Overcoming Objections to Overcome the Hungarian Veto

A Rejoinder to Dawson and van den Brink

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This June, we proposed ways to overcome a Hungarian veto on EU sanctions against Russia. Our proposal prompted Mark Dawson and Martijn van den Brink to write a sharp response, arguing that we had ventured beyond the confines of serious legal scholarship into the realm of the fantastical. To recall, our proposal addressed a veto that threatens existential interests of the Union and breaches the solidarity enshrined in Article 2 TEU. On this basis, we advanced two independent paths to overcome Hungary's obstruction.

First, Hungary's breach of Article 2 TEU is of such severity that it affects the veto's very existence. In consequence, Hungary's vote has never been validly cast, so a Council decision can be adopted without Hungary. Second, the CFSP's unanimity rule in Article 31(1) TEU can be interpreted in light of Article 2 TEU as not covering exceptional situations that threaten the Union's peace, its values, and the well-being of its peoples, so that qualified majority applies.

A "Methodenstreit" of our time

The disagreement between Dawson, van den Brink, and us reflects a deeper controversy over the role of scholars in society, often framed as a "controversy over method". Such controversies are often triggered by crises. One example is the Weimar "Methodenstreit", fought among constitutional scholars in the first German republic. A similar "controversy over methods" occurs in today's EU legal scholarship. One fault line concerns the acceptability of "creative scholarship" and "legal engineering" to address the Union's challenges.

A sceptical group stresses the *limits* of EU law and EU legal scholarship. Some of them – mostly from a state-centred perspective – focus on competences. They tend to perceive legal innovation as a power grab to the detriment of the Member States' autonomy. Others – often with a more European perspective such as Dawson and van den Brink – focus on consistency or constitutional constraints such as fundamental rights, the rule of law, and democracy. All tend to criticise their opponents as politically driven activists failing their scholarly mandate.

The opposite group is forward-looking, developing EU law to unlock its *possibilities*. As part of this group, we depart from three premises: First, the current Treaty framework is here to stay. In a Union of 27 diverse Member States, it seems difficult to imagine Treaty change that overcomes current challenges. Second, many citizens expect the Union to address these challenges and do not accept any excuse. They see inaction as a failure of the Union that erodes their trust. Third, we understand constitutional law as a "living instrument" that evolves over time in sync with society.

Against this backdrop, we will engage with Dawson's and van den Brink's critique, clarify our position, correct misrepresentations, and address their concerns. First, we recall the context of our proposal, a context that our critics largely ignore. Second, we reaffirm our proposal's exceptional nature and narrow scope. Third, we rebut the claim that it compromises procedural integrity, shattering trust among Member States and disregarding legal methods. Fourth, we show that Dawson's and van den Brink's alternative is not viable. And finally, we respond to the allegation of inconsistency.

There is a war, right?

Our critics and we seem to live in different realities. When reading Dawson's and van den Brink's piece, it feels like the Russian war of aggression against Ukraine does not exist. Yet, there lies an uncomfortable truth at the heart of our proposal, one that our critics fail to recognize: the Russian war might grow into an existential threat to the European Union.

Russia's justification of its war can easily be transferred to various Eastern Member States. Russia is already engaging in hybrid warfare against the European Union and portrays it as an aggressive power. In that context, the Union must embrace a new role. Most Member States and many citizens expect it to become a true geopolitical actor that safeguards peace, its values, and the well-being of its peoples, as promised by Article 3(1) TEU. We see it as a task of scholarship to support the Union in meeting this expectation.

Our critics' perception of reality also differs with regard to the Hungarian obstruction. Dawson and van den Brink doubt whether it constitutes a breach of solidarity. Still, it is well-established that Hungary's obstruction in the CFSP – culminating in its threat to veto the sanctions' renewal – reflects a systemic pattern, threatening the EU's geopolitical agency in a manner that benefits the authoritarian aggressor. We will come back to this point.

Tailored responses to exceptional situations

Dawson and van den Brink argue that our proposal could easily be expanded beyond Hungary to many situations, leading to unintended consequences. However, both paths of our proposal are narrow and context-specific. One limits the legal irrelevance of Hungary's veto to a *specific* vote on a *specific* issue in case of a particularly *serious* breach of European solidarity. The second path opts for an interpretation of the unanimity requirement as not applying to a *specific* vote in a *specific* situation: adopting decisions that counter *existential* threats to the Union's peace, its values, and the well-being of its peoples.

The narrow scope of our proposal becomes apparent when considering the example by which Dawson and van den Brink try to debunk it. They suggest that our reasoning would apply to Germany as well if it were to veto sanctions against Israel for its conduct in Gaza. However, our proposal requires a systemic pattern of obstruction that threatens peace, values, and well-being *within* the Union.

Disregarding procedural law?

Dawson and van den Brink argue that our proposal disregards procedures foreseen in the Treaties. Again, this critique misses our point. To recall the procedural side of our proposal: Under our first alternative, the Council Presidency calls for a vote on the renewal of the sanctions against Russia. If Hungary raises its veto during the vote count, the Presidency verifies whether there is consensus among all other Member States that Hungary's veto breaches Article 2 TEU. If that is the case, it registers that the Hungarian vote has not been validly cast and notes an abstention in the sense of Article 238(4) TFEU. Under the other alternative, the Presidency summons the Council that determines, first, whether there is an existential threat, and second, that this situation is not covered by Article 31(1) TEU. This determination is no formal decision but a preparatory step. Once the inapplicability of Article 31(1) TEU to the respective decision is established, the sanctions can be adopted by qualified majority voting under Article 16(3) TEU as well.

According to Dawson and van den Brink, both paths illegally bypass the procedure foreseen in Article 7 TEU. Yet, we simply follow the Court's reasoning on the legality of the conditionality regulation (*Hungary v Parliament and Council*, para 159), which permits alternative responses to violations of Article 2 TEU as long as they do not collide with Article 7 TEU. While Article 7 TEU allows the *suspension* of a Member State's voting rights in *general*, excluding Hungary from all voting, we suggest the legal *irrelevance* of a *single* vote cast in one specific case.

Our critics claim that our proposal renders voting in the Council meaningless, as it would disqualify any Member State's objection to disregarding Hungary's veto. Such objections would equally breach Article 2 TEU, thus leading to their disregard. In such a

scenario, the act of voting would indeed become meaningless. However, it takes far more than such an objection to breach Article 2 TEU. The Hungarian veto expresses a systemic pattern of obstruction. Below this threshold, any Member State can block the Presidency's course of action.

To be clear on this point: such an objection by any Member State would be legitimate. We aim to show a legal possibility, not a normative necessity. There may be many good reasons not to embark on the road we propose, but illegality is not one of them. We refer the issue to the realm of European politics and only close the door to an easy excuse for political inaction.

Shattering trust?

Dawson and van den Brink reject our proposal as a slippery slope towards an illiberal "tyranny of the majority" and present us as demolishers of the trust among Member States, the trust on which the Union is based. To begin with, this is a surprising reading of qualified majority voting under Article 16(3) TEU. In any event, we are not proposing a general move to majority voting, but overcoming the unanimity requirement in exceptional cases. This neither reduces the need to negotiate nor harms the consensual nature of European politics. As our proposal removes the possibility of extorting other Member States in situations of high mutual vulnerability, it rather opens space for *true* negotiation.

We agree that procedural rules are essential to maintaining trust among Member States. But trust among Member States is not unconditional. It depends on a shared commitment to the values of the Union. When a Member State exploits unanimity to sabotage the Union's response to aggression – while benefiting from the Union's legal and economic order – constitutional law should provide a remedy. Constitutional interpretation should avoid abuses of procedural rules as a shield for bad faith and means of extortion.

Of course, our proposal involves a sensitive move, yet one that the Council is well placed to undertake. It is an institution with democratic legitimacy (Article 10(2) TEU) and part of the Union's legislature (Article 16(1) TEU). Moreover, Hungary's (and other Member States') legitimate interests are not at the whims of the majority. Any of the proposed Council decisions would be subject to full judicial review by the Court of Justice – unlike decisions adopted under Article 7 TEU. We assume that our critics share our confidence in the independence and impartiality of the judges in Luxembourg.

Disregarding legal methods?

For Dawson and van den Brink, our proposal blurs the distinction between substantive norms (like solidarity in Article 2 TEU) and procedural rules (like unanimity in Article 31(1) TEU) in an unacceptable way. They purport that procedural provisions cannot be interpreted in light of the constitutional principles in Article 2 TEU.

Yet this is a common and accepted practice. Consider how the Court has expanded its jurisdiction in the CFSP. It interpreted the limitations in Article 40 TEU and 275 TFEU – both procedural provisions – narrowly so as to cover only political decisions (see KS & KD v Council, paras 68, 119). It justified this by relying on Article 2 TEU. The principle of the rule of law prohibits "the modification of the Treaties by the courts" but "obliges them to interpret primary law in light of Article 2 TEU" (see the Opinion by Advocate General Tamara Ćapeta in paras 99-100). Another example is the debate on the appropriate legal basis for the SAFE proposal. The Commission based it on Article 122 TFEU, thus excluding parliamentary involvement. The EP rejected this as unduly limiting democratic participation (see here, here, and here). This implies an interpretation of legal bases in light of the democratic principle contained in Article 2 TEU.

Dawson and van den Brink portray such an interpretation as *contra legem*. But it does not turn Article 2 TEU into a trump that overrides procedural rules. In the first alternative, a procedural act (here: a vote against sanctions) is legally irrelevant due to its manifest violation of a constitutional principle. In the second, Article 31(1) TEU is interpreted in light of Article 2 and 3(1) TEU as not covering decisions that counter exceptional threats. To this end, one can interpret "decisions under this Chapter" by employing the

method of "teleological reduction", a tool embraced by Advocate Generals Michal Bobek (Entoma, para 60), Laila Medina (Lineas, para 72), and Juliane Kokott (CFE, para 83). Likewise, one could interpret the phrase "except where this Chapter provides otherwise" as including Article 2 and 3(1) TEU. In this spirit, Article 23 TEU – a provision of "this Chapter" – refers to Article 21(2) TEU, which in turn refers to the values in Article 2 TEU.

Ignoring alternatives?

Dawson and van den Brink claim that our proposal is unnecessary because there is a better alternative. They point to enhanced cooperation and cite Article 20 TEU. Alas, they fail to consider Article 329 TFEU, which subjects enhanced cooperation in the CFSP to a unanimous decision in the Council. Why, we ask, should Hungary consent to this?

More elaborate alternatives reveal weaknesses, too. Sébastien Platon and others have suggested that Member States, rather than the Union, could impose the sanctions. Even if this is correct, it does not help to strengthen the Union's agency, the very question of our day. Moreover, it would expose the acting Member State to severe geopolitical pressure. Shielding against such pressures is a central function of the Union. Russian central bank assets of 200 billion EUR are currently frozen on Belgian clearing facilities. It would fall on Belgium alone to keep these assets frozen, which would encounter problems under Belgian law as well. Letting a single Member State do the "dirty work" hardly complies with the Member States' commitment to solidarity in the face of common threats.

One can consider alternative European legal bases. The Commission has proposed a shift of legal basis from the CFSP to the common commercial policy for sanctions on the Russian energy sector. Pursuant to Article 207(2) TFEU, "trade measures" can be adopted under the ordinary legislative procedure. However, even if one were to accept that the centre of gravity lies in trade and not in the CFSP, this proposal does not cover the most critical part of the sanctions: freezing the Russian central bank assets. Some Commission officials assume that so-called "capital controls" could prevent cash from flowing to Russia. Leaving aside whether the free movement of capital applies to central bank assets, these measures would either be taken again by single Member States, whose actions would be justified under Article 65(1)(b) TFEU, or by the Union on shaky legal bases, such as Article 64(2) or 66 TFEU. Article 66 TFEU, for instance, allows for so-called "safeguarding measures" only in case of "serious difficulties for the operation of economic and monetary union". This seems a viable alternative to our proposal, but no less of a stretch.

Betraying our scholarship on Article 2 TEU?

Dawson and van den Brink reproach us for being inconsistent over time. Generally, like constitutional law itself, constitutional scholarship can and should evolve. The Court's own understanding of Article 2 TEU has developed over the past decade, and so has the political context: Russia's full-scale war, the democratic erosion within Hungary, and the emerging geopolitics of European defence demand new responses. However, the inconsistencies they allege do not exist.

We agree with Dawson and van den Brink that Article 2 TEU should not turn into a Pandora's box, overriding the many compromises that underpin European constitutional law. Nor should it homogenise the Member States' constitutional law. To this end, we have developed a whole range of safeguards. Our proposal respects them all.

As to Article 2 TEU's *applicability*, we have always cautioned against its freestanding use. Already in 2012, we suggested mobilising Article 2 TEU against Hungarian attacks on free media, at that time mediated by Article 20 TFEU. That seemed fantastical to many until the Court applied a similar logic using Article 19(1)(2) TEU. Our proposal continues to operationalise Article 2 TEU through more specific Treaty provisions. A simple Ctrl-F search in the TEU reveals that solidarity is given expression in a whole range of CFSP provisions. In this sense, our proposal refers to Articles 21(1), 24(2) and (3), 31 and 32 TEU, all of which are expressions of the solidarity in Article 2 TEU.

As to Article 2 TEU's *threshold*, we have always argued that it must be high. For that reason, we developed the idea that breaching Article 2 TEU requires a systemic deficiency. Dawson and van den Brink worry that we have given up on this restraint, but that is not the case. Under the first alternative of our proposal, Hungary's veto qualifies as irrelevant because it emerges from a context of consistent – one may say: systemic – obstruction undermining the Union's response against the Russian war of aggression. Similarly, the second alternative bites only in case of existential threats. What is this if not a systemic threat? Moreover, we have developed the criterion of systemic deficiencies as only one of *several* approaches to limit the impact of Article 2 TEU. It would be fantastic to have one single criterion that fits all cases. However, such – fantastical – 'silver bullets' do not exist in complex constitutional realities.

As to Article 2 TEU's *content*, we have always stressed that its standards must remain thin. To protect the Member States' autonomy, the EU institutions should refrain from providing thick definitions and rather focus on whether a red line is crossed in a specific case. With regard to solidarity, the Court has stated that a Member State must refrain from "unilaterally upsetting the balance between the advantages and obligations arising from its membership of the European Union" (see *Commission v Hungary*, para 117). This provides guidance: Hungary's persistent obstruction in the CFSP reflects a systemic pattern of obstruction, undermines EU action in a manner that benefits the authoritarian aggressor and puts peace in the Union and the security of all Member States at serious risk – all while continuing to enjoy the full advantages of membership. With all respect to Dawson and van den Brink, we regard this as an evident, indeed self-evident, breach of solidarity.

The issue is no longer as urgent as when we first advanced our proposal. On 30 June 2025, the Council renewed the sanctions against Russia, including the freezing of €200 billion in Russian central bank assets. However, as the next renewal approaches in early 2026, the prospect of a Hungarian veto may once again loom large.

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