Expulsion of a Member State from the EU after Lisbon: Political threat or legal reality?

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Introduction

As recently as 6 January 2010, the Bulgarian Prime Minister, Boyko Borisov, said in an interview that a poor student in the “European Union class” who is constantly behaving badly may even be expelled.¹ European integration has experienced setbacks time and again throughout its history. There have been a number of cases when one or several Member States caused headaches for the others and the European Union (EU) in general. During the so called “empty chair crisis” in 1965-1966 France boycotted the work of the then European Community for half a year. Politicians in the United Kingdom have repeatedly threatened with withdrawal and even put its membership to a referendum in 1975. Nevertheless, compromises have always been reached and expulsion of a recalcitrant Member State has never been on the agenda. The integration brought the countries in the Union (as opposed to Europe as a whole) an unprecedented period of peace and prosperity. However the glue may no longer be strong enough to hold all these countries together. Now that 27 Member States are already part of the EU family and some half a dozen are at the doorstep, European cooperation seems a lot harder than when six countries founded the Union more than 50 years ago. Do the EU and its Member State really have the legal means to part with one or more of the countries that stand in the way of progress? What is the legal truth behind the above-mentioned political statement?

Because of the perceived overwhelming political and economic consequences of such an act, only few authors have ever asked the question whether the legal possibility for expulsion of a Member State exists. The intention to expel a Member State has been predominantly political so it would be important to see whether such possibility is available in the European legal order. The existing literature does not cover all the possible mechanisms and, more importantly, does not reflect some fundamental changes in the light of the Treaty of Lisbon². The purpose of this thesis is to show the current state of affairs after the entry into force of the latest amendments. This work would try to separate the legal issues from any political or economic matters that would only be remotely covered since they are too broad and speculative for the scope of the analysis. There are a number of reasons why some Member States might want to throw out another one.

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¹ Interview with Bulgarian Prime Minister Boyko Borisov, <http://www.btv.bg/news/news_details.pcgi?cont_id=150220> accessed on 1 November 2009

² Whenever Treaty of Lisbon, Lisbon Treaty or just Treaties are mentioned in this work, it should be read as the amended consolidated versions of the European treaties. Whenever a specific article is cited, it shall be specified if it is in the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) or one of the annexes and protocols. The thesis would use the consolidated versions of the Treaties as amended by the Treaty of Lisbon that may be found here: <http://europa.eu/lisbon_treaty/full_text/index_en.htm> (accessed on 1 October 2009)
The present work would elaborate further on some of them by linking them to possible legal provisions that may allow for expulsion. First, we would show that expulsion is not a taboo for the EU. In second and third chapter we would discuss mainly supranational measures taken on an EU level in connection with violation of fundamental values and breach of treaty obligations. Next two chapters would focus on measures that Member States themselves may take mainly on intergovernmental level in order to try and leave behind a recalcitrant country. In the last chapter we would discuss the idea of inserting an expulsion provision in the EU treaties and some of the consequences of expulsion for the Union, its Member States and EU citizens. For the purposes of this paper the terms exclusion, expulsion, termination of membership and revocation of membership should be considered equivalent.

1. Is expulsion precluded by the EU treaties?

Before proceeding into the search for legal basis for expulsion of a Member States, the author considers necessary to show that there is nothing in the EU Treaties that could be interpreted as a general ban on the right of ‘exit’.

1.1. Object and purpose of the treaties

Some authors claim that termination of membership would be against the very nature and purpose of the integration process of the European Union. The preambles of the current EU Treaties indeed underline that the Member States are determined to ‘continue the process of creating an ever closer union among the peoples of Europe’. The preambles have no legal effects and cannot be used as a source for objectives but they may serve as an interpretative aid for the intentions of the drafters of the treaties. The ECJ has also recognized the legal value of the preambles and used them as an aid in its decisions. Moreover, Article 1 of TEU stipulates that the treaty ‘marks a new stage in the process of creating an ever closer union among the peoples of

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1 See, for example: A Verhoeven, ‘How Democratic Need European Union Member States Be? Some Thoughts After Amsterdam’ 23 European Law Review 217
2 Recital 13 of the Preamble of TEU and Recital 1 of the Preamble of TFEU.
4 Article 31 (2) of the Vienna Convention on the law of treaties. The Article was recognized as a norm of general customary international law by the ECJ in Case C-344/04 IATA [2006] ECR I-403, para. 40
5 See, for example: Case 26/62 Van Gend en Loos [1963] ECR 1
Europe’. It is tempting to jump to the conclusion that no country can leave the Union in any way.\(^8\) There are, however, at least two arguments that show that the right to ‘exit’ is not necessarily in conflict with the goal of European integration. First, although the Treaty of Lisbon is a ‘new stage’ in the EU development, the Union has never had a ‘blueprint for the final state’\(^9\) as Joschka Fischer put it. Although every European country is welcome to apply for membership, the EU has never had the obligation to reach universal membership on the continent. This leads to my second argument. If we assume that the goal is to reach ‘an ever closer union’, expulsion of one or even several Member States may not be violation of that objective. Leaving behind a recalcitrant state may actually lead to much closer cooperation between the remaining Member States which in turn may make the Union more attractive to future candidate countries.

1.2. Duration of the treaties

Another often mentioned argument against a right to ‘exit’ is that current Treaties are ‘concluded for an unlimited period’.\(^10\) Opinions diverge greatly on whether this wording is simply an indication of the duration or has further legal importance. Joseph Weiler considers this wording as foreclosing exit from the European Union.\(^11\) According to John Hill the fundamental goal of the European Union is an irreversible and endless process of European integration which would make expulsion incompatible with the letter of the Treaties.\(^12\) Prodromos Dagtoglou notes that it is highly unlikely that the intention of the drafters was to create an ‘indissoluble’ Union which was the suggestion for example for the failed project of the European Political Community\(^13\). However, they didn’t opt for a time limit such as the one included in Article 97 of the Treaty establishing the European Coal and Steel Community\(^14\), either. Unfortunately, the travaux préparatoires for the Treaty of Rome (1957) that established the European Economic

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9 J Fischer, ‘From Confederacy to Federation - Thoughts on the finality of European integration’ (Speech at the Humboldt University in Berlin, 2000) <http://centers.law.nyu.edu/jeanmonnet/papers/00/joschka_fischer_en.rtf> accessed 20 April 2010
10 Article 53 TEU and Article 356 TFEU
14 The Treaty was signed in Paris in 1951 and entered into force in 1952, with a validity period limited to 50 years. The Treaty expired in 2002 and its duration was not extended. See Treaty establishing the European Coal and Steel Community, Article 97, <http://www.unizar.es/euroconstitucion/library/historic%20documents/Paris/TRAITES_1951_CECA.pdf> accessed 3 May 2010
Community are not available. We cannot be certain about the intentions of the drafters and to construct a ban on ‘exit’ from that rule would be too bold.

1.3. The absence of an ‘expulsion clause’

Only several regional and international organizations contain ‘expulsion clauses’ in their constitutive instruments.\textsuperscript{15} For example, in case a Member States violates the aims and principles of the Council of Europe, the Committee of Ministers may decide to terminate the membership of the recalcitrant State after its rights of representation have been suspended and it has denied a request to withdraw.\textsuperscript{16} Similarly, the Charter of the United Nations permits the General Assembly upon the recommendation of the Security Council to expel a Member State that persistently violates the principles of the organization.\textsuperscript{17} Still, the EU treaties do not contain any explicit expulsion clause. That may mean \textit{prima facie} that such possibility is not permitted - since the drafters decided not to deal with the issue in the treaties they did not want to create a possibility for expulsion. However, the argument may be constructed in the opposite direction – whatever is not explicitly forbidden is implicitly allowed. It is possible that the drafters could not reach any consensus on that matter and decided to leave it open. Or as some commentators put it - they just did not want to talk about divorce on the wedding day.\textsuperscript{18} Moreover, the drafters of the treaty may have considered that such right is already implied in other provisions and there is no need to codify it in a separate article. Again, we lack written evidence if the idea about an expulsion clause was even discussed during the drafting of the founding treaties and the reasons behind its lack are not clear. The records about the debate in recent revisions of the treaties will be discussed in the course of the thesis.

1.4. State practice

\textsuperscript{15} For a detailed commentary on expulsion mechanisms in a number of international organizations, see: K Magliveras, \textit{Exclusion from Participation in International Organizations: The Law and Practice Behind Member States Expulsion and Suspension of Membership} (Kluwer Law International, 1999)

\textsuperscript{16} Article 8, Statute of the Council of Europe, <http://conventions.coe.int/Treaties/EN/Treaties/HTML/001.htm>


\textsuperscript{18} JHH Weiler, supra note 11, p. 282; P. Taylor, \textit{The European Communities and the Obligations of Membership: Claims and Counter-Claims}, International Affairs, Vol. 57, No. 2 (1981), pp. 236-253
Even with the absence of an ‘expulsion clause’, there is may still be relevant state practice that may help us reveal the intentions of the Member States with regards to the right of ‘exit’. There is one case of leaving the Union but it was not a Member State but just of part of it that decided to withdraw – Greenland. Yet, it did not leave completely in 1984 but opted for a special status within the territory of Denmark. On top of that, the change of status from full membership to being one of the overseas countries and territories of the EU, was finalized with the mutual consent of Greenland, Denmark and the other Member States. Scholars agree that Greenland was a very special case and is not comparable at all to a Member State leaving the Union. That might have happened if in 1975 voters in the United Kingdom had answered negatively to the question ‘Do you think that the United Kingdom should stay in the European Community (The Common Market)?’ The lack of objections to referendum may be interpreted as showing that Member States do not exclude a general possibility of ‘exit’ from the Union. The failure to act, however, may be attributed to the fact that the Member States and the institutions did not consider the referendum as threatening the EU (then EEC) legal system.

1.5. New right to ‘exit’

All of the above considerations were highly inconclusive until the entry into force of the Treaty of Lisbon which changed the status quo by introducing a procedure in case a Member State decides to leave the Union. Until then there was no explicit provision in the Treaties about the right of voluntary withdrawal from the Union. The new Article 50 would be discussed in details below. Suffice it to say that that the inclusion of the so-called exit clause shows that Member States may be preparing for the worst. Christoph Meyer reminds us that ‘European integration is premised on a belief that everything can be worked out, that compromises will always be found and that rules will be upheld’. The new provision prompted him to argue that the Union also needs a “kick out clause” in order to be able to cope with a potential failure of its

afore-mentioned belief. The new provision also explicitly proves that exit from the European Union is not foreclosed as some interpretations of the Treaties implied. Moreover, in case the right to exit has been precluded by the ‘unlimited period’ provisions of the Treaties, it is bizarre that they have not been changed with the introduction of the withdrawal right.

1.6. Expulsion as an implied power

It is also widely accepted that international organizations should not be limited to the powers they received upon creation because ‘the drafters cannot be expected to think of every possible contingency, and because it may be expected, perhaps even hoped, that internal dynamics will move the organization forward’. There have been general arguments that every organization has implied powers to expel a Member State as a self-protection guarantee. According to a former ECJ judge, political motivations are usually the reason behind the lack of expulsion provisions in political unions but that should not preclude an implied right to part with a member. Although currently striving for deeper political integration, the basis for the European Union has always been economic cooperation and the interdependence between the Member States is much bigger than that in a political union or a military alliance. Alan Dashwood still argues that ‘rule is that the Treaty must be interpreted as conferring any powers that are really indispensable for carrying out the tasks it prescribes’. The European Union has a role in the decision on the accession of a Member States, so it should have the same scope of competences when it comes to its termination. The opposite view holds that an implied competence to expel a Member State would be ultra vires and may only be conferred to the organization by a constitutional amendment. Any such power in the Union would be limited by the principle of conferral which limits its actions on the competences that have been specifically transferred to it by the Member States in the Treaties. The EU does not have the competence to expand its own powers (the so called kompetenz-kompetenz) beyond what has been attributed to it.

24 C. Meyer, supra note 22
29 K Magliveras, supra note 15, pp. 254-257
30 Article 5 TEU.
The silence of the treaties and the analysis of some of their general provisions do not provide enough legal grounds to conclude that the contracting parties had the intention of precluding ‘exit’ from the Union. We will look further if it is possible for other Member States to use any of the existing treaty mechanisms to show the door of a recalcitrant country.

2. Breach of fundamental values

2.1. Far-right parties on the rise

The European Union brings together countries that share some fundamental values. These constitute the political part of the so called ‘Copenhagen criteria’ for membership listed by the European Council in 1993. Namely – democracy, the rule of law, human rights and respect for and protection of minorities. With the Treaty of Amsterdam in 1999 those principles became part of primary law not only in the membership criteria\(^{31}\) but also as self-standing treaty obligations\(^{32}\). The new Treaty of Lisbon added human dignity and equality to the list of freedom, democracy, the rule of law and respect for human rights, including minority rights. Initially those criteria were formulated specifically for the countries in Central and Eastern Europe that were once under the sphere of influence of the Soviet Union but now they have general application. Interestingly enough, it was not one of the former communist states that first brought fears about breaches of the fundamental values in the Union.

The far-right Freedom Party of Austria became part of the governing coalition in 2000. The controversial ideology of the party and the fear of possible fundamental human rights violations made the other then fourteen Members of the EU freeze bilateral diplomatic relations with Vienna.\(^{33}\) Oddly enough, the sanctions were announced by the Portuguese presidency of the Council of Ministers. Although the European Commission’s president announced that the affair in question is purely bilateral, the actions taken against Austria were widely attributed to the EU.

\(^{31}\) Article 49 TEU.
\(^{32}\) Article 2 TEU.
\(^{33}\) This short account of the case draws heavily on the following articles which are also very informative for the legal issues surrounding the sanctions against Austria, see: M McElfresh, ‘COMMENT: European Union Sanctions Against Austria: Was an Assault on Austria an Assault on Democracy?’ 79 University of Detroit Mercy Law Review; E Regan, ‘Are EU Sanctions Against Austria Legal?’ 55 Zeitschrift für öffentliches Recht (Austrian Journal of Public and International Law) 323; Bd Witte and G Toggenburg, ‘Human Rights and Membership of the European Union’ in S Peers and A Ward (eds), The European Union Charter of Fundamental Rights (Hart Publishing, 2004), pp. 73-79
Five months later the fourteen Member States decided to reevaluate their actions and entrusted three ‘wise men’ to draw up a report on Austria’s observance of the common European values. Following the positive conclusions of the report it was again the presidency of the Council (this time France) that announced lifting of the sanctions. The justifications, the efficiency and the legal basis for the sanctions were far from undisputed. However, this incident clearly demonstrated how far most countries would go in order to protect EU’s integrity. If all relations with a country could be cut off on grounds of unsubstantiated fears about violations of human rights, what would be the reaction in case such fears actually materialize? Is it possible for a country to be expelled from the European Union for breaching some of its most cherished values? Now that the Charter of Fundamental Rights acquired full legal enforceability, respect for fundamental rights would be even more important part of the European integration. The electoral success of extremist parties in the 2009 European elections makes the question even more pressing.

2.2. Suspension of membership rights

The first time that the notion of expulsion seems to appear in the history of the European integration is in a report presented at the Madrid European Council in 1995. A reflection group was entrusted with the task to give recommendations for the 1996 intergovernmental conference (IGC) that concluded the Treaty of Amsterdam. The document reads that ‘there is (...) consensus within the Group on the need to insert an Article into the Treaty providing for the suspension of its rights or even the expulsion of a Member State which infringes fundamental human rights or basic democratic principles’. The sanctions procedure included in the Treaty of Amsterdam shows that Member States only accepted the first part of the reflection group recommendation. The new provision gave the Council of Ministers the competence to declare a ‘serious and persistent breach’ of the EU fundamental values in a Member State and suspend with qualified majority ‘certain rights deriving from the application of the Treaties to the Member State in

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34 D Charter and R Watson, ‘European elections: extremist and fringe parties are the big winners’ The Times (London) <http://www.timesonline.co.uk/tol/news/politics/elections/article6452090.ece> accessed 19 December 2009
36 Article 7 TEU, para 3
question’. The most often cited examples of such breach concerns widespread violations of human rights or a coup d’etat.

The Austrian case caused wide political and academic debate and prompted changes in Article 7 TEU that were brought by the Treaty of Nice in 2003. It included a preliminary stage in the procedure during which the Council may determine that there is a ‘clear risk of a serious breach’\(^{37}\) by a Member State of the values in Article 2 TEU. Before taking such decision, the Council was put under the obligation to hear the position of the Member State in question. The IGC working on Treaty of Nice also received a recommendation to include an expulsion clause. This time it was the Federal Advisory Committee on European Affairs of the Belgian Parliament that recommended to the European Council to consider provisions ‘allowing sanctions that go as far as the exclusion of a Member State which does not respect the EU’s fundamental values’\(^{38}\). The suggestion was not accepted by the Heads of State or Government of the Member States.

The inclusion of the sanctions procedure was no doubt a precautionary measure in anticipation of the accession of countries in Central and Eastern Europe. Fortunately, after the accession the former communist states have not caused concern in the area of the basic democratic principles and the mechanism in Article 7 TEU has never been put into practice. However, it is still relevant given that the latest progress reports on the candidate countries Turkey and Croatia still show significant shortcomings in the areas of democracy and rule of law as well as human rights and protection of minorities.\(^{39}\) According to the European citizens, the most important factor to be considered prior to further EU enlargement is freedom and democratic values.\(^ {40}\)

The former Ambassador of the European Commission to the United States John Bruton called Article 7 TEU ‘an important bulwark for democracy in Europe’ and expressed the opinion that the provision may lead to the expulsion of ‘rogue states’\(^{41}\). At first I thought that was just another statement from a politician with no clue about legal provisions. But it turned out that unlike the Bulgarian Prime Minister, Mr. Bruton is a qualified barrister although he apparently

\(^{37}\) Article 7 TEU, para 1
\(^{40}\) J. Bruton, ‘Speech On the Occasion of The European Institute’s 15th Anniversary Gala Dinner’ 7 December 2004 (http://www.eurunion.org/welcome/ambassadorscorner/jbDec72004.html) accessed on 22 February 2010
never practiced law.\textsuperscript{42} If the Union may ‘deprive’ of membership a candidate country that commits flagrant violations of the democratic principles, then can it also do the same with an existing Member State?

One scholar suggests applying Article 7 TEU by analogy in case of serious breach that sanctions cannot rectify.\textsuperscript{43} Such an interpretation would be \textit{ultra vires} and thus in conflict with the principle of conferral. Same conclusion seems to apply to the idea that expulsion on the basis of Article 7 TEU may be possible in extreme cases as ultima ratio measure.\textsuperscript{44} The European Court of Justice is entrusted with the ultimate competence to rule on the interpretation of the treaties\textsuperscript{45} and only its position on that question may clear all uncertainties. The Court cannot act on its own initiative but there is a hypothetical scenario in which it may be called upon to give its opinion if the Council adopts a decision for the expulsion of a Member State on the basis of Article 7 TEU. The Member State in question or any of its natural or legal persons may bring the case for review of the legality of the act of expulsion.\textsuperscript{46} However, the Court’s jurisdiction to question the legality of acts pursuant to Article 7 is limited only to procedural matters.\textsuperscript{47} Back in 1984 the European Parliament’s Draft Treaty establishing the European Union proposed a much wider role for the judiciary. According to the proposal only the Court had the competence to establish the violations of the treaty.\textsuperscript{48} However, under the current state of affairs there is no right of appeal or independent arbitration with regards to the suspension of rights mechanism. Some authors still claim that the Court should still be able to intervene if the decision under Article 7 TEU has effects on the Union.\textsuperscript{49} That would definitely be the case if the provision is used to justify expulsion.

Other authors believe that Article 7 TEU makes expulsion legally impermissible.\textsuperscript{50} That is also the position of the European Commission. In a communication concerning the provision, the Commission underlines the preventive character of the mechanism but refuses to go into the

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\textsuperscript{42} Curriculum vitae of John Bruton presented by the European Commission at \\

\textsuperscript{43} S Griller (ed.), \textit{The Treaty of Amsterdam: facts, analysis, prospects} (Birkhäuser, 2000), p. 184

\textsuperscript{44} Bd Witte and G Toggenburg, supra note 32, p. 72

\textsuperscript{45} Article 267 TFEU.

\textsuperscript{46} Article 263 TFEU.

\textsuperscript{47} Article 269 TFEU.

\textsuperscript{48} Draft Treaty establishing the European Union, Bulletin of the European Communities. February 1984, No 2, pp. 8-26, Article 44 \\
<http://www.ena.lu/?lang=2&doc=8665> accessed on 22 February 2010

\textsuperscript{49} A Verhoeven, supra note 3, p. 217

\textsuperscript{50} Bd Witte and G Toggenburg, supra note 32, p. 72 citing F Schorkopf, \textit{Homogenität in der Europäischen Union - Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV} (Duncker & Humblot 1999), p. 187
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discussion about the possible sanctions that the Council may impose. On its website, however, it gives a straight negative answer to the question whether a Member State may be expelled for violating human rights, for example. Also according to the EU information center EUROPE DIRECT it is legally not foreseen that a Member State can be expelled from the European Union. The reasoning they provide is that the treaties are signed for unlimited period and they sanctions procedure precludes any stronger measures. We have to note that this statement is of purely informative character and does not have legally binding status.

Interpretation of Article 7 cannot lead to a conclusive answer whether it may be used as a legal basis for expulsion of a Member State from the European Union. The current author is in the opinion that the tiebreaker is hidden in the above-mentioned travaux préparatoires of the Treaty of Amsterdam and Treaty of Nice. The drafters obviously had the opportunity to confer the Union and the Council in particular with the powers to expel a culprit Member State. However, they decided not to include such possibility within the meaning of Article 7 TEU. Therefore it cannot be used as a justification for expulsion. The drafters may have hoped that if the suspension clause was strong enough, it would be unnecessary to insert expulsion provision. Jerzy Makarczyk calls the suspension a constructive measure that aims at restoring good conduct and the stability of the organization while expulsion has destructive results and should be used only as a last resort. He also notes that sometimes suspension may lead to such deterioration of the relations between the punished Member State and the others, that it may be better to terminate the whole cooperation between them at least in the framework of the organization. One commentator called the mechanism in Article 7 TEU ‘demi-mesure’. He argues that if the country is not really guilty of violations of fundamental values, then the measure would bring unnecessary humiliation. If, on the other side, the country did commit flagrant violations, the punishment would only be meaningful if can lead to expulsion of a Member State. Nevertheless, the reason behind the reluctance of the drafters to increase the scope of Article 7 TEU may as well be the fact that they knew they could still rely on a different ultima ratio measure.

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51 Commission (EU), 'Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based' (Communication) COM(2003) 606 final 15 October 2003
54 J Makarczyk, supra note 26, p. 480
55 A half-way measure (fr.).
56 PM Defarges, La "constitution" européenne en question (Editions d'organisation, Paris 2004), p. 68
57 See Chapter 6.
The freezing of rights under Article 7 TEU does not free the Member State from any of its obligations under the Treaties including future obligations that may be imposed without its vote being considered. It may de facto put the recalcitrant Member State in the position of a non-member state. As part of the European Economic Area, Norway, for example, enjoys a so-called ‘quasi-membership’ in the EU – it accepts the rules of the internal market but have no say in drafting legislation. The situation with Switzerland is similar but its relationship with the Union is negotiated in a sector-by-sector basis. To put it short, both countries have a huge part of the membership obligations to the EU but do not have all the rights. According to Bruno de Witte overall suspension of rights would mean de facto expulsion of the culprit state. Article 7 TEU, is rather vague on the scale of rights which may be suspended. However, its wording (‘certain rights’) seems to preclude a general suspension of all privileges of the Member State. Moreover, the mechanism does not envisage suspension of the whole application of the Treaties with regards to the Member State in question.

The provision does not specify any time limitations on the suspension or rights, either. The article only requires that the Council should regularly review the situation in order to vary or revoke the measures taken. This unclear situation lead to a revision proposal by a group of MEPs from the European People’s Party (EPP) in 2004 during the Convention on the Future of Europe that was entrusted with the task to prepare the failed Draft Treaty establishing a Constitution for Europe. The idea was that the recalcitrant member state should be given an ultimatum – either to terminate the breach of the values or face expulsion a year later. The proposal did not consider revision of Article 7 TEU but expanding the withdrawal clause that would be discussed below. Interestingly, the decision to expel the Member State would have been taken only by a qualified majority with the consent of the European Parliament. That provision was not included in the Draft Constitution, neither in the subsequent Treaty of Lisbon that maintained its core.

The procedure for suspension of rights is not applicable with regards to breach of substantive law. The separate provisions in that area and whether such violations may lead to expulsion would be discussed in the next chapter.

59 Bd Witte and G Toggenburg, supra note 32, p. 72
60 M Hofstätter, ‘Suspension of rights by international organisations - The European Union, the European Communities and other international organizations’ in V Kronenberger (ed) The European Union and the International Legal Order - Discord or Harmony? (T.M.C. Asser Press, The Hague 2001), p. 43
62 See Chapter 4.2.
3. Breach of treaty obligations

3.1. The black sheep of the Union

In 2004 ten countries became part of the European Union in the so called ‘Big Bang’ enlargement. Bulgaria and Romania, however, did not manage to meet the accession criteria by the time the other countries had already finalized their negotiations with the EU. Eventually, they acceded to the organization but only after the accession treaty was filled with safeguard clauses. Moreover, in order to supervise the reform of the judicial systems and the fight against organized crime and corruption, the European Commission put both countries under regular monitoring through the mechanism for cooperation and verification of progress created before their accession. Shortly after accession Bulgaria and Romania became the black sheep of the club and are still synonyms for corruption, ineffective judicial systems and improper use of European funds. Bulgaria has already seen ‘corrections’ of funds and the March 2010 progress reports state that Sofia and Bucharest still have not brought the reform process to a successful end. Both countries rank far behind most other EU states in the Transparency International 2009 Corruption Perceptions Index. The noun ‘corruption’ is also mentioned dozens of times in the US Department of State’s Human Rights Reports for 2008, quite often in conjunction with the adjective ‘widespread’. More than four out of ten Bulgarians and Romanians do not trust the courts and legal systems of their countries. All this prompted some far-right EU politicians to express openly their desire to expel the two Balkan countries because they are perceived as not

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63 This soft term used by the European Commission includes postponement of awards of funds, reduction on future payments or recovery of funds. For more information, see: Commission (EU), Progress Report on the Cooperation and Verification Mechanism – procedural aspects (Memo), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/260&format=HTML&aged=0&language=EN> accessed 13 February 2010
68 Geert Wilders, Dutch politician and leader of the Party for Freedom (PVV), brings controversy not only in the Netherlands but worldwide with his views on a number of issues such as immigration, freedom of speech, and Islam.
ready to fulfil their obligations as a member. But does the EU have the mechanisms to expel a Member States for failure to live up to their obligations under the Treaties?

3.2. Before: Membership conditionality

Bulgaria and Romania were admitted to the EU only after the other Member States secured ‘an impressive assortment of safeguard clauses, transitional arrangements and other defence measures’. Suspension of rights, a typical precursor of expulsion from international organizations, has been envisaged in the justice and home affairs safeguard clause. Article 38 of the Act of Accession provides for ‘temporary suspension of the application of relevant provisions and decisions in the relations between Bulgaria or Romania and any other Member State or Member States’. The internal market safeguard clause allows the Commission to take ‘appropriate measures’ in case Bulgaria or Romania caused a serious breach or an imminent risk of such breach of the functioning of the internal market. In case of serious economic difficulties, the Act of Accession also allowed for protective measures to be applied by the Commission. By way of analogy to Article 38, we may assume that last two provisions include the possibility of suspension of certain rights but not suspension or termination of membership. Besides, all these measures were only valid for up to three years after the admission of Bulgaria and Romania.

Transitional measures and safeguard clauses were common in other enlargements of the Union. Those temporary mechanisms aimed at nothing more than to limit the negative impact that enlargement may have on the Union and its Member States. The instruments of accession for Bulgaria and Romania, however, included a legal possibility that may be put on the same footing as expulsion from the organization. An unprecedented clause allowing for further postponement of membership was created in case one of the two countries was still ‘manifestly unprepared to...
meet the requirements of membership’. The legal basis for this instrument is Article 4.2 of the Accession Treaty read together with Article 39 of the Act of Accession. This provision was the stick to the sweet carrot of membership. Despite what some authors call ‘serious shortcomings as regards the state of preparedness’, Sofia and Bucharest’s accession was given a green light from the Commission in 2006 and the membership postponement clause was not used. It is yet another lesson for the steps the Member States are willing to take in order to defend the achievements of the European integration.

In 2004 the European Council decided that future accession negotiations with individual candidate States would be based on a specific framework devised ‘according to own merits and specific situations and characteristics of each candidate State’. The heads of state and government even considered imposing permanent safeguard clauses in future enlargements. According to some authors the Union is free to impose any additional membership criteria for new accession countries although introducing such double standards may cause political concerns. Most academics, however, agree that this would violate the prohibition of discrimination on the grounds of nationality which is one of the fundamental principles of the European legal order. Could termination of membership in the EU be included as a legal possibility in some of the future accession treaties? Some of the ‘old’ Member States have required the deepening of the European integration as a precondition for accepting further enlargement of the European Union. Increase of membership and increase of competences more and more often go hand in hand and each wave of enlargement has brought the momentum for new reforms of the EU. It would not be so far-fetched that Member States would agree on including a carefully drafted expulsion clause in order to allow more countries in the Union.

76 See Accession Act, supra note 69, Article 39
78 Editorial, supra note 68, p. 1499
84 C. Hillion, supra note 80, p. 158
Accession treaties have already been used to bring revision of the main treaties. Lucia Serena Rossi suggested using the accession treaty of Bulgaria and Romania to bring about the general withdrawal clause that was finally introduced by the Treaty of Lisbon. She described such option as less elegant from a legal point of view but more feasible when it comes to politics. Some authors, however, do not agree that it would be legally possible to use the accession treaties to bring unlimited changes to the EU. At least for the most probable next Member State, control mechanisms similar to that for Bulgaria and Romania would probably not be applied which means that wider limitations would also not be considered. Such mechanisms, however, may actually help the EU recover from what Steven Blockmans calls ‘enlargement blues’ caused by the last accession in 2007 and the ‘enlargement fears’ that the idea of bringing new Member States instills. And at the end of the day, political considerations would probably prevail over legal problems in case Member States decide to insert an expulsion provision in future accession treaty(ies).

The accession of Bulgaria and Romania brought another peculiar legal situation that may soon be repeated. Between 1st of January 2007 and 1st of December 2009 the two countries were Members of the EU on the basis of the treaty of accession amending the main Treaties. It was not until the entry into force of the Treaty of Lisbon that their membership was ‘written’ into the main Treaties. That brings a far-fetched but still relevant question. Is it easier to expel a new Member State through denunciation the accession treaty which would leave the founding treaties and the Union as a whole intact? Even in case such loophole actually exists, using it would be so undesirable in the case of the EU that we do not consider necessary discussing it any further. However, some general conclusions may be borrowed from the analysis of general international law about termination of membership with the regards of the main Treaties.

Once the country joins the Union respect for its fundamental values and treaty obligations transform from a precondition for accession to important standard of membership. The membership postponement becomes unusable, though. The temporary safeguard measures

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86 See, for example, Article 11 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, <http://eur-lex.europa.eu/en/treaties/dat/12003T/htm/L2003236EN.003301.htm> accessed on 20 April 2010
89 See Chapter 6.
replace the membership incentive as means to ensure compliance with the pre-accession commitments. They, however, do not envisage the possibility to expel a Member State from the organization. Once the carrot of membership has already been eaten, is the stick of its possible termination still a real threat? We already showed that as far as breach of fundamental values is concerned, expulsion is not a legally viable option. Now we would turn our attention to possible breaches of the *acquis* and the Union’s traditional tools to ensure compliance. It is curious that some authors consider the safeguard clauses in the light of the infringement procedure and believe there can be no parallels with the sanctions procedure in Article 7 TEU.\(^{92}\)

### 3.3. After: Infringement proceedings

The EU project has been a successful example of regional integration that virtually all countries on the continent (and not only\(^{93}\)) would like to be a part of.\(^{94}\) Usually candidate Member States are willing to satisfy all requirements imposed on them by the European institutions and make the necessary adaptations to respect the obligations that membership is going to put on them. The purpose of this part would be limited to the question whether the European Union has the ultimate tool to make non-compliance unaffordable for any country that would like to keep its membership after accession.

The Treaties entrust the European Commission with the responsibility to guarantee respect for EU law.\(^{95}\) The instrument that the Commission can use to put those powers into practice is the infringement procedure in Articles 258-260 TFEU. The infringement mechanism has been described by the ECJ as ‘the ultima ratio enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of Member States’.\(^{96}\) While the procedure in Article 7 TEU deals with violations in all Member State’s affairs, the infringement procedure concerns breaches only with regards to Union law obligations. The entry into force of the Treaty of Lisbon means that the procedure is now applicable to both Treaties and the whole range of EU

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\(^{93}\) Morocco’s application for membership was rejected in 1987 most probably because it is not regarded as an European state. See: A. F. Tatham, *Enlargement of the European Union*, (Kluwer Law International, The Hague, 2009), p.204

\(^{94}\) The only exceptions are Belarus and the so called ‘microstates’ such as Andorra, Monaco, San Marino, Liechtenstein and The Vatican.

\(^{95}\) Article 17 (1) TEU.

primary law. The object of the proceedings can be any breach of EU law except for the provisions on the Common Foreign and Security Policy. Article 258 TFEU is really general and its scope quite broad because the European Commission only has to consider that the Member State ‘failed to fulfil an obligation under the Treaties’. Article 259 TFEU also gives the other Member States the possibility to bring the matter before the European Commission and eventually the ECJ. The violation may be caused both by a positive act as well as omissions on the part of Member State(s). Even breach of the requirement of sincere cooperation between the Union and the Member States in what is not Article 4 (3) TEU can lead to infringement proceedings without violation of any other EU provision. The European Commission, however, has identified three categories of breaches that constitute its main concern.

1) Infringements that undermine the foundations of the rule of law
   a) Breaches of the principles of the primacy uniform application of Community law
   b) Violations of the human rights or fundamental freedoms enshrined in substantive Community law
   c) Serious damage to the Community’s financial interests
2) Infringements that undermine the smooth functioning of the Community legal system
   a) Action in violation of an exclusive European Union power in an area such as the common commercial policy; serious obstruction of the implementation of a common policy
   b) Repetition of an infringement in the same Member State within a given period or in relation to the same piece of Community legislation
   c) Cross-border infringements, where this aspect makes it more complicated for European citizens to assert their rights
   d) Failure to comply with a judgment given by the Court of Justice against a Member State

97 Article 226 TEC under the Treaty of Nice concerned ‘obligation under this Treaty’, while the new Article 258 TFEU is applicable for any ‘an obligation under the Treaties’.
98 Article 275 TFEU.
3) Infringements consisting in the failure to transpose or the incorrect transposition of directives, which can in reality deprive large segments of the public of access to Community law and actually are a common source of infringements.

The Commission can initiate the infringement proceedings by sending the Member State a reasoned opinion with which it asks the Member State to remedy the violation of Union Law. Before that the Member State concerned should be invited to submit its own position on the issue. In case the Member State does not comply with the instructions within the specified period, the Commission or another Member State may bring the matter before the Court. In case the Court finds that the Member State has indeed breached its obligations, it would deliver a judgment that has purely declaratory value and would again request from the Member State to put an end to the infringement. The Court cannot annul or declare void any State measures that are in breach of treaty obligations. Neither can it order that the Member State in question take specific action to remove or remedy the violation. Meanwhile the Commission may try to use ‘name and shame’ and ‘peer pressure’ tools to induce compliance such as, for example, press releases and scoreboards making public the violations.

The most serious violation among this should be point 2(d) because the Member State would not only breach its obligations but fail to correct its behavior after it has repeatedly been invited to do so. One commentator even went as far as suggesting that ‘if a Member State were to ignore the European Court and continue to violate the Treaty for an extended period of time, the action probably would be treated as exclusion of the Member State’. Already in 1975 the ECJ lamented the lack of ‘any effective sanction against a state which fails to temper its obligations, to the detriment of states which do’. Back in 1976 two authors wrote:

...a recalcitrant state cannot really be forced to abide by the judgment of the Court or the decision of the Commission. This indeed is the last vestige of sovereignty. In this respect...
the Community differs from a federal state which may have federal means at its disposal for the execution of the judgment of the federal court or the decisions of the federal executive... if the authority of the Community court was to be questioned, the matter would develop into a political crisis within the Community which could be solved only by political means.\footnote{109}

The European Coal and Steel Community, the organization that laid down the foundations for the European Union, had at its disposal a provision to deal with such a situation.\footnote{110} Article 88 allowed Member States to breach the provisions of the Treaty as counter-measures against the infringement.

It is exactly a deep political crisis that makes the idea of expulsion even more relevant with regards to breaches of EU law. With the increasing of the number of cases before the Commission, drafters of the Treaties decided to add another ‘incentive’ for Member States to comply with EU law and ‘give teeth to the infringement procedure’\footnote{111}. The possibility to impose lump sum or periodic payment fine against a Member State that has failed to comply with a judgment by the Court has been introduced in 1993 with the entry into force of the Maastricht Treaty. Are those teeth sharp enough, though? Phedon Nicolaides argues that the fines imposed by the EU do not deter the Member States and ‘it is remarkable’ that they comply at all.\footnote{112} Imposing a lump sum has a punitive effect while imposing a periodic penalty aims at restoring compliance with the legislation. The only mechanism for collection of fines in case a Member State refuses to pay, though, is suspension of funds for it.\footnote{113}

Whether or not non-compliance is a ‘pathological’\footnote{114} problem for the European Union as a whole, most authors agree that some countries have a several times worse compliance record than the other Member States.\footnote{115} Some authors warn that the new Member States may act in revenge once the threat of membership conditionality is gone knowing that the European Union

\footnote{110} ECSC Treaty, supra note 14, Article 88
\footnote{113} L. Prete and B. Smulders, supra note 95, p. 55
\footnote{114} For an analysis of the studies supporting that claim see TA Börzel, 'Non-Compliance in the European Union. Pathology or Statistical Artifact?', Journal of European Public Policy, Volume 8, Issue 5, 2001, p. 803–824.
\footnote{115} See, among others, P. Nicolaides and A. Suren, supra note 107; TA Börzel, supra note 109.
does not dispose of any serious deterrent except the quite long-term perspective of fines.\footnote{G Falkner and O Treib, ‘Three Worlds of Compliance or Four? The EU-15 Compared to New Member States’ (2008) 46 Journal of Common Market Studies 293} It is also important that the financial sanctions imposed by the ECJ would have smaller influence on more powerful and richer Member States because for them the cost of non-compliance may not exceed the cost of compliance\footnote{TA Börzel and D Panke, ‘Policy Matters - But How? Explaining Success and Failure of Dispute Settlement in the European Union’ (Annual convention of the American Political Science Association 2005) <http://userpage.fu-berlin.de/~europe/forschung/docs/BoerzelPanke_APSA05finalversion.pdf> accessed 5 March 2010, p. 5-6}. In these cases the ‘shadow of sanctions’\footnote{TA Börzel and D Panke, supra note 112, p. 5} in the form of expulsion may make high enough the cost of non-compliance and create a level playing field for all Member States.

Expulsion pursuant one of the provisions establishing the infringement proceedings, however, does not seem to be an available option. Even suspension of rights derived from the Treaties, the typically milder procedure, is not envisaged. Such idea, however, have been suggested in the past. The so called ‘Spinelli draft’\footnote{Draft Treaty establishing the European Union, Bulletin of the European Communities. February 1984, No 2, pp. 8-26, Article 44 <http://www.ena.lu/?lang=2&doc=8865> accessed on 22 February 2010} adopted by the European Parliament in 1984, included a single sanctions provision allowing for suspension of rights for both violations of the fundamental democratic principles and serious and persistent violations of Treaty provisions. The national governments considered the reforms in the document too radical and it was abandoned in its entirety. Some of its provisions were included in subsequent treaties such as the Single European Act. The fact that the procedure for suspension of rights with regards to infringements was not introduced and even discussed in the following treaty amendments is revealing for the intention of the drafters about an expulsion clause. At the current stage of European integration, such a step was apparently deemed unnecessary. Again, Member States might have just felt comfortable enough with a ‘plan C’ that international law may provide.\footnote{See Chapter 6.}

4. Refusal to ratify

4.1. From Copenhagen 1992 to Dublin 2008

Member States may cause headaches for the Union not only by violating current obligations but also by blocking the introduction of new ones. The European project started as a
predominantly economic community. Even the first treaty that was to transform it into supranational organization with broader political integration was on the verge of failure after 51% of the Danish electorate voted “no” on the Maastricht Treaty in 1992.\(^{121}\) It was only after Copenhagen gained opt-outs from four important areas of cooperation (Eurozone, Union citizenship, common defence and justice and home affairs), that the Maastricht Treaty was accepted at a second referendum a year later. Those opt-outs are still in force today almost twenty years down the line. History repeated itself when in 2001 the Irish voters rejected the Nice Treaty\(^{122}\) only to accept it in 2002 after Dublin had secured a special protocol on Irish neutrality\(^{123}\). In these two cases neither the Member States, nor the EU institutions officially considered the possibility that the ratifying countries could move ahead without the unwilling state.\(^{124}\) The Treaty establishing a Constitution for Europe, however, was not that successful in 2005. Voters in France and The Netherlands rejected it in separate referendums\(^{125}\) and it was not the two founding Member States that were left behind but the Constitution itself. Member States gave up mainly symbolic parts of the texts, like the anthem and flag or the name “foreign minister” for the current post of High Representative of the Union for Foreign Affairs and Security Policy. However, the ratification of the Treaty of Lisbon in 2008 did not come as easy as expected and hoped. Another referendum fiasco in Ireland and a familiar scenario: new guarantees and a new vote – this time successful. Czech president Vaclav Klaus delayed even further the entry into force of the document by refusing to sign it until he secured an opt-out of the Charter of Fundamental Rights of the European Union. All these cases when one or two countries block the new treaties have been another reason for the idea of expulsion to be thrown out in the public. The latest threat allegedly came from the French president Nicola Sarkozy.\(^{126}\) Eventually, the Treaty of Lisbon came into force but unlike Maastricht, Nice and Amsterdam it does not contain a fixed timetable for further revision.\(^{127}\) Many commentators believe that we would not see amendments to the Lisbon Treaty in the near future. Is expulsion a legal option to overcome the fear of another blockage of further reforms? Most of the mechanisms discussed


\(^{122}\) Ratification process of the Treaty of Nice, <http://www.unizar.es/euroconstitucion/Treaties/Treaty_Nice_Rat.htm> accessed on 09.02.2010


\(^{125}\) In France 54,87% voted against the treaty, while in The Netherlands the text was rejected by 61,6% of the voters. Ratification process of the Constitution, <http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const_Rat.htm> accessed on 09.02.2010

\(^{126}\) <http://www.timesonline.co.uk/tol/news/world/europe/article6869578.ece>

\(^{127}\) See Article N of Maastricht Treaty; Article 2 of the Protocol on the institutions with the prospect of enlargement of the European Union attached to the Treaty of Amsterdam; and 23. Declaration on the future of the Union in the Treaty of Nice.
below are relevant for a ‘refusal to ratify’ scenario but some of them are applicable also in other cases as those discussed in the previous chapters.

4.2. Forced withdrawal

According to EU law the amending treaties should be ratified by all Member States in accordance with their respective constitutional provisions.\textsuperscript{128} This requirement stems from the international law which says that a country cannot be bound by a treaty if it does not express its consent. The unanimity condition prompted very few international organizations to include in their constitutive instruments a possibility for expulsion or compulsory withdrawal in case a Member States refuses to ratify an amendment.\textsuperscript{129}

It may not come as a surprise that Altiero Spinelli’s vision about the structure of the European Union also included a proposal to tackle ratification problems. The 1984 draft envisaged that a new treaty would enter into force if ratified by a majority of Member States representing two-thirds of the Union’s population albeit it did not say what would happen if other countries would not accept it.\textsuperscript{130} This ambiguity opens up the possibility of existence of two separate organizations which would be discussed below.\textsuperscript{131} A more clear idea was put forward in 2002 in an unofficial draft code-named ‘Penelope’ and prepared by a working group at the request of the President of the European Commission.\textsuperscript{132} It was supposed to tackle anticipated problems with the entry into force of the Constitutional Treaty. According to the proposal, Member State would have to sign and ratify a separate agreement laying down the conditions on the entry into force of the Constitution. This separate international treaty would provide a choice to the Member State to accede to the Constitution and the revised European Union or continue its relationship with the others on the basis of an ad-hoc treaty keeping the current level of cooperation. The agreement would lay down the conditions for withdrawal in case a Member State decides not to go through the ratification process at all. The most important innovation was connected with a situation when a Member State signs the Constitution and the agreement but

\textsuperscript{128} Article 48 TEU.
\textsuperscript{131} See Chapter 4.3.
cannot complete the ratification process. In such a case, ‘Penelope’ proposed that if by a certain date a majority of five-sixths of the Member States have ratified both the Constitution and the Agreement, it would enter into force with respect to them and the other countries would not be considered members of the European Union. The problem with this proposal was the fact that Member States would have to ratify unanimously the agreement. That would certainly be problematic in a number of Member States especially those where the government cannot exercise effective control on the ratification process because of a binding referendum requirement.

Another draft for the Constitution also suggested that the countries that fail to ratify the Constitution either accept the changes or leave.\textsuperscript{133} None of those suggestions were adopted, neither was the Constitution. The latter, however, did include one seemingly important change which was preserved in the Treaty of Lisbon. Any amendment should be sent back to European Council in case two years after the adoption four-fifths of the Member States have ratified it but one or several have reached a dead-end.\textsuperscript{134} The proviso was in a separate Declaration attached to the Constitution but with the Treaty of Lisbon it became part of the article governing treaty amendments. The change, however, has more political than legal value because the ratification problems would be considered by the European Council even without the specific provision. Moreover, it does not modify the requirement that all countries should express their consent to for the treaty amendment.

Yet another change, however, may have opened the door for a Member State to leave voluntarily the Union or be compelled to do so. For the first time in the EU history, the Treaty of Lisbon includes a withdrawal clause. The new Article 50 reads that any Member State may decide to leave the organization following its own constitutional requirements. The country shall negotiate an agreement with the European Council for the future relations with the Union. The agreement shall be concluded by the Council of Ministers with the consent of the European Parliament. The representatives of the leaving country in the European Council and the Council cannot participate in the discussions or the voting process. Withdrawal becomes effective after the entry into force of the agreement or after two years in case the European Council and the Member State in question decide to extend that deadline. As already mentioned, this development is a further proof that membership of the EU is not irreversible. Since the provision concerns

\textsuperscript{133} See Bd Witte, supra note 119, p. 21
\textsuperscript{134} Article 48 (5)TEU.
voluntary withdrawal, it is applicable to the ‘refusal to ratify’ in one highly hypothetical case. Namely, when a friendly Member State does not want to ratify a new treaty but is willing to leave and keep its current state of cooperation with the others.\textsuperscript{135} This Member State may ratify the new treaty and then open the procedure for withdrawal by negotiating its future legal relations with the EU.

The new provision also makes possible several other controversial scenarios and this is one of the reasons it is highly criticized in the literature. Commenting the proposed article in the Constitution Henri De Waele remarks that ‘a perilous instrument of blackmail may even be taking root and form’\textsuperscript{136} European Commission expressed fears that the withdrawal right may lead to ‘political equivalent of a game of “dare”’.\textsuperscript{137} One commentator notes that the existence of the withdrawal right may change the political weight of Member States’ positions in the EU.\textsuperscript{138} Indeed, a Member State may decide to withdraw from the Union without concluding any agreement for its future relationship and effectively block the work of the institutions for two years. Moreover, it is not clear whether it is possible to withdraw the notification for its desire to withdraw. As long ago as 1982 Jerzy Makarczyk suggested that expulsion should be possible to prevent abuse and balance the powers of the organization and the Member States. He gave the example of UK’s threats about leaving the EEC without possible retortion mechanism by the then European Community.\textsuperscript{139} The above-mentioned EPP proposal for the Constitution included a possibility to fight abuse of the withdrawal clause. The draft clause envisaged the possibility for a Member State to be expelled in case it has used its right of withdrawal in shady ways. The procedure is the same as described in case of a persistent breach of values for more than one year. MEPs from the EPP also proposed another defense mechanism against abuse. They recommended that the two-year period be removed and a country should be able to withdraw only after a negotiated agreement on its future relationship with the Union has entered into force.

With the Treaty of Lisbon, abuse becomes possible not only on the side of the recalcitrant Member State but also from the other countries in the Union. The new legal mechanism may fall victim to political ends if a group of countries decide that they want to force a Member State to

\textsuperscript{135} Hd Waele, supra note 21, p. 186
\textsuperscript{136} Hd Waele, supra note 21, p. 182
\textsuperscript{139} J Makarczyk, supra note 26, p. 480
withdraw from the Union. Janis Emmanouilidis notes that it would be pointless to demand that a Member State leave the Union if the country in question does not want to do it voluntarily. However, that is not entirely the case. There are ways in which a country may be forced to leave the Union following the procedure in Article 50 TEU. The most ‘legal’ one is by use of the suspension of rights procedure in Article 7 TEU. Given the lack of time limit for the sanctions, they may be imposed for indefinite period. There is no judicial review for that procedure so all the considerations are up to the institutions of the EU without counting the votes of the representatives of the Member State in question. Suspension of voting rights would deprive the Member State of participation in the day-to-day agenda of the EU on important issues that would affect it. Besides, countries may impose bilateral diplomatic sanctions which would not affect the application of the treaties but may as well put political pressure on the recalcitrant state to ask for withdrawal and renegotiation of the cooperation.

There is another legally possible way through which a country may be forced to withdraw. Since the entry into force of the Lisbon Treaty what was known as the ‘codecision’ procedure became the ‘ordinary’ procedure. That means that more and more decisions in the EU would be taken by a qualified majority. It would be easier to adopt a decision that may run counter to the constitutional arrangement of a Member State. The Constitutional court on Poland, for example, ruled that the principle of supremacy of Union norms is not unlimited. In case of collision between a Union norm and a constitutional norm, Poland would be faced with three options – to amend its constitution, to try to promote change of the EU norm or to withdraw from the Union.

All the legal options for termination of a country’s membership by forcing it to withdraw include a degree of political coercion. Most authors agree that such a tool would run counter the spirit of the EU treaties. Bruno de Witte concludes that forced withdrawal has no legal basis neither in EU law, nor international law and is ‘out of the question’. Same position is held by a judge in the German Constitutional Court who dismisses such ideas as nonsense. However, at the end of the day forced withdrawal may actually be the lesser evil in some scenarios (in

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142 Bd Witte, supra note 119, p. 21

particular when it comes to a culprit Member State violating fundamental values, for example) because it may save some of the humiliation of being expelled.

4.3. Enhanced cooperation

As clearly shown above, in case where all of the Member States have to take a decision to move forward with the same speed, reaching a dead-end is often the result. Many European politicians have recommended some form of enhanced cooperation. Different names have been put to what is in its core the same idea - ‘multi-speed Europe’, ‘variable geometry Europe’, ‘Europe à la carte’, ‘concentric circles of integration’ or ‘core-Europe’. Majority of EU citizens also seem to be in favour that some Member States increase their cooperation without waiting for the others.\textsuperscript{144} The Treaty of Amsterdam in 1997 brought explicit legal provision that may allow a group Member States to increase their cooperation in certain fields even though the other may not want to follow suit.\textsuperscript{145} What is now Article 20 TEU read together with Articles 326-334 TFEU allows countries to proceed with further integration in areas that are not part of the Union’s exclusive competences. It is highly unlikely that the mechanism would ever be put into practice considering the strict conditions and limitations that surround it. Recently there have been proposals to use it but only for a very limited area of cooperation.\textsuperscript{146} There are the two well know examples of enhanced cooperation of EU Member States that started outside the EU legal order – the European Monetary System and the Schengen Agreement. Various opt-outs from cooperation also have been negotiated within the boundaries of the EU law. However, for our analysis we are interested only in possibility of large-scale differentiation that covers all aspects of European integration and in practice leaves the recalcitrant Member State behind. Two such scenarios may be envisaged that are relevant for the ‘refusal to ratify’ and other cases as well.

4.3.1. Parallel union

\textsuperscript{144} Flash Eurobarometer \#159, \textltt{http://ec.europa.eu/public\_opinion/flash/fl159\_2en.pdf} accessed on 9 February 2010
\textsuperscript{145} For on different flexible arrangements, see: J Shaw, Flexibility in a “reorganized” and “simplified” treaty (2003) 40 Common Market Law Review 279
Another possibility that would amount to expelling of a Member State would be the creation of new entity without the non-ratifying country/countries. It was the first major ratification crisis surrounding the Maastricht Treaty that brought a similar idea.\textsuperscript{147} The negative outcome of the first Danish referendum made the heads of state and government contemplate the idea of the entry into force of the Treaty on the European Union among the eleven out of twelve Member States that had ratified it. At the time this was not legally possible. However, another solution was also considered. The Treaty of Maastricht created the European Union as an entirely new organization based on several existing entities. The treaty could have been redrafted to exclude the unwilling state. In this scenario the new organization would have consisted of all but one Member State which would have still been a part of the European Community. Compromise was reached and the Maastricht Treaty entered into force with respect to all Member States. The idea, however, resurfaced again with the Constitutional Treaty that also was also claimed to rebuild the Union instead of just amending its constitutive instruments.

Nothing can stop the rest of the countries to proceed with the creation of a new union without one or more of the current Member States. Establishing a new organization would be a matter of a new intergovernmental treaty and nothing in the law of treaties says that the two unions cannot exist simultaneously. However, the legal orders of each of them would be binding to the parties and bring its own rights and obligations. The countries that are members of both Unions would they would still have to fulfil their obligations under the current EU treaties and would not be able to include any of the exclusive EU competences in the new organization. Failure to do so would lead to opening infringement procedures even though there may be no working institutions in the ‘old EU’ to actually initiate them. Moreover, the left-behind state(s) would have the right to claim that their rights and obligations cannot be modified by the creation of the new organization.\textsuperscript{148}

The new organization would probably require new institutional structure since scholars agree that using the institutions of the ‘old EU’ would not be a feasible option therefore the new entity\textsuperscript{149} Such option would lead to complex legal situation because both unions would have similar structure and it would be increasingly difficult for Member States to follow and comply

\textsuperscript{147}The narrative is based on: Bd Witte, ‘Rules of Change in International Law: How Special is the European Community?’ Netherlands Yearbook of International Law 299, p. 330
\textsuperscript{148}The rule of international customary law that a treaty cannot impose rights or obligations on a third party is also codified in Article 35 and Article 36 of the Vienna Convention on the Law of Treaties.
\textsuperscript{149}JA Emmanouilidis, supra note 134, p. 4; E Philippart and MSD Ho, ‘Flexibility and the new constitutional treaty of the European Union’ in J Pelkmans, MSD Ho and B Limonard (eds), Nederland en de Europese grondwet (Amsterdam University Press, Amsterdam 2003), p. 140
with both groups of obligations. Some authors even believe that it would be impossible for such institutions to function with two separate set of rules. The enormous practical difficulties mean that the creation of a new Union would require a great amount of political momentum and readiness to reach a much higher step of integration and limitation of sovereignty which at the present moment does not seem to be the case in the European Union.

Building an entirely new organization would create very serious fragmentation in the European integration – some countries would be bound by both the old and the new provisions while some would only need to follow the rules of the ‘old’ Union. The relations between the two unions would not be stable especially if the new union consists of big member states that may command majority in the old organization. Even if all but one Member States create a new organization this would still draw much bigger dividing lines than just expelling the recalcitrant one. It is so obvious that such an option would be counter the law and the spirit of the European Union that it is not even necessary to try to find answers on the great number of question it poses. Such solution would not be sustainable, cannot bring about the necessary legal certainty and would probably have enormous detrimental effect on the European integration process as a whole.

4.3.2. Withdrawal en masse and creation of a new union

Another a bit more feasible possibility is abandoning the non-ratifying states in the old European Union before creating an entirely new organization. The ‘Union refondée’ scenario is indeed the most radical of all scenarios in case of ratification crises and should mean that the Union cannot continue working without the necessary amendments. It would also mean that the other country(ies) could not be convinced, forced to withdraw or expelled in any other way to prevent blocking the EU. So far most scholars focused on a discussion whether it would be possible for a group of Member States to leave the European Union and create a new entity.

151 Bde Witte, written evidence to the House of Commons European scrutiny committee, at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmeuleg/38-xiv/38xiv-i.pdf> accessed 13 April 2010
152 JA Emmanouilidis, supra note 134, p. 4
153 Bde Witte, supra note 145.
155 E Philippart and MSD Ho, supra note 143, p. 142
new withdrawal clause in the Lisbon Treaty makes that debate irrelevant and the option much more plausible. Using the procedure in Article 50 requires an agreement setting the conditions for withdrawal to be taken by a qualified majority in the Council. The provision is silent on the possibility that more than one country may want to withdraw from the Union at the same time, let alone all but one, for example. Moreover, the procedure envisages receiving the consent of the European Parliament. It is interesting that there is no express prohibition for the Members of the European Parliament from the withdrawing state(s) to participate in the vote for the agreement. However, even if agreement is not reached in the Council, the Treaties would cease to apply for the withdrawing countries two years after they have notified the European Council of their intention to leave the Union. One commentator notes that the ‘exit clause’ is appropriate only in case one or two countries decide to withdraw but would be irrelevant in case of a ‘mass exit’ from the Union. Indeed, given the lack of any specific obligations for the withdrawing country, it is possible that all but one Member State notify their intention to leave the Union one by one or even at the same time and just wait till the end of the two-year period. The procedure does not require any justification for the desire to withdraw and therefore the action would be completely in agreement with EU law. In case majority of States leave the ‘old’ European Union, it would probably be soon dissolved because it would not be able to continue sustainable development. After the entry into force of the Treaty of Lisbon this scenarios becomes much more realistic from a legal point of view. Politically speaking it may however cause unrepairable damage to the image of the new organization in the international arena. To make it less problematic, Member States may want to agree to fulfil all their obligations under the current Treaties and negotiate mutually beneficial agreement for their future relations.

According to Janis Emmanouilidis the suggestions to create a new Union are unrealistic, risky, counter-productive and run against the idea of the Union. Indeed, both above-mentioned scenarios would entail highly complex legal issues about dissolution, transfer of assets, succession of the organization as well as constitutional amendments, especially in those countries where they have specific reference to the European Union. Moreover, the leaving states would

158 S Biernat, supra note 148, p. 25
159 JA Emmanouilidis, supra note 134, p. 4
have an implied duty to settle adequate terms for their future relations with the left-behind state(s), especially if they have not violated any of its treaty obligations.

5. Plan C: International public law

5.1. Admissibility of international law in the EU legal order

Since there is no explicit provision about expulsion of a Member State in the EU Treaties and the analysis so far showed that there is no other legally and politically sound basis for such measure, it is natural to turn our eyes to international public law in order to fill this gap. First, we would consider briefly whether norms of international law are applicable at all to the case of the EU.

European Union is an international organization created through a series of international treaties. Many authors discuss the *sui generis* character of the EU and try to find a special position for its primary law. The ECJ also seem to distinguish between ‘ordinary international treaties’ and the constitutive instruments of the EU. It is also insistent on distinguishing between the legal system of the Union with its own sources of law and methods of interpretation and that of international law. In the *Van Gend en Loos* case the Court stated: ‘The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields’. Thus, the ECJ does not accept that international law may be situated hierarchically above EU law. The Court becomes the ‘gatekeeper’ that decides on the admission of international law norms into the Union legal system.

Indeed, the EU may still be an ‘unidentified political object’ as Jacques Delors once described it. However, under the international legal order, it may only be characterized as a state or an international organization. The current state of international law does not recognize any transitional or borderline status. Even the controversial notion of ‘self-contained regime’ is not applicable to the EU because although it has its own norms in a wide variety of fields, recourse to

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160 Case 6/64 Flaminio Costa v E.N.E.L. [1964] ECR 585
161 Case 26/62 Van Gend en Loos [1963] ECR 1
162 R Holdgaard, *Principles of reception of international law in Community law* [2006] Yearbook of European law 263, p. 264
public international law is still possible.\(^{165}\) Without rejecting the unique character of the European integration, the EU still does not have the powers of a supranational government or a federal state and Member States are still independent and sovereign.\(^ {166}\) Some authors even declare that ‘its status as an international organization is beyond dispute’.\(^ {167}\) In its recent decision concerning the compatibility of the Lisbon Treaty with German constitution, The German Federal Constitutional Court (Bundesverfassungsgericht) underlined once again that the EU is designed to be ‘an association of sovereign nation states (Staatenverbund) […] which exercises public authority on the basis of a treaty’. The Court confirmed the view that Member States are still ‘masters of the treaties’ that could still exercise final control over the contents of the Treaties and the direction of the European integration. The Bundesverfassungsgericht also welcomed the introduction of the withdrawal clause as guarantee for state sovereignty.\(^ {168}\) We believe that the Member States should be still free to turn to some of the provisions of international law whether the ECJ like it or not.

The main norms of the international law of treaties were codified in the 1969 Vienna Convention on the Law of Treaties\(^ {169}\) (hereinafter, Vienna Convention). However, there are three countries (France, Romania and Malta) in EU-27 that are not parties to the convention.\(^ {170}\) The ECJ also seems to regard the Convention as not binding to the EU or all of the Member States.\(^ {171}\) Another argument against use of the convention claims that its rules are not binding to the EU treaties since the original Treaty of Rome establishing the European Economic Community came into force in 1958. Vienna Convention entered into force in 1980 and ‘applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States’\(^ {172}\). If we do not look further, this indeed may mean that the text does not apply to


\(^{167}\) D Verwey, supra note 5, p. 65


\(^{172}\) Vienna Convention, Art. 4
original treaties creating the European Communities as well as the treaties for the accession of Denmark, Ireland and the United Kingdom (1973) and Greece (1979).

While not accepting all norms of treaty law but ECJ appears to confirm the idea that general (customary) international law is binding source of EU law.\textsuperscript{173} It is widely accepted that the Vienna Convention codifies norms of customary international law that were in effect when the founding Treaties were concluded and in particular the norms that are relevant to the current discussion. In one of its judgments the International Court of Justice confirmed the view in particular with regards to relevant provisions for our discussion: ‘The rules laid down by the Vienna Convention (...) concerning the 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.’\textsuperscript{174} The courts of the European Union may be reticent in relying on international law norms, but they still have referred to customary international law in their case-law and accepted its validity. The \textit{Opel Austria}\textsuperscript{175} and \textit{Racke}\textsuperscript{176} cases are most often cited as examples for the court confirmation of the customary international law codified in the Vienna Convention. Moreover, many international jurists also are of the opinion that the rules of the Vienna Convention dealing with treaty termination are applicable to the EU Treaties.\textsuperscript{177}

We would look into the Vienna Convention in order to see whether it can serve as an \textit{ultima ratio} to fill the lacuna in case the mechanisms discussed above prove unsuccessful. According to the Convention whenever a treaty does not contain an explicit provision regarding termination, this would be only possible if such right maybe implied by the nature of the treaty or the intentions of the parties.\textsuperscript{178} Our analysis showed that constructing an implied right would be expansionist. The intentions of the drafters also cannot help us because none of the available sources allows for any definite conclusions. The inclusion of the withdrawal right, however, tips the scale in favor of the idea that about the right of termination is at least not precluded. In two extreme cases Vienna Convention still permits termination of the treaties with regards to a single Member State that would de facto mean expulsion.

\textsuperscript{173} J Wouters, A Nollkaemper and Ed Wet (eds), \textit{The Europeanisation of International Law: The Status of International Law in the EU and its Member States} (T.M.C. Asser Press, The Hague 2008), p. 79
\textsuperscript{175} It makes reference to the principle of good faith which is a rule of customary international law codified in Vienna Convention. See Case T-115/94 Opel Austria GmbH v Council of the European Union [1997] ECR II-39 para 77
\textsuperscript{176} See Case C-162/96 A. Racke GmbH & Co. v Hauptzollamt Mainz [1998] ECR I-3655, para 44
\textsuperscript{177} JA Hill, supra note 12, p. 343
\textsuperscript{178} Vienna Convention, Art. 54
5.2. Material breach

One of the fundamental norms of international treaty law reads that treaties should be respected (pacta sunt servanda). This ‘cornerstone of international relations’ has been codified in the Vienna Convention. Given the importance of that rule, the document envisages a last resort option in case one of the parties of a bilateral or multilateral treaty does not respect its obligations. Since the European Union is based on multilateral treaties, relevant for the discussion is Article 60, para. 2 (a)(i) of the Vienna Convention. It entitles the other parties to a treaty to terminate its operation in between themselves and a Member State that has committed a material breach of its provisions. In that case the treaty would remain in force between the other Member States. Given that the provision governs extreme cases, it is understandable that it does not appear in the case-law of the ECJ. However, in one case, the Advocate General accepts that the rule in Article 60 may serve as a justification for a treaty to be ‘suspended or even extinguished, either for all contracting States or only for the State in breach’. The Court does not explicitly base its analysis on that provision but does not reject it either.

The Vienna Convention gives two possibilities for what constitutes a ‘material breach’ – ‘repudiation of the treaty’ or ‘violation of a provision essential to the accomplishment of the object or purpose of the treaty’. It would be highly unlikely that a Member decides to reject the Treaties as a whole without withdrawing from the Union so we would focus on the second part. It is interesting to look at the relation between the definition ‘material breach’ from the Vienna Convention and the terms ‘serious and persistent breach’ and ‘infringement of an obligation’ under the above-mentioned articles of the Treaties. Some authors see the procedures in Article 7 TEU and Articles 258-260 TFEU as precluding use of any other provisions in international law. Such a conclusion is derived from the fact that the Vienna Convention is applicable to the constituent instruments of an international organization such as the EU Treaties for everything that is not regulated by them. Following the principle *lex specialis derogat legi generali*,
primary EU law is a special norm with regards to public international law and the treaties should be considered with priority in all areas that they regulate.

However, Article 60 of the Vienna Convention should be interpreted to cover situations beyond what is considered in the Treaties. The EU does not provide for a course of action in cases when the violation is not terminated despite the use of all the available mechanisms in the Treaties. Bruno Simma comments that ‘if and when the remedies provided (…) definitely fail to put an end to persistent violations of Community law, the situation may reach the point where further fulfillment of community obligations towards a defaulting member state would simply become an intolerable burden on the injured (…) parties’\(^\text{186}\). Gerard Conway also notes that the injured Member States would not be able to take any reciprocal measures against the culprit country and would still have to fulfil their obligations under EU law. That means that in case of persistent and serious violations of basic human rights, for example, the other Member States would be accepting the existence of an offending regime.\(^\text{187}\) A case when a Member State fails to implement or enforce significant parts of EU law for a long period of time because that would amount to contempt of the Court’s jurisdiction as well as breach of the uniform validity and application of Union’s law.\(^\text{188}\) Resort Article 60(2)(a)(i) should therefore be possible but should be limited to cases of absolute necessity.

Only one work dares to consider the ‘refusal to ratify’ scenario in the light of the material breach provision in the Vienna Convention. Henri De Waele plays with the idea that rejecting a fundamental treaty revision such as the one proposed by the Constitutional treaty may meet the conditions for denunciation of the treaty and de facto expulsion of a Member State because it is putting at risk the *acquis communautaire*.\(^\text{189}\) Further on, however, he notes that current EU law does not envisage obligations for the Member State to prevent blocking the entry of force of any amending treaties. Indeed, refusal to ratify cannot be qualified as a material breach because there is no legal provision that may be interpreted as an obligation to express consent to overarching changes in the structure of the Union.

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\(^{186}\) B Simma, ‘Self-Contained Regimes’ (1985) 16 Netherlands Yearbook of International Law, p. 127


\(^{189}\) H de Waele, supra note 21, p. 185
There is no requirement for prior determination of the material breach in case the Member States take a unanimous decision to terminate the treaty.\footnote{MM Gomaa, Suspension or Termination of Treaties on Grounds of Breach (Brill, The Hague 1996), p. 140} The unanimity condition is accepted as a sufficient proof that the material breach is indeed existence. Moreover, the culprit Member State does not have any way to appeal the decision of the others. This may problematic in the light of Article 344 TFEU which gives the ECJ the exclusive jurisdiction to rule on disputes concerning the interpretation or application of the Treaties. However, residual use of the Vienna Convention provision would mean that the pivotal role of the ECJ has already been exhausted. Termination of the treaty with regards to one Member State due to material breach would certainly be controversial in another aspect. It may have an adverse effect on the rights of the other Member States other than the culprit ones. However, we believe that if this last resort measure is indeed considered the only option, then the costs would not exceed the benefits which may at some point equal to the salvation of the Union.

5.3. Fundamental change of circumstances

Another exception to the pacta sunt servanda rule that has been codified in the Vienna Convention allows for termination of the treaty in case of a fundamental change of circumstances.\footnote{Article 62 Vienna Convention.} The clause can only be invoked in situations when the change was not foreseeable by the Member States when they were signing the Treaties. There are two cumulative conditions that must be met in order to be able to rely on that provision. The circumstances under which the treaty was signed should be ‘an essential basis of the consent of the parties to be bound by the treaty’\footnote{Article 62, para. 1(a)} and ‘the effect of the change is radically to transform the extent of obligations still to be performed under the treaty’\footnote{Article 62, para. 1(b)}. It is also very important that this article cannot be used in cases of violation of treaty obligations. Thus, it would require a serious leap of imagination to be able to find situation that would fall under this provision in the case of EU.

The (re)unification of Germany has often been invoked as one of the very few examples of fundamental changes of circumstances within the boundaries of the EU. However, it is arguable whether the change was not expected or at least hoped for given the fact that the German delegation during the negotiations of the Rome Treaties made a declaration that it would
reconsider the agreements in case of German reunification.\textsuperscript{194} In the \textit{Racke}\textsuperscript{195} case, for example, the ECJ used this provision in order to justify suspension of the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia. The reasons were clear – lack of peace and institutions capable to supervise the application of the agreement. The Court specifically confirmed the status of Article 62 as a norm of international customary role that is binding upon the Union institution and forms part of its legal order. Such situation could hardly be imagined in the EU although in one of the candidate countries there was an alleged coup d’etat plot by the military.\textsuperscript{196} Democracy, however, is one of the political criteria for membership that also forms part of the Union’s fundamental values. Any breach would first fall under Article 7 TEU and then possibly under the material breach provision in the Vienna Convention. Another essential criterion for accession to the EU and ratification of accession treaties is the existence of a functioning market economy. Turn (or return) to planned economy, for example, would fulfil the criteria for invoking the fundamental change of circumstances clause. Although the existence of an open market economy with free competition is an essential obligation for Member States under EU primary law\textsuperscript{197}, such a situation may as well be invoked as a ground for terminating the Treaty. It would also be legally dubious to claim fundamental change of circumstances that makes it impossible to continue the work of the European Union under the current treaties and thus the expulsion of the non-ratifying Member States becomes inevitable.

The wording of Article 62 is rather vague and it would hardly ever be applicable to the case of the EU. However, this should be seen more as an important characteristic of the provision than a disadvantage. The article would have incredibly narrow scope in the case of the EU but after all it was designed to cover situations that were not foreseeable. It should be regarded as the last possible emergency mechanism.

6. Miscellaneous

The thorny issue of expulsion raises a huge range of legal issues. Many of them would be left unanswered by this thesis due to considerations of space and consistency. In this chapter,

\textsuperscript{194} C Tomuschat, ‘A United Germany within the European Community’ (1990) 27 Common Market Law Review 415  
\textsuperscript{195} See Case C-16296 A. Racke GmbH & Co. v Hauptzollamt Mainz [1998] ECR I-3655, para 44  
\textsuperscript{196} BBC News, ‘Top Turkish officers charged over coup plot’ <http://news.bbc.co.uk/2/hi/8531486.stm> accessed on 02 March 2010  
\textsuperscript{197} Article 120 TFEU
however we would like to make some reflections on two of the outstanding questions. Whether it is possible to include an expulsion clause and how would it look like? And what would be some of the consequences if a Member State is forced out of the Union?

6.1. Expulsion clause: How and what?

The analysis so far showed that the intentions of the drafters of the treaties with regards to expulsion are not entirely clear. On one side, inclusion of an expulsion clause may contribute to increasing the legal certainty which is one of the general principles of EU law. Such move would not only clear the situation but also close all the possible loopholes in the EU legal order and prevent abuse. Obviously the Union and its Courts do not feel really comfortable relying on international law norms so they may want to clarify the situation. If we assume that the ultimate goal of the Union is creating an indissoluble organization, then an explicit prohibition on expulsion may be the solution. Such an idea would very likely meet the opposition of some of the Member States (and especially their constitutional courts) that would probably take such amendment as an assault on sovereignty.198 On the other side, inserting clause that allows for expulsion, especially as part of the EU competences, would also meet the resistance of Member States out of self-preservation. It may also send a wrong signal to future Member States.

At the current state of affairs inserting any provision about expulsion seems impossible for a number of reasons. After the latest ratification crises, the Member States would probably wait at least a couple of years before even considering opening the Treaties for negotiations. It is interesting to note that according to the current Swedish Prime Minister Fredrik Reinfeldt, during the drafting of the Treaty of Lisbon the heads of state and government of the EU promised each other to leave the document intact at least for a decade.199 The reason is not a secret to anyone familiar with the recent history of European integration – ratification of Treaties in EU-27 is ‘a lengthy process and very very hard’.200 The main reason for that – any amendment including changes with regards to expulsion would require following the ordinary revision procedure in Article 48 TEU. This brings us back to parliaments voting, constitutional courts’ decisions,

198 See, for example, the German Constitutional Court’s decision on the Treaty of Lisbon’s compatibility with the German constitution: BVerfG, 2 BV 208 vom 30.6.2009, Absatz-Nr.(1 - 421); <http://www.bverfg.de/entscheidungen/ez20090630_2bve00208en.html> accessed on 20 February 2010
199 J Chaffin, Relief in euro world as leaders back Greek deal Financial Times 26 March 2010 <http://blogs.ft.com/brusselsblog/2010/03/relief-in-euro-world-as-leaders-back-greek-deal/> accessed on 1 April 2010
200 J Chaffin, supra note 193.
referendums and all this in the light of the unanimity requirement. Ironically, a revision that may introduce a way out of ratification crises, may itself fall victim to such crisis. There is one more avenue that can be taken to establish or prohibit the right of expulsion. Bruno de Witte reminds us that the creative interpretation of the Treaties by the ECJ often amounts to de facto treaty amendment.\(^{201}\) The Court has repeatedly been a driving force for the development of European integration beyond anything that the drafters of the Treaty of Paris or Treaties of Rome probably imagined.

In case expulsion does get on the negotiations table at a IGC in the future, how would possible a draft clause look like? In an expansive comparative study, Konstantinos Magliveras suggests that expulsion should be included in all treaties constituting international organizations because it is ‘inherent in the membership of any state in an international organization’.\(^{202}\) He proposes a model expulsion clause\(^{203}\) that is based on the analysis of the law and practice of expulsion and suspension of membership in the United Nations, its specialized agencies and a great number of regional organizations. The first stage of his proposal introduces the determination of breach of either fundamental values, or the treaty obligations. The determination of the breach is made by the court of the organization on the proposal of the executive or plenary organ. The recalcitrant Member State is then given a ultimatum to put an end to the offending behavior. If it does not comply within the specified time limit, the plenary organ may decide to suspend all or some of its membership rights. Another deadline is then presented to the Member State in order to make it terminate the breach in question. After its expiration, the plenary organ may decide on the expulsion of the Member States as a last resort measure. All disputes on the

\(^{201}\) Bd Witte, supra note 141, p. 330
\(^{202}\) K Magliveras, supra note 15, p. 269
\(^{203}\) (1) Should a Member State or the executive or plenary organ believe that another Member States has violated/breached/not fulfilled the aims of the organization set out in Articles… and/or the obligations imposed by this constitutive instrument and enumerated in Articles…. it may request the judicial authority to determine the existence of the alleged infraction. The judicial authority shall reach a final and binding Opinion recording its findings. If the Opinion determined that an infraction has been perpetrated by the Member State in question, the latter shall, at the first instance, be afforded the opportunity to terminate the infraction within a time period to be determined by the executive organ by simple majority.

(2) Should such Member non comply therewith, the plenary organ shall be entitled to suspend the exercise of all or some of the following membership rights and impose any additional measures deemed necessary:
- participate and vote in all main and subsidiary organs;
- put forward candidates for election to these organs;
- receive all kind of assistance, except medical/humanitarian assistance;
Throughout the period of suspension, the length of which shall be determined by the plenary organ, the latter may review the situation and the suspended Member shall observe all its obligations.

(3) If at the expiration of the period of suspension, the plenary organ determines that the suspended Member has not terminated the infraction or, following the opinion of the judicial authority, has not observed any of its other obligations, it shall decide upon the expulsion of that Member.

(4) Expulsion does not exonerate Members from existing obligations, for which they remain liable until fully discharged. Any expelled Member may be readmitted to membership by following the admissions procedure of Article … The plenary organ reserves the right to impose additional conditions on expelled Members to be fulfilled before its application is considered.

(5) Unless otherwise mentioned, all decision shall be reached by a two-thirds majority, the vote of the recalcitrant state not counting. All disputes arising from the application of this clause shall be settled by a binding and final decision of the judicial authority.
application of the clause should be resolved by the judicial organ of the organization. Decisions are taken by a two-thirds majority without the votes of the recalcitrant state.

I would like to draw several lessons that may be valuable for the European Union. The leading role of the judicial authority in determination of the breach and providing judicial review to avoid abuse is something that Article 7 TEU, for example, is clearly missing. Suspension of rights, the step preceding possible expulsion, is prone to political abuse as the Austrian case clearly showed. It is obvious that when applied to the European Union this clause would combine the sanctions for breach of the Union’s values and the infringement procedure for failure to fulfill an obligation imposed by the Treaties just as suggested by the 1984 European Parliament’s draft. Adherence to the common values and respect for the *acquis communautaire* are equally important membership criteria, then why would sanctioning be less stringent for flagrant violations? Magliveras assumes that the plenary organ is responsible for all membership issues and bestows it with the main role in the procedure. That is not the case in the European Union. Besides, since codecision became the ‘ordinary’ procedure in the European Union after the Treaty of Lisbon, it may be proper to consider an equal role of the Council of Ministers and/or the Commission in such procedure in order to balance between the intergovernmental and supranational character of the Union. The suspension stage includes an explicit determination of the period which would serve as a deadline to put an end to the offending behavior which is again something missing in Article 7 TEU.

It would be much better to anticipate problems than look for ways to solve them ex post. The effectiveness of an possible expulsion clause would lie in the fact that in the case of the European Union the incentive of membership is perceived high enough to act as a deterrent against any offending behavior. Moreover, it is not possible to foresee now all the contingencies the future may hold. However, expulsion may turn into a bigger problem than the problems it is trying to solve.

### 6.2. (Some) consequences of expulsion

Termination of membership would have vast political, economic and legal consequences for the European Union, its Member States and its citizens.
The expelled Member State would not be able to enjoy the benefits of membership in the EU but would still have to cover all its prior obligations. The EU is widely regarded as the most successful example of a regional integration system and expulsion from this exclusive club may lead to political isolation. Termination of the cooperation with the Union would also mean that the Member State would have to renegotiate its relations not only with the other Member State but also in every aspect of cooperation that it has been part of under the umbrella of the EU. Even if the Member State manages to continue some kind of privileged partnership with the rest of the Union, its expulsion would probably have economic consequences as well. In case the expelled state wishes to reapply for membership, it would have to fulfill its outstanding obligations and be subject to rigorous monitoring in order to prove that it ended the violations. In order to secure another accession to the Union, the expelled Member State would probably have to comply with much more stringent conditions than the first time it joined.

For the Union and its remaining Member States expulsion would mean failure of the compliance mechanisms of the EU which involve a mixture of the management and enforcement strategies. Some argue call expulsion ‘a token of impotence’. Compromise has always been the cornerstone of EU relations and such ‘unilateral’ measure may also endanger the stability of the Union. The principle of sincere cooperation or loyalty reads that Member States should assist each other in carrying out tasks which flow from the Treaties, take any measures to ensure fulfillment of obligations and refrain from measures that can jeopardize the smooth functioning of the Union. This also means that Member States should focus mainly on prevention and do anything in their power to try to avoid recourse to expulsion. They should exhaust all available enforcement mechanisms in the Treaties before turning to expulsion. After all, it is assumed that all Member States are committed to the same values and deliberate non-compliance should not be possible. Any non-negotiated solution would create enormous legal and economic problems that would be damaging also for the rest of the Members. Makarczyk also underlines the ‘penetration of the organizations into internal structures of member countries’ that makes expulsion ‘unusable weapon’ in practice especially in the case of the European Union. We should remind again that

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204 There are a number of cost-benefit analyses of the EU membership, especially for the United Kingdom. See, for example: B Hindley and M Howe, ‘Better off out?: the benefits or costs of EU membership’ (IEA occasional paper, Institute of Economic Affairs, London 2001); P Minford, ‘Measuring the Economic Costs and Benefits of the EU’ (2006) 17 Open Economies Review 509-526
205 J Tallberg, supra note 101, p. 632
206 HG Schermers and NM Blokker, supra note 25, p. 138
207 Article 4 (3) TEU.
208 J Makarczyk, supra note 26, p. 481
expulsion may be regarded as a step back from integration but as well as a step forward to deeper cooperation that is otherwise blocked by one or few of the Member States.

Expulsion would not only have impact on the Member State but also on its citizens given the wide range of rights that the EU brings. One author concludes that this is a serious barrier to expulsion because of the ‘legal challenges by disgruntled natural persons, legal entities or even countries, objecting to the loss of the rights that they or their nationals may have acquired from membership of the EU and invoking their legitimate expectation of maintaining these in perpetuity as an obstacle to expulsion’209. A statement by the British government on the occasion of the introduction of the suspension of rights clause in the Treaty of Amsterdam summarizes very well the problematic nature of expulsion:

Participation in the European Union gives rise to a wide web of rights and obligations to citizens, companies and governments. To erase all those obligations at a stroke by expelling the member state would create huge confusion and penalise ordinary citizens and ordinary businesses, who rely on their rights of residence and free movement, to name but two210

Indeed, Article 7 stipulates that when taking the decision to suspend certain rights of a culprit Member State, the Council should ‘take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons’. However, it would be almost impossible to untwine the suspension or termination of rights for the Member States with suspension or termination of rights for its nationals. However, we should again not forget the other side of the coin. Any persistent refusal by a Member State to follow its obligations towards the other Member States would also have wide adverse effects on the citizens of the injured countries.

Conclusion
Divorce in the European Union was not seriously considered on the wedding day, neither on any of the subsequent wedding anniversaries. During some of the treaty revisions proposals have been made to include an explicit provision allowing for kicking out a Member States for the Union. Our analysis, however, confirmed what one author called ‘continuity in the will of avoiding to insert (…) an expulsion clause’. The reasons behind that, however, remain unclear. Indeed, the goal of the Member States is ‘an ever closer’ integration in an organization with no expiry date. However, the introduction of the withdrawal clause in the Treaty of Lisbon, showed that exit from the Union is not legally precluded.

The constant amendments of the treaties have considered a number of negative scenarios for the Union and brought remedies and preventive measures for them. Persistent breaches of treaty obligations have since 1993 been punishable by financial penalties. The possibility of flagrant violations of the EU fundamental values has been addressed by including a suspension of rights provision in the 1997 Treaty of Amsterdam. The introduction of those mechanisms shows that the Member States are gradually preparing to guard more stringently their cooperation and integration. Although in some situations suspension of rights may put the culprit country in the position of a non-member state, Article 7 TEU does not allow for expulsion. Similar conclusion should be drawn for the breach of treaty obligations scenario. The European Union can ‘deprive’ of membership a culprit state before accession but cannot terminate it once the country has been allowed to join the organization. Member States are still not ready to consider that the worst could happen. It is possible that in extreme circumstances the imposition of financial sanctions or the suspension of rights would not be effective remedy for a persistent breach of EU law values or obligations.

The introduction of the withdrawal clause with the Treaty of Lisbon opened up new legal and quasi-legal options that would amount to expulsion and seems particularly appealing in case of a treaty ratification crisis. Although forced withdrawal or creation of an alternative organization are possible options, none of them is a desirable approach given the nature of the European integration. Most of them are not even realistic in case of blocking of the ratification process. They may unblock the ratification of a new treaty but would inevitably weaken the Union and may even lead to the creation of a new division in Europe. They should be resorted to only when the failure of the negotiated treaty would inevitably lead to the end of the Union itself.

211 J-V Louis, supra note 79 , p. 12
It can only be hoped that there would be no future situations in which any of the discussed scenarios or options would be considered in practice. The interdependence of the Member States has reached such a level that expulsion would have enormous consequences for virtually every interested party. However, the crisis in Greece that unfolded during the writing of this thesis, showed that despite its success, the EU is still very fragile and problems in one Member State may have vast consequences for the whole organization.\footnote{It is important to note that expulsion of Greece from the European Union or even just the eurozone was never officially on the agenda although there were such proposals. See, for example, The Local, ‘Conservatives suggest Greece leave Euro currency union’ at <http://www.thelocal.de/national/20100424-26755.html> and The Local, ‘Merkel: Greece expulsion from euro not an option’ <http://www.thelocal.de/politics/20100426-26756.html>}

When all other options have been exhausted, rules of public international law should still be able to apply residually. The Union should not be left without a mechanism to guard its achievements. Expulsion should be legally possible as an extreme measure that would save the Union as a whole from falling apart.

The provisions in the Vienna Convention can only be invoked in case all available remedies in EU law have been exhausted. The current author is of the opinion that only an explicit prohibition on expulsion would preclude the right of exit and close all the possible loopholes in European and international law that may have equivalent effect. In case the national capitals do believe that they may not be able to live happily ever after together in the European Union, then writing a prenup\footnote{Prenuptial agreement is a contract that may be concluded before marriage in some countries. It usually regulates the rights and obligations of the parties in case of breakup of the marriage.} may not be such a bad idea.

**BIBLIOGRAPHY**

**ARTICLES**

• G Conway, 'Breaches of EC Law and the International Responsibility of Member States' 13 European Journal of International Law 679
• PD Dagtoglou, 'How Indissoluble is the Community?' in PD Dagtoglou (ed.), Basic Problems of the European Community (Basil Blackwell, Oxford, 1975) 258
• G Falkner and O Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46 Journal of Common Market Studies 293
• JA Hill, The European Economic Community: The Right of Member State Withdrawal’ (1982) 12 Georgia Journal of International and Comparative Law 335
• C Hillion, ‘Widen to deepen? The potential and limits of accession treaties to achieve EU constitutional reform’, in S. Blockmans and S. Prechal (eds.), Reconciling the Deepening and Widening of the European Union (The Hague, TMC Asser Press 2007), 157-165
• R Holdgaard, 'Principles of reception of international law in Community law' [2006] Yearbook of European law 263
• P Minford, 'Measuring the Economic Costs and Benefits of the EU' (2006) 17 Open Economies Review 509-526
• E Philippart and MSD Ho, 'Flexibility and the new constitutional treaty of the European Union’ in J Pelkmans, MSD Ho and B Limonard (eds), Nederland en de Europese grondwet (Amsterdam University Press, Amsterdam 2003)
• E Regan, 'Are EU Sanctions Against Austria Legal?' 55 Zeitschrift für öffentliches Recht (Austrian Journal of Public and International Law) 323
• LS Rossi, 'En cas de non-ratification: le destin périlleux du Traité- Constitution', Revue trimestrielle de droit européen 2004, p. 62
• B Simma, ‘Self-Contained Regimes’ (1985) 16 Netherlands Yearbook of International Law, p. 127
• B Simma and D Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 European Journal of International Law 519
• C. Timmermans, The EU and Public International Law, European Foreign Affairs Review 4 (1999), 181-194
• GL Tosato and E Greco, ‘The EU Constitutional Treaty: How to Deal with the Ratification Bottleneck’ The International Spectator 7
• A Verhoeven, ‘How Democratic Need European Union Member States Be? Some Thoughts After Amsterdam’ 23 European Law Review 217
• Hd Waele, ‘The European Union on the Road to a New Legal Order - The Changing Legality of Member State Withdrawal’ 12 Tilburg Foreign Law Review 169-189
• F Weiss, ‘Greenland's withdrawal from the European Communities’ (1985) 10 European Law Review 173
• Bd Witte, ‘Rules of Change in International Law: How Special is the European Community?’ Netherlands Yearbook of International Law 299

BOOKS

• I. Brownlie, Principles of Public International Law, (OUP, Oxford 2003)
• PM Defarges, La "constitution" européenne en question (Editions d'organisation, Paris 2004)
• MM Gomaa, Suspension or Termination of Treaties on Grounds of Breach (Brill, The Hague 1996)
• S Griller (ed.), The Treaty of Amsterdam: facts, analysis, prospects (Birkhäuser, 2000)
• J Klabbers, An Introduction to international institutional law (Cambridge University Press, Cambridge 2004)
• K Magliveras, Exclusion from Participation in International Organizations: The Law and Practice Behind Member States Expulsion and Suspension of Membership (Kluwer Law International, 1999)
• P Malanezuk, Akehurst's Modern Introduction to International Law (Routledge, 1997)

**COMMUNICATIONS AND DRAFTS**

• Commission (EU), 'Better monitoring of the application of community law’ (Communication) COM(2002)725 final/4 16 May 2003
• Commission (EU), 'Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based’ (Communication) COM(2003) 606 final 15 October 2003
• Progress Report from the Chairman of the Reflection Group on the 1996 Intergovernmental Conference, Madrid, 1 September 1995, SN 509/1/95 Rev 1 (REFLEX 10),
COURTS DECISIONS

- Case 26/62 Van Gend en Loos [1963] ECR 1
- Case 6/64 Flamminio Costa v E.N.E.L. [1964] ECR 585
- Case C-344/04 IATA [2006] ECR I-403

PAPERS AND REPORTS

- J Fischer, ‘From Confederacy to Federation - Thoughts on the finality of European integration’ (Speech at the Humboldt University in Berlin, 2000) <http://centers.law.nyu.edu/jeanmonnet/papers/00/joschka_fischer_en.rtf> accessed 20 April 2010
- B Hindley and M Howe, ‘Better off out?: the benefits or costs of EU membership’ (IEA occasional paper, Institute of Economic Affairs, London 2001)
- PA Kraus, The new article 50 TEU (Lisbon Treaty) - inconsistent with the concept of an "ever closer union"? (Master thesis, Riga Graduate School of Law, Riga 2008)

TREATIES
• Act concerning the conditions and arrangements for admission of the republic of Bulgaria and Romania to the European Union (Accession Act), <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/L_157/L_15720050621en00290045.pdf> accessed on 5 April 2010
• Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, <http://eur-lex.europa.eu/en/treaties/dat/12003T/htm/L2003236EN.003301.htm> accessed on 20 April 2010
• Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam Treaty) available at <http://www.eurotreaties.com/amsterdamtreaty.pdf>
• Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Nice Treaty) available at <http://www.eurotreaties.com/nicetreaty.pdf>

NEWS ARTICLES

• Agence Europe 08/06/2000, by Personal communication 26 February 2010
• BBC News, ‘Top Turkish officers charged over coup plot’ <http://news.bbc.co.uk/2/hi/8531486.stm> accessed on 02 March 2010
• J Chaffin, ‘Relief in euro world as leaders back Greek deal’ Financial Times 26 March 2010 <http://blogs.ft.com/brusselsblog/2010/03/relief-in-euro-world-as-leaders-back-greek-deal/> accessed on 1 April 2010
• D Charter and R Watson, ‘European elections: extremist and fringe parties are the big winners’ The Times (London) <http://www.timesonline.co.uk/tol/news/politics/elections/article6452090.ece> accessed 19 December 2009
• The Local, ‘Conservatives suggest Greece leave Euro currency union’ at <http://www.thelocal.de/national/20100424-26755.html>
• The Local, ‘Merkel: Greece expulsion from euro not an option’ <http://www.thelocal.de/politics/20100426-26787.html>

**OTHER**

• Personal communication Case_ID: 0246715 / 9172360 25 February 2010
• Bde Witte, written evidence to the House of Commons European scrutiny committee, at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmueleg/38-xiv/38xiv-i.pdf> accessed 13 April 2010