. 62 VCLT.

Discussion

Despite these provisions, numerous commentators⁷⁴ consider the expulsion of a Member State to be unlawful. Their main argument is that the EU Treaties conclusively regulate how to proceed if a Member State violates the EU Treaties, i.e. by way of infringement proceedings and the procedure under Art. 7 TEU. The latter provides that the rights of a Member State - e.g. to vote in the Council - may be suspended if that Member State seriously and persistently breaches the values of the EU - respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. This argument finds support in the established case law of the CJEU, according to which Member States are not entitled to "unilaterally adopt corrective measures or measures designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty".⁷⁵ In the same vein, an older judgement states that EU law "establishes a new legal order which governs the powers, rights and obligations of the persons [to whom it is applicable] as well as the necessary procedures for taking cognizance of and penalising any breach of it [so that] Member States shall not take the law into their own hands."⁷⁶ Against this, it is argued that this case law only prohibits Member States from taking unilateral action outside EU law against breaches by another Member State, but not from acting jointly.⁷⁷

Other commentators argue that an expulsion would severely impair the individual rights of the citizens of the expelled state;⁷⁸ that an expulsion would be excessive as compared with a suspension of

⁷⁴ E.g. Kokott, J. (2018), in: Streinz, R. (Ed.), EUV/AEUV, 3rd Edn., Art. 356 AEUV, para. 6; Jaeckel, L. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 71st Update, Art. 356 TEU, para. 19; Schmalenbach, K. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 356 AEUV, para. 3; Hofstötter, B. (2015), in: von der Groeben, H. / Schwarze, J. / Hatje, A. (Eds.), Europäisches Unionsrecht, 7th Edn., Art. 153 TEU, para. 5.; Booß, D. (2012), in: Lenz, C. O. / Borchardt, K.-D. (Eds.), EU-Verträge Kommentar, Art. 7 EUV, para. 7; Schorkopf, F. (2017), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 61st Update, Art. 7 EUV, para. 54; Athanassiou, P. (2009), Withdrawal and expulsion from the EU and EMU, ECB Legal Working Paper Series No. 10, pp. 34 ff.; Calliess, C. (2017), in: Pechstein, M. / Nowak, C. / Häde, U. (Eds.), Frankfurter Kommentar zu EUV, GRC und AEUV, Art. 7 EUV, para. 25; Nowak, C. (2017), in: Pechstein, M. / Nowak, C. / Häde, U. (Eds.), Frankfurter Kommentar zu EUV, GRC und AEUV, Art. 356 AEUV, para. 8; Götting, F. (2000), Die Beendigung der Mitgliedschaft in der Europäischen Union, p. 158; Pache, E. / Rösch, F. (2008), Der Vertrag von Lissabon, Neue Zeitschrift für Verwaltungsrecht, Vol. 27, pp. 473-480 (p. 479); Terhechte, J. P. (2019), Elemente und Wandlungen der Mitgliedschaftsverfassung der EU – Beitritt, flexible Integration, Austritt, Ausschluss, JuristenZeitung, Vol. 74, pp. 105-114 (p. 111); Nicolaysen, G. (2002), Europarecht I, 2nd Edn., pp. 157 f. simply stating that the Treaties do not provide for the expulsion of a Member State and that it should therefore be assumed that Poland and Hungary will remain in the EU, Blanke, H.- J. / Sander, A. (2023), Die europäische Rechtsstaatlichkeit und ihre Widersacher - Anmerkungen zur Situation in Polen mit einem Seitenblick auf Ungarn, Europarecht, Vol. 58, pp. 54-84 (p. 83); considering expulsion based on the VCLT to be unlawful due to the provisions of the EU Treaties, but the expulsion based on emergency law as lawful Schwarze, J. (1983), Das allgemeine Völkerrecht in den intragemeinschaftlichen Rechtsbeziehungen, Europarecht, Vol. 18, pp. 1-39 (pp. 30 ff).

⁷⁵ CJEU, Case C232/78 (Commission v France), Judgement of 25 September 1979, [ECLI:EU:C:1979:215](#), para. 9; Case C-5/94 (Hedley Lomas), Judgement of 23 May 1996, [ECLI:EU:C:1996:205](#), para. 20; Case C-11/95 (Commission v Belgium), Judgement of 10 September 1996, [ECLI:EU:C:1996:316](#), para. 37; Case C-14/96 (Denuit), Judgement of 29 May 1997, [ECLI:EU:C:1997:260](#), para. 35.

⁷⁶ CJEU, Joined Cases 90/63 and 91/63 (Commission v Luxembourg and Belgium), Judgement of 13 November 1964, [ECLI:EU:C:1964:80](#).

⁷⁷ Stein, T. (1998), Die rechtlichen Reaktionsmöglichkeiten der Europäischen Union bei schwerwiegender und anhaltender Verletzung der demokratischen und rechtsstaatlichen Grundsätze in einem Mitgliedstaat, in: Götz, V. / Selmer, P. / Wolfrum, R. (eds.), Liber amicorum Günther Jaenicke - Zum 85. Geburtstag, pp. 871-898 (p. 890).

⁷⁸ Athanassiou, P. (2009), Withdrawal and expulsion from the EU and EMU, ECB Legal Working Paper Series No. 10, pp. 33 f.

membership rights⁷⁹⁰ and that the Member States had decided against bringing in a right of expulsion when they drafted the text of the treaties.⁸¹ The latter point - admittedly without reference to the question of the lawfulness of an expulsion - is also confirmed by the CJEU.⁸²

Even if one rejects the outlined arguments against a right of expulsion under international law, Art. 60 VCLT and Art. 62 VCLT are by no means directly applicable to the EU Treaties because France and Romania have not ratified the VCLT.⁸³ And even if France and Romania ratified it, the VCLT would still not apply to the EU Treaties because, according to Art. 4 VCLT, the VCLT only applies to treaties which are concluded by states after the VCLT has entered into force with regard to such states.

However, the contents of Art. 60 and Art. 62 VCLT could constitute customary international law and as such could also be binding on states that have not ratified the VCLT. The International Court of Justice has affirmed this both for Art. 60 VCLT⁸⁴ and for Art. 62 VCLT⁸⁵, as has the CJEU with regard to Art. 62 VCLT.⁸⁶ While this also meets with approval in the literature on Art. 62 VCLT,⁸⁷ some commentators⁸⁸ take a different view with regard to Art. 60 VCLT.

Furthermore, the CJEU strongly emphasises the independence of EU law from international law.⁸⁹ It believes that, in contrast to ordinary international treaties, the EU treaties created a new legal order

⁷⁹ Understood to mean a suspension on the basis of Art. 60 of the Constitution and not as a suspension on the basis of the Art. 7 TEU procedure, which did not yet exist when *Ehlermann* and *Peukert* wrote their respective contributions.

⁸⁰ Ehlermann, C.-D. (1984), *Mitgliedschaft in der Europäischen Gemeinschaft*, *Europarecht*, Vol. 19, pp. 113-125 (p. 121); Frowein, J.A. (1983), *Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie für den europäischen Integrationsprozeß*, *Europarecht*, Vol. 18, pp. 301-317 (p. 315).

⁸¹ Schorkopf, F. (2000), *Homogenität in der Europäischen Union - Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV*, para. 321; Athanassiou, P. (2009), *Withdrawal and expulsion from the EU and EMU*, ECB Legal Working Paper Series No. 10, p. 32.

⁸² CJEU, Case C-621/18 (*Wightman et al.*), Judgement of 10 December 2018, [ECLI:EU:C:2018:999](#), para. 68.

⁸³ See list of signatory states in the United Nations Treaty Collection (n.d.), https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en (17.04.2023).

⁸⁴ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 (pp. 46 f.): „The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach [...] may in many respects be considered as a codification of existing customary law on the subject.“

⁸⁵ Götting, F. (2000), *Die Beendigung der Mitgliedschaft in der Europäischen Union*, p. 9 with further references.

⁸⁶ CJEU, Case C-162/96 (*Racke*), Judgement of 16 June 1998, [ECLI:EU:C:1998:293](#), para. 24.

⁸⁷ Shaw, M. N. / Fournet, C. (2011), in: Corten, O. / Klein, P. (Eds.), *The Vienna Conventions on the Law of Treaties*, Art. 62 Convention of 1969, para. 15; Villiger, M. (2009), *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Art. 62, para. 30; Jakob, C. T. (1988), *Sanktionen gegen vertragsbrüchige Mitgliedstaaten der Europäischen Gemeinschaft (EWG)*, p. 189; Fischer, P. / Köck, H. F. (2004), *Völkerrecht*, 6th Edn., para. 202.

⁸⁸ Villiger, M. (2009), *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Art. 60, para. 29; Simma, B. (1977), *Zum Rücktrittsrecht wegen Vertragsverletzung nach der Wiener Konvention von 1969*, in: Kipp, H. / Mayer, F. / Steinkamm, A. (Eds.), *Um Recht und Freiheit*, pp. 615-630 (618); *ibid.* (1970), *Reflections on Article 60 of the Vienna Convention on the Law of Treaties and Its Background in General International Law*, *Österreichische Zeitschrift für öffentliches Recht*, Vol. 20, pp. 5-83 (pp. 65 f.) relating to the termination of a multilateral treaty by the other parties to it, which is of relevance here; Hanschel, D. (2012), *Der Rechtsrahmen für den Beitritt, Austritt und Ausschluss zu bzw. aus der Europäischen Union und Währungsunion*, *Neue Zeitschrift für Verwaltungsrecht*, Vol. 31, pp. 995-1001 (pp. 999 f.); dissenting view Jakob, C. T. (1988), *Sanktionen gegen vertragsbrüchige Mitgliedstaaten der Europäischen Gemeinschaft (EWG)*, pp. 173 f.; Schmah, S. (2000), *Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett - Eine europa- und völkerrechtliche Analyse -*, *Europarecht*, Vol. 1, pp. 819-835 (p. 829); Athanassiou, P. (2009), *Withdrawal and expulsion from the EU and EMU*, ECB Legal Working Paper Series No. 10, pp. 12 f.; probably also Sinclair, I. M. (1973), *The Vienna Convention on the Law of Treaties*, p. 103; Fischer, P. / Köck, H. F. (2004), *Völkerrecht*, 6th Edn., para. 202.

⁸⁹ In the same vein Terhechte, J. P. (2019), *Elemente und Wandlungen der Mitgliedschaftsverfassung der EU – Beitritt, flexible Integration, Austritt, Ausschluss*, *JuristenZeitung*, Vol. 74, pp. 105-114 (p. 111).

that was autonomous vis-à-vis international law.⁹⁰ Accordingly, the CJEU almost never uses the VCLT as a basis for interpreting the EU Treaties. It would appear to have done so only once: in *Wightman*,⁹¹ a case that revolved around the question of whether the UK could unilaterally revoke its declaration of withdrawal. Here, too, the CJEU only used the VCLT to confirm the result obtained from its interpretation of the TEU.

Possible reasons for expulsion

Despite these objections, numerous commentators consider the expulsion of a Member State based on general international law to be lawful in principle. Most of them cite Art. 60 VCLT as the legal basis.⁹² Others either do not refer to a legal basis,⁹³ do not specify whether Art. 60 VCLT or Art. 62 VCLT should be the legal basis,⁹⁴ or see a possible legal basis in both provisions.⁹⁵

The literature contains various scenarios under which expulsion is said to be permissible. For an expulsion under Art. 60 VCLT, the following are mentioned:

- The breach of the Treaties by the Member State to be expelled amounts to a definitive rejection of the Treaties and can no longer be dealt with by the procedures provided for in the Treaties (Art. 7 TEU).⁹⁶
- The Member State continues to commit flagrant and persistent breaches of the law even after infringement proceedings and the procedure under Article 7 TEU.⁹⁷

⁹⁰ E.g. CJEU, Case C6/64 (*Costa v E.N.E.L.*), Judgement of 15 July 1964, [ECLI:EU:C:1964:66](#); Case C-621/18 (*Wightman et al.*), Judgement of 10 December 2018, [ECLI:EU:C:2018:999](#), para. 44 f. with further references.

⁹¹ CJEU, Case C-621/18 (*Wightman et al.*), Judgement of 10 December 2018, [ECLI:EU:C:2018:999](#), para. 70 ff.

⁹² Dörr, O. (2020), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), *Das Recht der Europäischen Union*, 70th Update, Art. 53 TEU, para. 6; Schmahl, S. (2000), *Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett - Eine europa- und völkerrechtliche Analyse -*, *Europarecht*, Vol. 1, pp. 819-835 (829); likewise on the basis of the Constitutional Treaty Puttler, A. (2004), *Sind die Mitgliedstaaten noch "Herren" der EU? - Stellung und Einfluss der Mitgliedstaaten nach dem Entwurf des Verfassungsvertrages der Regierungskonferenz*, *Europarecht*, Vol. 5, pp. 669-690 (679); Pechstein, M. (2018), in: Streinz, R. (Ed.), *EUV/AEUV*, 3rd Edn., Art. 49 EUV, para. 18; *ibid.* (2018), in: Streinz, R. (Ed.), *EUV/AEUV*, 3rd Edn., Art. 7 EUV, para. 23; *ibid.* (2014), in: Hatje, A. / Müller-Graff, P.-C. / Terhechte, J. P. (Eds.), *Europäisches Organisations- und Verfassungsrecht*, § 15, para. 21; Ruffert, M. (2022), in: Calliess, C. / Ruffert, M. (Eds.), *EUV/AEUV*, 6th Edn., Art. 7 TEU, para. 34; Geiger, R. (2010), in: Geiger, R. / Khan, D.-E. / Kotzur, M. *EUV/AEUV*, Art. 53 EUV, para. 4; Zuleeg, M. (1981), *Der Bestand der Europäischen Gemeinschaft*, in: Bieber, R. et al. (Eds.), *Das Europa der zweiten Generation*, pp. 55-72 (pp. 63 f.); Volz, H.-P. (2001), *Austritt und Ausschluss aus der Europäischen Union*, in: Ginther, K. et al. (Eds.), *Völker- und Europarecht*, pp. 145-165 (163 f.); Haratsch, A. / Koenig, C. / Pechstein, M. (2020), *Europarecht*, 12th Edn., para. 116; Geiger, R. (2010), in: Geiger, R. / Khan, D.-E. / Kotzur, M. *EUV/AEUV*, Art. 53 EUV, para. 4; Stein, T. (1998), *Die rechtlichen Reaktionsmöglichkeiten der Europäischen Union bei schwerwiegender und anhaltender Verletzung der demokratischen und rechtsstaatlichen Grundsätze in einem Mitgliedstaat*, in: Götz, V. / Selmer, P. / Wolfrum, R. (Eds.), *Liber amicorum Günther Jaenicke - Zum 85. Geburtstag*, pp. 871-898 (pp. 888 f.).

⁹³ Becker, U. (2012), in: Schwarze, J. (Ed.), *EU-Kommentar*, 3rd Edn., Art. 356 AEUV, para. 7.

⁹⁴ Streinz, R. (2023), *Europarecht*, 12th Edn., para. 112 f.).

⁹⁵ Blagoev, B. (2011), *Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?* *Tilburg Law Review*, Vol. 16, pp. 191-237 (pp. 231 f.); Jakob, C. T. (1988), *Sanktionen gegen vertragsbrüchige Mitgliedstaaten der Europäischen Gemeinschaft (EWG)*, pp. 190 f.

⁹⁶ Geiger, R. (2010), in: Geiger, R. / Khan, D.-E. / Kotzur, M. *EUV/AEUV*, Art. 53 EUV, para. 4.

⁹⁷ Hanschel, D. (2012), *Der Rechtsrahmen für den Beitritt, Austritt und Ausschluss zu bzw. aus der Europäischen Union und Währungsunion*, *Neue Zeitschrift für Verwaltungsrecht*, Vol. 31, pp. 995-1001 (p. 999). The author cites this case only hypothetically, as he denies the applicability of Art. 60 VCLT - even as customary international law.

- The Member State permanently disregards the demands issued or upheld by the CJEU to behave in accordance with the Treaty or completely turns its back on democracy, the rule of law or respect for human rights.⁹⁸
- The Member State is persistently in breach of the Treaties, whereby the breaches are not cases covered by Art. 7 TEU and cannot be ended via infringement proceedings.⁹⁹
- In the case of serious, persistent violations of EU values, the Member State will not be influenced by a decision of the European Council establishing the violation, or by concrete sanctions, and insists on EU membership despite the permanent suspension of all rights.¹⁰⁰
- The Member State commits particularly serious breaches of the law directed against the EU following the suspension of its rights in the procedure under Art. 7 TEU.¹⁰¹
- The Member State persistently resists requests upheld or pronounced by the CJEU to behave in accordance with the Treaties, or turns its back on democracy.¹⁰²
- The Member State establishes a dictatorial regime despite the suspension of membership rights.¹⁰³
- The Member State is in serious and persistent breach of the EU's founding values and will not be deterred by the suspension of membership rights.¹⁰⁴
- The Member State persists in its breach of the Treaties and all conceivable legal and political sanction options have been exhausted.¹⁰⁵
- The Article 7 TEU procedure proves to be inadequate and intolerable conditions arise.¹⁰⁶
- The Member State persistently commits extremely serious breaches of the EU Treaties without breaching the EU founding values.¹⁰⁷
- The Member State persistently commits serious infringements of fundamental human rights or fails to implement or enforce significant parts of EU law over a long period of time. In addition, recourse to Art. 60 of the VCLT should be limited to cases of absolute necessity, e.g. if the existence of a state is threatened.¹⁰⁸

Far fewer assertions are available regarding the existence of grounds for an expulsion under Art. 62 VCLT. Older literature¹⁰⁹ - from before the introduction of the list of EU values and the procedure under

⁹⁸ Stein, T. (1998), Die rechtlichen Reaktionsmöglichkeiten der Europäischen Union bei schwerwiegender und anhaltender Verletzung der demokratischen und rechtsstaatlichen Grundsätze in einem Mitgliedstaat, in: Götz, V. / Selmer, P. / Wolfrum, R. (Eds.), *Liber amicorum Günther Jaenicke - Zum 85. Geburtstag*, pp. 871-898 (pp. 888 f.).

⁹⁹ Pechstein, M. (2018), in: Streinz, R. (Ed.), *EUV/AEUV*, 3rd Edn., Art. 49 EUV, para. 18; *ibid.* (2014), in: Hatje, A. / Müller-Graff, P.-C. / Terhechte, J. P. (Eds.), *Europäisches Organisations- und Verfassungsrecht*, § 15, para. 21.

¹⁰⁰ Ruffert, M. (2022), in: Calliess, C. / Ruffert, M. (Eds.), *EUV/AEUV*, 6th Edn., Art. 7 TEU, para. 34.

¹⁰¹ Becker, U. (2012), in: Schwarze, J. (Ed.), *EU-Kommentar*, 3rd Edn., Art. 356 AEUV, para. 7.

¹⁰² Zuleeg, M. (1981), Der Bestand der Europäischen Gemeinschaft, in: Bieber, R. et al. (Ed.), *Das Europa der zweiten Generation*, pp. 55-72 (pp. 63 f.).

¹⁰³ Pechstein, M. (2018), in: Streinz, R. (Ed.), *EUV/AEUV*, 3rd Edn., Art. 7 EUV, para. 23.

¹⁰⁴ Putter, A. (2004), Sind die Mitgliedstaaten noch „Herren“ der EU? - Stellung und Einfluss der Mitgliedstaaten nach dem Entwurf des Verfassungsvertrages der Regierungskonferenz, *Europarecht*, Vol. 5, pp. 669-690 (679).

¹⁰⁵ Volz, H.-P. (2001), Austritt und Ausschluss aus der Europäischen Union, in: Ginther, K. et al. (Eds.), *Völker- und Europarecht*, pp. 145-165 (163 f.).

¹⁰⁶ Streinz, R. (2023), *Europarecht*, 12th Edn., para. 112 f.).

¹⁰⁷ Haratsch, A. / Koenig, C. / Pechstein, M. (2020), *Europarecht*, 12th Edn., para. 116.

¹⁰⁸ Blagoev, B. (2011), Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality? *Tilburg Law Review*, Vol. 16, pp. 191-237 (p. 231). The author does not explain how the violation of human rights or EU law should threaten the existence of a state.

¹⁰⁹ Jakob, C. T. (1988), Sanktionen gegen vertragsbrüchige Mitgliedstaaten der Europäischen Gemeinschaft (EWG), pp. 190 f.

Art. 7 TEU - includes turning away from democracy as an example of possible grounds for expulsion. However, the suspension of membership rights¹¹⁰, being a less draconian measure, was considered preferable to expulsion. On that basis, the EU Commission suspended relations under the Association Agreement with Greece after the military coup in Greece in 1967, but considered a termination of the agreement to be unlawful. If, on the other hand, the fundamental change of circumstances was due to a breach of the EU Treaties, expulsion could conceivably be based on Art. 60 VCLT, but not on Art. 60 VCLT. In addition, one example of a reason that would lead to expulsion on the basis of Art. 62 VCLT is the introduction of a planned economy by a Member State.¹¹¹ Art. 62 VCLT must in any case be interpreted with restraint. No international court appears ever to have affirmed the application of Art. 62 VCLT,¹¹² not even due to the dramatic deterioration in relations between the USA and Iran as a result of the 1979 Islamic Revolution¹¹³.

There is a view, which remains isolated, that if a violation of the Treaty were so serious that its continuation could jeopardise the existence of the EU, this might justify expulsion of the Member State in retaliation¹¹⁴. The example cited is when France blocked decision-making in the Council for some time in the 1960s with its "empty chair policy".¹¹⁵

The view that¹¹⁶ expulsion on the basis of Art. 60 and 62 VCLT is unlawful but permissible on the basis of the right "to take emergency action", also remains an isolated one. This sort of emergency exists in the case of sustained and serious violations of the Treaties, most notably the permanent non-observance of judgements of the CJEU, or the definitive abandonment of generally recognised, fundamental principles of the rule of law and democracy.

Procedure under Art.7 TEU probably a necessary precondition for expulsion

Despite all differences of opinion, it is undisputed among those authors who consider expulsion to be possible in principle, that expulsion is only possible through joint action by all other Member States. There is no unanimity on the question of whether the procedure under Art. 7 TEU must have been carried out before an expulsion but, since this view is frequently affirmed, the procedure under Art. 7 TEU is set out below.

The procedure under Art. 7 TEU is initiated by a reasoned proposal, made by one third of the Member States, by the EU Parliament or by the EU Commission, for the Council to determine that there is a clear risk of a serious breach of EU values by a Member State. The Council may only make this determination with the agreement of four fifths of its members, not including the Member State concerned. Before this can happen, the EU Parliament must give its consent by two-thirds of the votes

¹¹⁰ Again, of course, understood to be based on Art. 60 TEU and not on Art. 7 TEU - which did not exist at the time of publication.

¹¹¹ Blagoev, B. (2011), Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality? *Tilburg Law Review*, Vol. 16, pp. 191-237 (p. 232).

¹¹² Kolb, R. (2016), *The Law of Treaties*, p. 229; Helfer, L. R. (2005), *Exiting Treaties*, *Virginia Law Review*, Vol. 91, pp. 1579-1648 (p. 1643).

¹¹³ Kolb, R. (2016), *The Law of Treaties*, p. 234.

¹¹⁴ According to Fischer, P. / Köck, H. F. (2004), *Völkerrecht*, 6th Edn., para. 992, "retaliation against one lawful but unkind act by another unkind but equally lawful act".

¹¹⁵ Meier, G. (1974), *Die Beendigung der Mitgliedschaft in der Europäischen Gemeinschaft*, *Neue Juristische Wochenschrift*, Vol. 27, pp. 391-394 (p. 393).

¹¹⁶ Schwarze, J. (1983), *Das allgemeine Völkerrecht in den intragemeinschaftlichen Rechtsbeziehungen*, *Europarecht*, Vol. 18, pp. 1-39 (pp. 30 ff).

cast and a majority of its members, and the Council must hear the Member State concerned.¹¹⁷ The Council must regularly verify whether the reasons that led to its determination are still valid.

The European Council may - irrespective of whether the Council has previously determined that there is a risk of a breach of EU values¹¹⁸ - determine, on the proposal of one third of the Member States or of the EU Commission, that the Member State is in serious and persistent breach of EU values. This also requires the consent of the EU Parliament by two-thirds of the votes cast and a majority of its members, and a hearing of the Member State concerned. Unlike the determination of the risk of a violation by the Council, the determination of a violation by the European Council requires unanimity (but, of course, without the Member State concerned) - in other words: every other Member State has a "right of veto". Where the European Council makes such a determination, the Council, acting by qualified majority, may decide to suspend certain rights of the Member State concerned deriving from EU membership, namely the right to vote in the Council. These measures may be amended or revoked by a qualified majority in response to changes in the situation which led to their imposition.

There is dispute regarding the specifics of what further measures can be taken, apart from the deprivation of the right to vote in the Council. What is clear, however, is that restraint must be exercised. Article 7 (3) TEU, for example, states that the Council may decide to suspend "certain" rights. It cannot therefore suspend all rights en bloc, and thereby treat the offending state like a third country. Likewise, Art. 7 (3) TEU requires that, when imposing measures, "the possible consequences of such a suspension on the rights and obligations of natural and legal persons" be taken into account.

Art. 7 TEU does not contain any time limits so the length of the procedure depends on the will of the organs involved. With regard to Poland, the EU Commission asked the Council in December 2017 to determine a clear risk of a serious breach of EU values,¹¹⁹ it asked the EU Parliament to do the same with regard to Hungary in September 2018.¹²⁰ So far, the Council has not come to any such determination, although - as shown - unanimity would not be necessary for this step. No measures have ever been taken to establish a serious and persistent breach of EU values.

2.3 "EU 2.0"

It is theoretically possible for all (other) Member States to leave the EU and establish a new organisation ("EU 2.0") without Hungary that would assume all the tasks previously undertaken by the EU. Similar ideas circulated in 1992 after Denmark's rejection of the Maastricht Treaty.¹²¹ Some argue

¹¹⁷ For the voting modalities, see Art. 354 TFEU.

¹¹⁸ Ruffert, M. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 7 TEU, para. 16; Schorkopf, F. (2017), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 61st Update, Art. 7 EUV, para. 48; Pechstein, M. (2018), in: Streinz, R. (Ed.), EUV/AEUV, 3rd Edn., Art. 7 EUV, para. 10.

¹¹⁹ European Commission (2017), Proposal [COM\(2017\) 835](#) of 20 December 2017 for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

¹²⁰ European Parliament (2018), European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded [P8_TA\(2018\)0340](#).

¹²¹ See Pechstein, M. (2014), in: Hatje, A. / Müller-Graff, P.-C. / Terhechte, J. P. (Eds.), Europäisches Organisations- und Verfassungsrecht, § 15, para. 21; Volz, H.-P. (2001), Austritt und Ausschluss aus der Europäischen Union, in: Ginther, K. et al. (Eds.), Völker- und Europarecht, p. 145-165 (147).

that, from a legal point of view, such an approach constitutes a breach of contract vis-à-vis the Member State concerned.¹²² However, the prevailing opinion is probably that such a procedure is lawful.¹²³

3 *A realpolitik assessment of the options of withdrawal, expulsion and "EU 2.0"*

The political discussion on how the EU should deal with "problematic" Member States now involves three options: 1) withdrawal from the EU, 2) expulsion from the EU and 3) the creation of an "EU 2.0". In this section, we will use the example of Hungary to examine how the scenarios should be classified based on *realpolitik*.

3.1 *Withdrawal*

Withdrawal from the EU must be declared by the withdrawing Member State.¹²⁴ That is currently unlikely, mainly for economic but also for political reasons. Economically, Hungary's exit from the EU would be very costly because Hungary would lose access to the single market, to which the Hungarian economy is closely tied: 71 % of Hungarian exports go to the EU. The main countries of destination for Hungarian exports are Germany (25 %), Italy (6 %), Romania, Slovakia and Austria (5 % each). The largest export markets outside the EU are the United States (4%), the United Kingdom (3%) and China (2%).¹²⁵ 68 % of Hungarian imports come from the EU, in particular from Germany (21 %), Austria (7 %), Slovakia (7 %), Poland (6 %) and the Netherlands and Czech Republic (5 % each). Imports from outside the EU come most notably from China (7 %), Russia (6 %) and South Korea (4 %).¹²⁶

In the event of a withdrawal, trade with the EU would most likely see a major collapse since it is hard to imagine that the EU would be willing to enter into a comprehensive free trade agreement with Hungary. This is because the aforementioned areas of conflict between Hungary and the EU would continue to exist and it is currently hard to imagine that the EU would conclude a comprehensive free trade agreement under these circumstances. And, in addition, the EU does not want to encourage other Member States to leave. As Hungary is almost entirely surrounded by Member States, it would find it difficult to replace its EU trading partners. The Hungarian economy's close ties to the EU are also reflected in the foreign direct investment in the country. The main countries of origin for foreign direct investment are Germany (share of total stock 2020: 19.2%), the Netherlands (18.8%), Austria (12.1%) and Luxembourg (7.8%).¹²⁷ In 2021 and 2022, South Korea was the largest investor in Hungary.¹²⁸ These direct investments would also plummet if Hungary no longer had access to the Single Market.

¹²² Pechstein, M. (2014), in: Hatje, A. / Müller-Graff, P.-C. / Terhechte, J. P. (Eds.), *Europäisches Organisations- und Verfassungsrecht*, § 15, para. 21

¹²³ Nowak, C. (2017), in: Pechstein, M. / Nowak, C. / Häde, U. (Eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV*, Art. 356 AEUV, para. 8; Athanassiou, P. (2009), *Withdrawal and expulsion from the EU and EMU*, ECB Legal Working Paper Series No. 10, p. 26, alluding to the problem that the Council would have to conclude a withdrawal agreement, which would be problematic in the case of a "mass exit"; Blagoev, B. (2011), *Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality?* *Tilburg Law Review*, Vol. 16, pp. 191-237 (p. 227).

¹²⁴ See on this Section 2.1.

¹²⁵ See <https://tradingeconomics.com/hungary/exports-by-country>.

¹²⁶ See <https://tradingeconomics.com/hungary/imports-by-country>.

¹²⁷ See https://www.gtai.de/resource/blob/15002/0a931ae98ce1135cccae11e83029256f/GTAI-Wirtschaftsdaten_November_2022_Ungarn.pdf.

¹²⁸ See <https://hipa.hu/news/fdi-inflow-to-hungary-hits-new-high/>.

Another reason why Hungary will not withdraw is that Hungary is the third largest recipient of funds from the EU budget.¹²⁹ In 2021, the country received € 4.3 billion more from the EU budget than it contributed. This corresponds to 2.5% of Hungarian GDP. Hungary would have to do without this money if it left.

The benefits of membership will diminish if the EU imposes sanctions under an Art. 7 TEU procedure, although there has been no definitive clarification of which sanctions are possible as Art. 7 TEU does not contain an exhaustive list. Art. 7 TEU refers to the Council "suspending certain rights deriving from the application of the Treaties to the Member State in question". The only concrete example which it then gives is the right to vote in the Council. In addition, the academic literature only seems to agree on the fact that speaking and participation rights in meetings can be suspended.¹³⁰ It is not disputed that depriving the EU Commissioner or members of the EU Parliament from the offending Member State of their rights or denying its citizens and courts access to the CJEU would be unlawful.¹³¹

From a political perspective, Hungary's withdrawal is currently unlikely. In the area of the rule of law, for example, Hungary is currently moving closer to the EU in order to receive the frozen EU funds. In addition, a referendum would probably be necessary before a declaration of withdrawal - as was the case for Hungary's accession to the EU.¹³² It is doubtful whether, in this case, a majority would come out in favour of withdrawal because, in the last Eurobarometer survey, 39% of Hungarians said that they had a positive image of the EU.¹³³ In contrast, only 19% said that the EU conjures up a negative image for them (see Fig. 1). The proportion of Hungarians who have a negative image of the EU is thus still significantly lower than the proportion of UK residents at the time of the "Brexit" vote. However, the EU's reputation in Hungary has - on the whole - deteriorated noticeably in recent years. Whether this will be a long-term negative trend is unclear.

¹²⁹ See "Wer finanziert die EU", online at https://www.iwkoeln.de/fileadmin/user_upload/Studien/Report/PDF/2022/IW-Report_2022-Wer-finanziert-die-EU.pdf, p. 15.

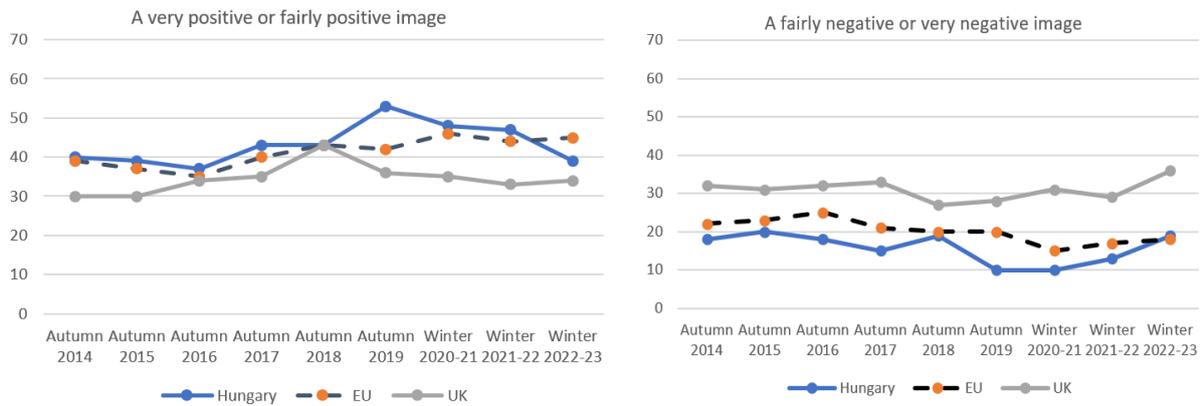
¹³⁰ Ruffert, M. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 7 TEU, para. 28 f.; Schorkopf, F. (2000), Homogenität in der Europäischen Union - Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV, para. 298 ff.; *ibid.*, (2017), in: Grabitz, E. / Hilf, M. / Nettesheim, M. (Eds.), Das Recht der Europäischen Union, 61st Update, Art. 7 EUV, para. 43; Pechstein, M. (2018), in: Streinz, R. (Ed.), EUV/AEUV, 3rd Edn., Art. 7 EUV, para. 19; Leyrer Leifer Nunes, K. (2023), Die rechtliche Entwicklung Ungarns seit 2010 aus europarechtlicher Sicht, p. 308; Voet van Vormizeele, P. (2015), in: von der Groeben, H. / Schwarze, J. / Hatje, A. (Eds.), Europäisches Unionsrecht, 7th Edn., Art. 7 TEU, para. 13.

¹³¹ Ruffert, M. (2022), in: Calliess, C. / Ruffert, M. (Eds.), EUV/AEUV, 6th Edn., Art. 7 TEU, para. 28; Schorkopf, F. (2000), Homogenität in der Europäischen Union - Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV, para. 308 ff; Pechstein, M. (2018), in: Streinz, R. (Ed.), EUV/AEUV, 3rd Edn., Art. 7 EUV, para. 19.

¹³² Business Leaders (2023): Ungarn Huxit - Europäische Union (EU)? Die Wahrheit zur Meldung, online at: <https://www.business-leaders.net/ungarn-huxit-europaeische-union-eu-die-wahrheit-zur-meldung/>.

¹³³ Cf. Standard-Eurobarometer 98 – Winter 2022-2023, online at: <https://europa.eu/eurobarometer/api/deliverable/download/file?deliverableId=86416>, p. 12.

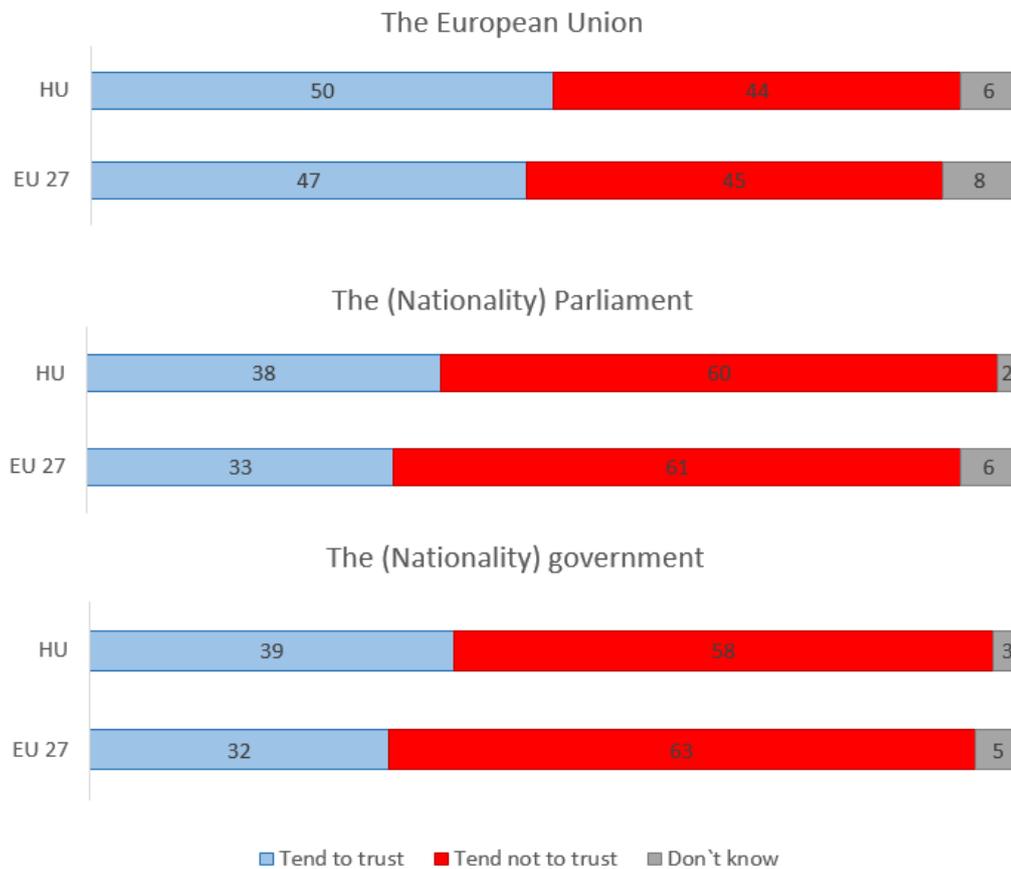
Fig. 1: Eurobarometer survey - In general, do you have a very positive, fairly positive, neutral, fairly negative or very negative image of the EU? (%)



Source: Standard Eurobarometer.

Another argument against leaving is that the Hungarian population trusts the EU more than it trusts the Hungarian parliament and government (see Fig. 2).

Fig. 2: Eurobarometer survey - Do you tend to trust or not to trust each of the following institutions?



Source: Standard Eurobarometer 98 - Winter 2022-2023 - Country Factsheets Hungary.

3.2 Expulsion

From a legal perspective, it is uncertain whether a Member State can be expelled from the EU.¹³⁴ The CJEU has not ruled on this and academic opinion is divided. If one takes the view that expulsion is possible in extreme cases, the abandonment of democracy and the consistent violation of EU law - particularly in spite of CJEU judgements to the contrary - would be conceivable scenarios for this.

If Hungary were to turn more towards Russia, this would probably not in itself be a sufficient reason for expulsion. For expulsion to be a viable option, Hungary would have to align itself politically and economically with Russia, abolish democracy and consistently ignore EU law. This cannot be ruled out, but is unlikely.

In any case, as a general requirement, expulsion can only be enforced if the imposition of sanctions as part of the procedure under Art. 7 TEU fails to result in any change to the factual situation. Thus, it would only be considered as a last resort. The scope of sanctions imposed under Article 7 TEU is disputed, as described above.

In this regard, it should be noted that the conclusion of this procedure and the adoption of harsh sanctions (e.g. withdrawal of votes) is currently difficult to imagine in view of the majorities needed in the Council and the European Council¹³⁵ combined with the fact that Poland is currently vetoing sanctions under Art. 7 TEU.

The idea of Poland supporting not only the procedure under Art. 7 TEU - despite being at risk of sanctions itself under Art. 7 TEU¹³⁶ - but also the expulsion of Hungary, would be conceivable if there were a change of government involving a major repositioning of Poland, or if Hungary were to completely go over to the Russian side, as Poland is one of the Member States most critical of Russia.

3.3 Establishment of an "EU 2.0"

It is theoretically possible for all (other) Member States to leave the EU and establish a new organisation ("EU 2.0") without Hungary that would assume all the tasks previously undertaken by the EU. Similar ideas circulated in 1992 after Denmark's rejection of the Maastricht Treaty.¹³⁷ Some argue that, from a legal point of view, such an approach constitutes a breach of contract vis-à-vis the Member State concerned.¹³⁸ However, the prevailing opinion is probably that such a procedure is lawful.¹³⁹

¹³⁴ See on this Section 2.2.

¹³⁵ The "rule of law mechanism" - more precisely the Conditionality Regulation, see below, Chap. II.1 - is partly a reaction to the fact that procedures under Art.7 TEU were "stuck" due to the majorities needed. See also the guest article by Barley, K. (2020), [Wert\(e\)loses europäisches Geld](#): "...as with the so-called Article 7 procedure. This allows voting rights in the Council to be withdrawn in the case of violations of fundamental values but it already fails because all Member States except for the affected state must agree before the sanction can take effect. The ongoing cases against Hungary and Poland are therefore stuck".

¹³⁶ Since Hungary would then probably drop its support in return.

¹³⁷ See Pechstein, M. (2014), in: Hatje, A. / Müller-Graff, P.-C. / Terhechte, J. P. (Eds.), *Europäisches Organisations- und Verfassungsrecht*, § 15, para. 21; Volz, H.-P. (2001), *Austritt und Ausschluss aus der Europäischen Union*, in: Ginther, K. et al. (Eds.), *Völker- und Europarecht*, p. 145-165 (147).

¹³⁸ Pechstein, M. (2014), in: Hatje, A. / Müller-Graff, P.-C. / Terhechte, J. P. (Eds.), *Europäisches Organisations- und Verfassungsrecht*, § 15, para. 21.

¹³⁹ Nowak, C. (2017), in: Pechstein, M. / Nowak, C. / Häde, U. (Eds.), *Frankfurter Kommentar zu EUV, GRC und AEUV*, Art. 356 AEUV, para. 8; Athanassiou, P. (2009), *Withdrawal and expulsion from the EU and EMU*, ECB Legal Working Paper Series No. 10, p. 26, alluding to the problem that the Council would have to conclude a withdrawal agreement, which would be

The quasi-expulsion of "problematic" Member States by establishing an "EU 2.0" would involve major difficulties¹⁴⁰ because the "EU 2.0" would not be the legal successor of the EU. This means, among other things, that the "EU 2.0" would not be a party to any of the agreements under international law - e.g. free trade agreements - that currently apply to the EU. All EU workers and civil servants would remain EU workers and civil servants and would not automatically switch to "EU 2.0". All EU institutions would have to be re-established and re-staffed. Assets of the EU - such as land and buildings - would not devolve to the "EU 2.0". In view of these and many other practical obstacles, such an approach is almost unimaginable.

4 Conclusion and outlook

Conclusion

Currently, the governments of certain Member States are acting in contradiction to EU policy in some key policy areas. The main areas of conflict are: rule of law, refugee policy, the relationship with Russia, and LGBTIQ policy. Against this background, we considered the procedural and legal issues of the withdrawal and expulsion of a Member State from the EU before applying a *realpolitik* analysis to the two scenarios as well as to the idea of an "EU 2.0".

First of all, it should be noted that according to Art. 50 TEU, each Member State has the unilateral right - in accordance with its national constitution - to withdraw from the EU. The date on which the withdrawal becomes legally effective is determined, in the case of an agreement between the EU and the withdrawing state, on the mutually agreed date in the withdrawal agreement; in the absence of an agreement, automatically two years after the declaration of withdrawal. Once the state in question has effectively left the EU, future relations may be negotiated but there are no requirements for this under European law. Various forms of future relationship are possible. Despite the political rhetoric, Member States like Hungary are currently unlikely to take such a step of their own volition. Hungary, for example, is the third largest recipient of funds from the EU budget and has close economic ties to the EU.

Some doubt is still in evidence about whether it is legally possible to expel a Member State from the EU. One view put forward by the academic literature is that this could be based in extreme cases on Art. 60 VCLT. Most notable grounds for this could be that a Member State turns away from democracy or persistently disregards EU law - despite CJEU rulings to the contrary. However, expulsion can only be considered as a last resort. All other available means must already have been exhausted. In particular, the widespread view is that measures must have been imposed in the procedure under Art. 7 TEU which failed to persuade the Member State to change its behaviour. Furthermore, unanimity of the other Member States is also required. From a political perspective, straying from the path of democracy or persistently disregarding EU law would probably not be enough for Hungary to be expelled because at present Poland is blocking sanctions against Hungary in the Art. 7 TEU procedure and in return Hungary is blocking sanctions against Poland in the Art. 7 TEU procedure.

problematic in the case of a "mass exit"; Blagoev, B. (2011), Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality? *Tilburg Law Review*, Vol. 16, pp. 191-237 (p. 227).

¹⁴⁰ Likewise Athanassiou, P. (2009), Withdrawal and expulsion from the EU and EMU, ECB Legal Working Paper Series No. 10, pp. 37 f.

The quasi-expulsion of "problematic" Member States through the establishment of an "EU 2.0" would involve major difficulties because the "EU 2.0" would not be the legal successor of the EU. This means, among other things, that the "EU 2.0" would not be a party to any of the agreements under international law - e.g. free trade agreements - that currently apply to the EU. All EU workers and civil servants would remain EU workers and civil servants and would not automatically switch to "EU 2.0". All EU institutions would have to be re-established and re-staffed. Assets of the EU - such as land and buildings - would not devolve to the "EU 2.0". In view of these and many other practical obstacles, such an approach is almost unimaginable from the perspective of *realpolitik*.

Outlook

The situation is far from easy. The mechanisms outlined above (expulsion and withdrawal) as well as the establishment of an "EU 2.0" are a means of last resort. The existence of a means of last resort and the efficient application of other mechanisms (infringement procedures, etc.) are a necessary but in no way sufficiently effective condition for binding together an EU with 27 (and potentially more) in some cases very different Member States.

In addition, it must be clearly communicated that the common rules - the list of values such as freedom, democracy and the rule of law - apply to all Member States that have voluntarily chosen to join an EU that is committed to the values of Art. 2 TEU. But the specific meaning of these values is not easy to grasp. In order to (re-)create a common understanding - a "common ground" - the Member States first and foremost - independently of the EU institutions - must really get involved in the dialogue and become the active "Masters of the Treaties" that they are meant to be. Justified criticism can foster the debate¹⁴¹ that is necessary for maintaining the cohesion of such a complex political community. The EU's credibility when it comes to upholding its own values is essential, also and above all in relation to third parties. On the other hand, negotiating common positions across legitimate differences between Member States is an inherent part of the EU's political identity (and institutional stability). There is, however, a natural limit to this balancing act, namely where institutional procedure comes into conflict with political credibility. And this is increasingly the case both in Hungary and in Poland.

¹⁴¹ Basically also Leyrer Leifer Nunes, K. (2023), Die rechtliche Entwicklung Ungarns seit 2010 aus europarechtlicher Sicht, p. 362, which refers mainly to the increased use of infringement proceedings initiated by a Member State (Art. 259 TFEU).

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