Re-establishing the EU - Dissolution, withdrawal or succession?

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Dissolution, withdrawal or succession?

Merijn Chamon[1]

In a debate in the Dutch parliament on 9 September 2020, Dutch PM Mark Rutte was challenged on the unclear rule of law guarantees that had been agreed on by the European Council in relation to the upcoming multiannual financial framework. Rutte first responded by noting that he hoped the European Parliament would make further demands which the Netherlands would then try to build upon within the Council. Secondly, Rutte quipped that the maximum of what could have been achieved in the European Council had indeed been achieved and that asking for more "would have required us to enter new territories. We would have to ask ourselves: can you establish a budget through an intergovernmental treaty, or can you establish an EU without Poland and Hungary? These would be nuclear options".

> **Can you *(de facto or de iure)* re-establish an EU without Poland and Hungary?**

In an Op-Ed on EUObserver, Theuns discussed Rutte's suggestion from a political perspective but evidently these questions are first and foremost legal in nature. The present contribution will focus on the second question: can you (*de facto or de iure*) re-establish an EU without Poland and Hungary? The background to this question hardly needs explaining. Over recent years, these two countries have demonstrated that they have no place in a civilised polity like the EU. While there are mechanisms in place to deal with retrograding Member States, they are ineffective and any fundamental reform is hampered by the requirement of unanimity.

The legal feasibility of de *iure* or de *facto* re-establishing the EU has both an EU and a public international law (PIL) dimension. For both, the issue to be addressed is two-fold: what is the legal framework governing the dissolution of the current EU (following which a new EU can be established without Poland and Hungary) and what is the legal framework for establishing a new international organisation (IO) (without Poland and Hungary) that would succeed the old EU (regardless of whether the old EU has been disbanded).

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Dissolution and succession under Public International Law

As a preliminary point, it should be noted that the general rules on PIL refer to the EU's internal rules on dissolution or succession. While these are not explicitly laid down in the Treaties, as we will see, they arguably do exist. The general rules under PIL are included here to sketch the broader context but would be displaced by the EU-specific rules if a dissolution or succession would effectively materialise.

Very few instruments establishing IOs contain provisions on the dissolution of the IO and this evidently includes the EU, which is furthermore established for an indefinite period of time (Articles 53 TEU and 356 TFEU). What then are the general rules on dissolution in case the establishing instrument is silent? As Klabbers notes two broad views can be discerned, a first follows the traditional view that IOs are the creatures of the states establishing them and that dissolution is only possible pursuant to an agreement between the members. A second view gives more weight to the idea that IOs are actors in their own right and suggests that they could end their own existence. Still, according to Klabbers this would have to be done pursuant to the procedure reserved to the most important decisions taken by the IO. For the EU this would mean looking at the procedures for the simplified treaty revision or the passerelle clauses under Article 48 TEU. As a result this would at least involve unanimity in the European Council. In any case every EU Member State would have to agree to the liquidation of the EU.

Turning to the question of succession, it should be noted that this issue has not been explored much in the PIL scholarship (2). It seems to have been briefly discussed but then dropped (p. 270) by the International Law Commission (ILC) in the margins of its work on the succession of states. Later the ILC even noted that 'strictly speaking, there can never be a "succession" of organisations"' (p. 93), because differently from the succession of states no territory is involved. While not going as far, the lack of any territorial dimension to the succession issue is also highlighted by Shinkaretskaya to argue against a simple transposition of the rules on state succession (3).

Also on the issue of succession in the sense of replacement, two broad views can be distinguished. Under a first, only the original parties can replace an IO with a new one, and of course this would in principle require the consent of all Member States. Under a se-

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2. But see Dandi Gnamou-Petauton, *Dissolution et succession entre organisations internationales*, Bruxelles, Bruylant, 2008 and the authors cited in Ramses Wessel, 'Dissolution and succession: The transmigration of the soul of international organizations', In: Jan Klabbers & Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations*, Cheltenham, Edward Elgar, p. 343.

3. G Shinkaretskaya, 'Eurasian Economic Union and Issues of Succession among International Organizations', (2018) *Journal of the Higher School of Economics* 3, pp. 172-194.

cond view, the IO itself can also regulate the continuity of its functions by entrusting some of its tasks to a new IO (see Wessel p. 350). Could the rule of law-compliant EU Member States then de facto replace the old EU by establishing an EU 2.0 that pursues the same functions as the EU, while not formally disbanding or withdrawing from the old EU? While Poland and Hungary could not stop the other EU Member States from doing so, the rule of law-compliant Member States would be required to respect the rights and obligations of Poland and Hungary under the EU Treaties. In case of a dispute, Poland and Hungary could bring this before the CJEU and possibly (notwithstanding Article 344 TFEU) the International Court of Justice (ICJ). In the 1950s the latter ruled on an interesting case whereby South Africa questioned whether it could be supervised by the UN General Assembly as an administrator of the territory of South West Africa. This was given that the original supervising authority, the League of Nations (LoN), had been dissolved. These powers of supervision were not expressly transferred by the LoN nor expressly assumed by the UN. The ICJ found that the task entrusted to South Africa survived the LoN and that supervision was therefore required and implicit under the UN Charter. Of course, South Africa was a member of both the LoN and the UN which would not be the case for Poland and Hungary. Dissociating a function from its institutional framework, one would have to argue that the old EU has become dysfunctional in terms of fulfilling the EU's original tasks, and its functions could therefore legitimately be taken up by an EU 2.0 without Poland and Hungary. It is clear however that such a reasoning would require considerable legal gymnastics.

Dissolution and succession under EU Law

Whereas in principle anything is possible under PIL as long as all Member States consent, the situation is more complex under EU law, since the latter constitutes an autonomous and constitutional system. Under EU law then, dissolution (and *de iure* succession) would arguably require a decision by the *pouvoir constituante*, which has to be exercised

pursuant to Article 48 TEU. A body such as the CJEU could not otherwise sanction any dissolution or succession without denying the foundations of its established jurisprudence which is premised on the EU being a constitutional system. As a result, one could not simply take the 'easy option' of a tabula rasa by letting the original EU wilt away and starting anew with an EU 2.0 as if nothing happened. Doing so would amount to breaching the rule of law in order to uphold the rule of law.

The only scope to bypass the consent of Poland and Hungary would have to be found in a de facto succession, whereby the old EU continues to exist, with or without the other Member States as parties.

Collective exit

A first possibility would seem to be the reverse of the suggestion made by Hillion earlier this year on *Verfassungsblog*. Hillion argued that Poland and Hungary have effectively triggered the procedure of Article 50 TEU through their illegitimate behaviour. Reversing this solution would see the rule of law-compliant Member States collectively leave the EU by each individually triggering Article 50 TEU. While the European Council would not be able to provide guidelines under Article 50 TEU, compliance with Article 218 TFEU would be entirely possible. The Commission would then negotiate identical withdrawal agreements in parallel. The EU's entire assets could thus be returned to the withdrawing Member States, leaving the old EU (and Poland and Hungary) with zero assets. As long as the rule of law-compliant Member States muster a QMV in the Council, they can effectively dismantle the old EU in this way. Similarly to what happened when the European Coal and Steel Community was dissolved, they could then mandate the would-be Commission 2.0 to manage the assets on their behalf before they are transferred to the EU 2.0

Exploiting enhanced cooperation

One further option builds on the suggestions made by Piris in his book on the Future of Europe in which he discussed the possibility for an avant-garde EU to deepen EU integration. A second option would thus be to exploit to the fullest the potential of enhanced cooperation under Articles 20 TEU and 326 TFEU. According to Piris the downside of this would be that the relevant Treaty provisions would still have to be respected and that all members of the Parliament and Commission (not only those from the avant-garde Member States) would participate in decision-making. However, that would not be a drawback in this case, since we are not talking about a small avant-garde but a majority of rule of law-complying Member States. This option is different from the preceding ones since *de iure* the EU would continue to exist. However, the current EU would become the shell (including Poland and Hungary) in which the core EU progresses further without Poland and Hungary.

Under this solution, the fact that the EU Treaties are traités cadres would be exploited: some benefits of EU membership follow directly from the Treaties (such as free movement of goods, services and persons) and cannot be withheld from Member States. Other benefits are created through secondary legis-

lation (such as agricultural subsidies, regional funds). Here the rule of law-compliant Member States would use their QMV in the Council to repeal the existing legislative frameworks in place (for example by repealing the basic regulations establishing the CAP and the European Structural and Investment Funds) and set up between themselves an enhanced cooperation linking EU funds to rule of law conditionality that is unacceptable to Poland and Hungary. If we assume that the EU's budgetary competence is ancillary to its material competences and that it therefore is not an EU exclusive competence, pursuing this option seems largely compatible with the Treaty framework for enhanced cooperation as clarified by the CJEU in *Spain and Italy v. Council*. At least one major question would be whether it would not 'undermine the economic, social and territorial cohesion in the EU' as prohibited by Article 326 TFEU. No doubt the idea is here that effective adherence to the rule of law is a fundamental prerequisite to ensure cohesion and does not undermine cohesion.

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Establishing a new EU (and transferring powers)

Finally, the possibility for the rule of law-compliant Member States to establish an EU 2.0, without withdrawing from or dissolving the EU, and pursuing policies such as a CAP or regional policy through the EU 2.0 is precluded by the Court's Pringle judgment. In that judgment it allowed the Eurozone Member States to establish the ESM precisely because the EU Treaties did not contain a specific power for the EU 'to establish a permanent stability mechanism such as the ESM' (paragraph 105). That is clearly not the case for the CAP or regional policy. Conversely, while the EU can transfer some of its powers to another IO, Opinion 1/76 precludes the rule of law-compliant Member States from setting up an EU 2.0 to which the EU will transfer the power to pursue, for example, a CAP or regional policy. That Opinion makes the transfer of powers to an IO dependent on the impossibility to attain the EU's objectives through EU common policies and the necessity of pursuing those objectives through the cooperation with a third state, a condition not met in casu. In addition, Opinion 1/76 also rules out recourse to such an incomplete mixed agreement since it prohibits the exclusion (even voluntary!) of Poland and Hungary.

As is well clear, all of the options discussed above would require considerable legal creativity and political will on the part of the rule of law-compliant Member States. While intellectually interesting, it would make more sense to put all the necessary political energy into the mechanisms that are more readily available. They are already there, we just need to use them to the fullest.