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The legality of a temporal suspension of veto rights for new EU Member States

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Executive summary

There is widespread fear among Member States that without institutional reform, EU enlargement will add more players tempted to wield their veto to the Council's negotiating table and bring the decision-making process to a grinding halt. To assuage those concerns, the Staged Accession model proposes to gradually integrate acceding states and to temporarily suspend their veto rights upon the moment of accession (Stage 3), thus allowing more time for, *inter alia*, the socialisation of their representatives in the functioning of the EU institutions, and negotiations on treaty reform to bear fruit. This proposal has been met with criticism from stakeholders that acceding countries would effectively become 'second-class members' of the EU.

Leaving arguments of fairness, identity and popular acceptance aside, this paper argues that the principle of equality is a 'constitutional' but not an absolute right. With regard to the non-derogable essence of the principle, i.e. the equality of Member States before EU law (Article

4(2) TEU), the Stage 3 proposal would undeniably introduce a temporary differentiation between new and existing Member States as to the exercise of voting rights in the Council. Yet, this divergence would not constitute a breach of Article 4(2) TEU *per se*: rather than creating a permanent opt-out from the institutional rights of full membership, the Stage 3 proposal reflects the readiness of the existing Member States to automatically grant full voting rights to the new members in Stage 4 upon the expiration of the temporal limitation. Still, to satisfy the legality criterion, the suspension of veto rights would have to be applied without exception to all future acceding states and therefore not constitute a tool to discriminate between them. Furthermore, the legal validity of the Stage 3 proposal hinges on the proportionality of the derogation of EU primary law.

A review of past practice with temporary derogations from EU primary law reveals the conditions under which the proposed exemption from the unanimity rule would meet the standards of proportionality developed by the Court of Justice of the European Union (CJEU) in its jurisprudence. For several reasons the paper argues that the measure is both suitable and necessary to achieve the legitimate aim of enhancing further the democratic and efficient functioning of the institutions, enabling them to better to carry out, within a single institutional framework, the tasks entrusted to them. The temporary exemption would also increase the EU's resilience against malevolent foreign influences and help to prevent cracks in the EU's international posture as a consequence of its widening. The temporary derogation would also allow more time for EU treaty reform to bear fruit.

Moreover, less restrictive measures that attain those objectives do not exist. Within the decision-shaping and consensus-seeking column of the Council, new Member States' interests would be stated and considered in the vast majority of cases. The measure would thus generally not have an excessive effect on the applicant's interests. But to mitigate the impact of the temporary suspension of the right to cast a negative vote on what may be perceived as among the core interests of new members (e.g. the harmonisation of taxes, own resources decisions, vital security interests), the paper suggests, among others, introducing an 'emergency brake' into the Accession Treaty, similar to that foreseen in the EU Treaty, adapted accordingly.

The duty to avoid tensions rests on the governments and the national parliaments during the treaty-drafting process, and on the CJEU in the interpretation and application of the law. While past practice with transitional measures laid down in Accession Treaties has not established a hard deadline for derogations from the application of EU primary law to expire, our review reveals that suspensions of the exercise of constitutional rights for around a decade or more have been deemed justifiable under EU law. Whether such a derogation is politically palatable is a matter for negotiation and public expectations management.

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1. Introduction

Stage 3 of the Staged Accession model strikes a grand bargain between existing Member States wary of adding more potential veto-wielding players to the Council's negotiating table and candidate countries eager to be integrated into the EU in a more gradual and accelerated fashion than hitherto politically acceptable¹. In return for the extension of greater sums of (structural) funding and pre-accession participatory rights in EU bodies and institutions, acceding countries accept to temporarily renounce their right to cast a negative vote in the decision-making procedures of the Council that require unanimity.

In discussions with several groups of stakeholders, this proposal has raised concerns that acceding countries would effectively become 'second-class members' of the EU. In another paper, part of the core research team has addressed these concerns from the perspective of fairness, identity and popular acceptance². This paper supports the legality of the proposal and establishes the conditions under which a temporal suspension of veto rights would comply with EU law.

2. EU 'constitutional' principles as absolute rights?

A legal investigation into this matter should start with the observation that there is no material provision in the EU Treaties specifying its scope *ratione temporis*. The exception is the generic Article 351 of the Treaty on the Functioning of the EU (TFEU), which states that '*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.*' Consequently, EU candidate countries are expected to '*take all appropriate steps to eliminate the incompatibilities*'. In the pre-accession process, the focus is as much on prior international agreements as it is on conflicting domestic legislation, requiring in certain cases constitutional change to give full effect to EU law³.

Temporal limitations on applying primary EU law on grounds of nationality are generally tolerated. For the protection of, *inter alia*, public health, order and safety, temporary derogations are possible from the free movement rights that constitute the cornerstones of

¹ See Emerson, M., Lazarevic, M., Blockmans, S. and Subotic, S. (2021), 'A Template for Staged Accession to the EU', CEP-CEPS Working Paper.

² See Subotic, S. and Lazarevic, M. (2022), 'The Model of Staged Accession to the European Union: Addressing the Western Balkans' Three Key Concerns', CEP Discussion Paper, at 4-6.

³ See Albi, A., 'Impact of European Integration on National Constitutions and Parliaments' (2006), in Kellermann, A.E., Czuczaj, J., Blockmans, S., Albi, A. and Douma, W., eds. (2006), *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries – Hopes and Fears*. TMC Asser Press, 243-265.

the EU's Single Market, so long as such restrictions do not constitute a means of arbitrary discrimination between Member States⁴.

Outside emergency situations the temporary suspension of EU law has also been accepted. In the sixth round of EU enlargement, for instance, temporal limitations of up to seven years were imposed on Bulgarian and Romanian citizens, meaning they were unable to fully exercise their right to work in all EU countries without a work permit⁵. Such limitations are laid down in Accession Treaties, which specify the terms under which acceding states become Member States. These international agreements are legally on a par with the EU Treaties, which are thereby amended and/or supplemented to incorporate the adjustments brought about by the accession of new Member States (cf. Article 49 TEU)⁶.

Contrary to the exclusion of new and existing Member States from areas of enhanced cooperation for which higher levels of commitment and adherence are required than those established by the EU Treaties (e.g. EMU, Schengen, PESCO⁷), the examples above are grounded in the basic law of the EU which – as a matter of principle – applies to all. The temporal derogation from these rules of EU primary law can be inferred from applying the general principles of EU law in the case-law of the Court of Justice of the European Union (CJEU).

General principles of EU law are applied by the CJEU and the national courts of the Member States when determining the legality of legislative and administrative measures within the EU. In contrast to the rule of law, 'principles are more general and open-ended in the sense that they need to be honed to be applied to specific cases with correct results⁸'. General principles are applied to avoid the denial of justice, fill gaps in EU law and to strengthen its coherence⁹. Accepted general principles of EU law include fundamental rights, legal certainty, and subsidiarity¹⁰.

⁴ See Articles 36 (goods), 45(3) (workers), 52(1) (establishment), 65(1)b (capital) of the Treaty on the Functioning of the EU (TFEU) and other references on the adoption of provisional measures by Member States for the reasons mentioned in these safeguard clauses.

⁵ See, e.g., point 6 of ANNEX VI 'List referred to in Article 23 of the Act of Accession: Transitional measures, Bulgaria', Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, Official Journal EU 2005, L 157/ 203.

⁶ Case 185/73, Hauptzollamt Bielefeld/König, ECLI:EU:C:1974:61, paras. 2-3.

⁷ In the case of EMU it is mostly a matter of the new members meeting the convergence criteria, while in the case of the Schengen *acquis*, it is about the readiness of the new members as well as the technical systems necessary for compliance. Regarding PESCO, it is about meeting higher levels of commitment laid down in Protocol No. 10 attached to the EU Treaties. In the fifth round of EU enlargement, the new members had been obliged to meet quality, production, processing and hygiene standards, and to take full responsibility for third country imports into the Single Market. However, they were excluded from the financial benefits in terms of subsidies and direct payments, due to the then-ongoing reform of the Common Agricultural Policy and were only gradually integrated into it. Indeed, in all these areas, the new Member States will be gradually included in the Union's activities. See Inglis, K. (2010), *Evolving Practice in EU Enlargement with Case Studies in Agri-Food and Environmental Law*, Brill.

⁸ See Jans, J. (2007), *Europeanisation of Public Law* (1st ed), Europa Law Publishing, at 418.

⁹ See Kaczorowsky, A. (2008), *European Union law*, Taylor & Francis, at 231.

¹⁰ See, e.g., Tridimas, T. (2013), *General Principles of EU law*, Third Edition, Oxford University Press.

For the examination at hand, the general EU principles of legality and proportionality require that a curb on unanimity in Council decision-making can be established under and within the law. **Whether or not the EU can suspend the exercise of new Member States' veto rights inferred from the Treaties depends on the legal hardness of the unanimity rule, as well as the conditions under which the CJEU deems a time-limited collateral infringement of the constitutional rule of equality of Member States before the Treaties (Article 4(2) TEU) to be proportional.** We leave aside the argument that, consequently, the democratic principle of the equality of EU citizens (Articles 9 and 10(3) TEU and Article 18 TFEU) might equally be infringed¹¹.

While the proposed exemption from the unanimity rule temporarily limits the *indirect* exercise of citizens' political rights in blocking decision-making in the Council, their representation remains otherwise guaranteed in that institution and – more importantly – the other parts of the EU's diffuse and multi-layered representative democracy whereby the political executive continues to be held accountable to the parliamentary majority¹². Article 10(2) TEU underscores the paramount role of the European Parliament, which is the institution *directly* representing citizens at the EU level, while national governments are represented in the European Council and the Council, 'themselves democratically accountable either to their national Parliaments, or to their citizens.'

When establishing the legal hardness of the norms at hand, it suffices to note that the Treaty-based unanimity requirement in Council decision-making is a procedural 'rule', not a general principle of EU law. Over the past few decades, several rounds of Treaty reform have lifted the requirement by expanding the use of qualified majority voting (QMV) across policy areas. The current debate on 'widening v. deepening' reflects the persistent desire of some larger Member States (France and Germany, in particular), to mainstream QMV in the Council before the next round of EU enlargement to overcome practices of 'vetocracy' (see Section 5.1.1 below) and thus increase the democratic legitimacy of EU decision-making. But even without having to change the law, several 'passerelle' clauses allow a shift from unanimity to QMV or from the special to the ordinary legislative procedure without a formal amendment of the current Treaties¹³. The flexibility agreed to by Member States in applying the unanimity rule therefore reveals the malleable nature of the concept and suggests that it might be subject to 'adjustments' in a future Accession Treaty. This is somewhat different for general principles of EU law.

¹¹ See Hillion, C. (2007), 'Negotiating Turkey's Membership to the European Union: Can the member states do as they please?', *European Constitutional Law Review*, No. 3, 269–284.

¹² See Lijphart, A. (1984), *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*. Yale University Press, at 68; Achenbach (2013), *Demokratische Gesetzgebung in der Europäischen Union*, Springer, 302–326; and Blockmans, S. (2019), 'Conclusions', in Blockmans, S. and Russack S. (eds.), *Representative Democracy in the EU: Recovering legitimacy*, Rowman & Littlefield International, 359–373.

¹³ The general passerelle clause is contained in Article 48(7) TEU. Six special passerelle clauses apply in the fields of Common Foreign and Security Policy (Article 31(3) TEU), family law with cross-border implications (Article 81(3) TFEU), social policy (Article 153(2) TFEU), environmental policy (Article 192(2) TFEU), the multi-annual financial framework (Article 312(2) TFEU) and enhanced cooperation (Article 333 TFEU).

In the abundant academic literature on the use of the term ‘principle’ in EU law¹⁴, a special place is reserved for ‘founding’ or ‘constitutional’ principles¹⁵. Keeping distance from philosophical and ideological discourses, largely inappropriate in court judgments¹⁶, it suffices to note that this paper understands EU primary law, i.e. the law enshrined in the Treaties, as ‘constitutional’ law. This includes Article 4(2) TEU. ‘Founding principles’ are defined as *‘those norms of primary law which, in view of the need to legitimise the exercise of any public authority, determine the general legitimacy foundations of the EU’ and therefore ‘express an overarching normative frame of reference for all primary law, indeed for the whole of the EU’s legal order’*¹⁷. Enshrined as lofty ‘values’ in Article 2 TEU, ‘respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights’ provide important points of orientation for policymakers. ‘Principles’, in turn, are generally more defined and can therefore generate specific legal rules and obligations that can also be enforced by a court¹⁸.

Their elevated status in EU ‘constitutional’ law notwithstanding, founding values and general principles are not absolute. They offer interpretative guidance for the operationalisation of other norms of EU law (primary or secondary), but there may be good reasons for divergence¹⁹, if treated as exceptions.

The best-known absolute rights contained in EU law are certain fundamental rights. It is in this context that the CJEU has developed **the ‘essence of law’ test to determine the non-derogable content of rights extended under EU law** (Section 3). This test is instrumental in determining whether the substance of Article 4(2) TEU, according to which ‘(t)he Union shall respect the

¹⁴ The English language version of the Treaty of Lisbon uses the term 98 times, ranging from the principle of democracy (Article 6 TEU) to the principles of national social security systems (Article 153(4) TFEU). Some principles are even to be laid down by the Council (Article 291(3) TFEU).

¹⁵ The CJEU speaks of constitutional principles: Cases C-402/05 P and C-415/05 P, *Kadi*, ECLI:EU:C:2008:461, para. 285.

¹⁶ See von Bogdandy, A. (2010), ‘Founding Principles of EU Law. A Theoretical and Doctrinal Sketch’, *European Law Journal*, Vol. 16, 95-111, paras. 27-28: ‘the Treaty maker often identifies as principles elements of a provision with a rather vague content, as even the principles for single topics such as those of Article 191(2) TFEU or Article 317 TFEU show. (...) The presumption of a missing overarching conception of the authors of the Treaty is confirmed by the rather fortuitous assignment of attributes such as guiding (Article 119(3) TFEU), existing (Article 47(2) EC), basic (Article 67(5) EC), uniform (Article 207(1) TFEU), fundamental (Article 340(2) TFEU), general (Article 340(2) TFEU) or essential (Article 2 of the Protocol on the Financial Consequences of the Expiry of the Treaty Establishing the European Coal and Steel Community). One has to analyse individually for every single use of the word ‘principle’ what legal consequences are attached to the norm, especially with regard to legal remedies and judicial review.’

¹⁷ *Ibid.*, para. 31

¹⁸ See von Bogdandy, loc. cit., para. 35; and Cremona, M. (2016), ‘Structural Principles and Their Role in EU External Relations Law’, *Current Legal Problems*, Vol. 69, at 35.

¹⁹ See Chirico, F. and Larouche, P. (2008), ‘Conceptual Divergence, Functionalism, and the Economics of Convergence’, in Prechal, S. and van Roermund, B. (eds.), *The Coherence of EU Law; The Search for Unity in Divergent Concepts*, Oxford University Press, 463–495. Von Bogdandy, loc. cit., para. 44: ‘Even under the premise of a uniform validity of the founding principles, the question arises whether this corresponds to a uniform meaning in the various areas of EU law. For instance, the dual structure for democratic legitimation through the Council and Parliament only exists under the competences of the TFEU, and judicial review by the ECJ, paramount for the rule of law principle, is limited or even precluded in important domains.’

equality of Member States before the Treaties (...)’ belongs to the *noyau dur* of EU law, on the exercise of which no limitation can be imposed (Section 4). This paper provides a negative answer to the question and therefore proceeds to establish the conditions under which a derogation could meet the proportionality – and thus legality – tests applied by the CJEU in its jurisprudence (Section 5).

3. Fundamental rights: the ‘essence test’ applied to general principles of EU law

The ‘essence’ of a general principle or constitutional norm in EU law defines a sphere of application that must always remain free from interference or limitation. With respect to violations of the non-derogable core of EU rules and principles, the jurisprudence pertaining to the Charter of Fundamental Rights (CFR), which has the same standing as the Treaties in the hierarchy of EU law, serves as a helpful benchmark.

According to the first sentence of Article 52(1) CFR: ‘*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms*’.

Absolute fundamental rights are ‘all essence’, meaning that their exercise may not be restricted, not even in a declared state of emergency²⁰. Examples are few – the right to life, the prohibition of inhuman or degrading treatment, and the principle of legality in criminal law (i.e. no punishment without law²¹). The right to equal treatment does not feature in this list.

In fact, the exercise of most fundamental rights may be subject to limitations²². According to the incumbent President of the Court of Justice of the EU,

‘a measure that respects the essence of such rights does not call them into question as such. It follows from the case law of the CJEU that the essence of a fundamental right is not compromised where the measure in question limits the exercise of certain aspects of such a right, leaving other elements untouched, or applies in a specific set of circumstances with regard to the individual conduct of the person concerned. Conversely, in order for an EU or

²⁰ Lenaerts, K. (2019), ‘Limits on Limitations: The Essence of Fundamental Rights in the EU’, *German Law Journal*, Vol. 20, 779–793, at 792.

²¹ Article 15(2) of the European Convention on Human Rights (ECHR) provides a list of rights that may not be suspended under any circumstances. The EU is bound to respect these non-derogable fundamental rights as general principles of EU law pursuant to Article 6(3) TEU.

²² See C-355/10, *European Parliament v Council*, ECLI:EU:C:2012:516, para. 77: ‘... the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required’. See also e.g., C-92/09, *Volker und Markus Schecke and Eifert*, ECLI:EU:C:2010:662; C-236/09, *ASBL Test-Achats*, ECLI:EU:C:2011:100; and C-362/14, *Schrems*, ECLI:EU:C:2015:650.

national measure to compromise the essence of a fundamental right, such a measure must constitute a particularly intense and broad limitation on the exercise of such a right²³.

Because no interference with the ‘hard nucleus’ of liberty may be justified, one must proceed with caution when defining the conditions under which the essence of a fundamental right is compromised: *‘A broad understanding of that concept would run the risk of transforming all rights recognised in the Charter into absolute rights, which is simply untenable in a democratic system of governance such as the EU where the balancing of competing interests occurs regularly²⁴.*

These considerations apply as much to the fundamental right of ‘equality before the law’ (Article 20 CFR) as they do to other founding principles and constitutional norms of EU law, including Article 4(2) TEU. The CJEU has clarified that the notion of ‘equality of Member States before the Treaties’ in Article 4(2) TEU should be understood as ‘equality before the law’ and ‘equality of arms between parties to judicial proceedings²⁵’. To protect general principles of EU law effectively, there is no need for the broad understanding that Court President Lenaerts refers to. This is because when it comes to applying the principle of proportionality to limitations on the exercise of fundamental rights – as indeed other general principles of EU law – the CJEU does not confine itself to ascertaining whether the measure in question is manifestly inappropriate to attain the objectives it pursues²⁶. The CJEU has held that the more extensive and serious an interference with fundamental rights is, the less discretion the EU legislator enjoys and the stricter judicial scrutiny will be²⁷.

In the context of the *Template on Staged Accession*, the question has been raised over whether the introduction of a temporary denial of veto powers for new Member States constitutes a violation of Article 4(2) TEU on the equality of Member States under EU law. To answer this question, we need to unpack the treaty provision, determine the essence of this constitutional rule, and establish whether that essential element belongs to the ‘hard nucleus’ of EU law that must always remain free from interference.

²³ Lenaerts, loc. cit, at 793.

²⁴ Ibid.

²⁵ See C-157/21, Poland v Parliament and Council, ECLI:EU:C:2022:98, paras. 18, 37 and 43.

²⁶ See Lenaerts, K. and Gutiérrez-Fons, J.A. (2018), ‘A Constitutional Perspective’, in Schütze, R. and Tridimas, T. (eds.), *Oxford Principles of European Union Law. Volume I: The European Union Legal Order*, Oxford University Press, 103-141, at 116.

²⁷ Joined Cases C-293 and 594/12, Digital Rights Ireland, ECLI:EU:C:2014:238, paras. 47–48. Considering the judgment in Joined Cases 2013 and 698/15, Tele2 Sverige, ECLI:EU:C:2016:970, the same applies to national legislatures.

4. Are some Member States more equal than others?

4.1 The essence of Article 4(2) TEU

Going by its positioning (among the ‘Common Provisions’ of the TEU) and formulation, Article 4(2) TEU appears to be one of the foremost general principles of EU law²⁸. Its current wording is as follows:

‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State’.

The legal geography in the Treaties and its wording suggest that Article 4(2) TEU is an autonomous provision, to be distinguished from other provisions concerning the cultural, linguistic and religious specificities of the Member States, as well as from those relating to the protection of fundamental rights and should be read jointly with the principles of conferral, sincere cooperation, subsidiarity and proportionality. For those reasons, Christiaan Timmermans, a former judge at the CJEU, has claimed that the Treaty provision should be interpreted strictly, since Article 4(2) TEU would constitute a general limitation on the reach of EU law, whether primary or secondary²⁹.

However, the vast majority of EU scholars, including the current President of the CJEU³⁰, support the view that Article 4(2) TEU is an unqualified reference neither to national culture nor to the entirety of national constitutions but rather to the core elements or values of a particular Member State’s national community derived from its constitutional order³¹.

²⁸ Rossi, L.S. (2017), ‘The Principle of Equality Among Member States of the European Union’ in Rossi, L.S. and Casolari, F. (eds.), *The Principle of Equality in EU Law*, Springer, at 3-43.

²⁹ See Timmermans, C. (2014). ‘Book review: The Magic World of Constitutional Pluralism’, *European Constitutional Law Review*, Vol. 10, 356.

³⁰ Lenaerts, K. (2020), ‘No Member State is More Equal than Others: The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties’, *Verfassungsblog*, DOI: [10.17176/20201008-113323-0](https://doi.org/10.17176/20201008-113323-0). See further Section 4.3 below.

³¹ See e.g. Cloots, E. (2015), *National Identity in EU Law*, Oxford University Press; Konstadinides, T. (2011), ‘Constitutional Identity as a Shield and as a Sword: The European Legal Order Within the Framework of National Constitutional Settlement’, *Cambridge Yearbook of European Legal Studies*, 195; Von Bogdandy, A. and Schill, S. (2011), ‘Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty’, *Common Market Law Review*, Vol. 48, 1417; Besselink, L. (2010), ‘National and Constitutional Identity Before and After Lisbon’, *Utrecht Law Review*, 36-49; Dobbs, M. (2014), ‘Sovereignty, Article 4(2) TEU and the Respect of National Identities: Swinging the Balance of Power in Favour of the Member States?’, *Yearbook of European Law*, Vol. 33, 277;

Bruno De Witte, former EUI professor of EU law, has been the most vocal in rejecting ‘*the inordinate, and frankly excessive, place occupied by Article 4(2) TEU and by the notion of national identity in questions of interpretation or validity of EU law where they should have no role to play and where their invocation only confuses things*³²’. He argues that Article 4(2) TEU

‘... should not be interpreted or applied as a generic and ill-defined protection of diversity. That broader meaning opens the door to abusive and superficial uses of identity as a justification for non-compliance with EU law obligations from the side of the Member States. In particular, we can observe how “the use of the terms national and constitutional identity provides fertile ground for framing nationalist-sovereigntist arguments in a way that they sound as fitting the existing European framework³³, and how constitutional identity is being turned into ‘an arbitrary tool of judicial identity politics³⁴’. We agree with Advocate-General Cruz Villalon’s remark that it is ‘an all but impossible task to preserve the Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as “constitutional identity^{3536”’.}

Instead, De Witte proposes to limit the meaning of Article 4(2) TEU to what its text actually states, namely a guarantee for the *constitutional structures* of the EU Member States.

By way of interim conclusion, **the essence of Article 4(2) TEU** is not to be found in the ‘national identity clause’ contained in it but in **the notion that all provisions of EU law are to have the same meaning and are to be applied in the same fashion throughout all EU Member States.**

4.2 Autonomous legal order

Having identified the essential element of Article 4(2) TEU, the question that needs to be answered is whether the proposed temporary suspension of veto rights for new Member States qualifies as a breach of a non-derogable right.

Before venturing further into that discussion, it should be observed that the equality of EU Member States before the Treaties has two further dimensions: the one expressed in Article

Rosenfeld, M. (2012), ‘Constitutional Identity’, in Rosenfeld M. and Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 756; Van de Schyff, G. (2012), ‘The Constitutional Relationship Between the European Union and Its Member States: The Role of National Identity in Article 4(2) TEU’, *European Law Review*, Vol. 37, 563.

³² De Witte, B. (2021), ‘Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States’, *European Public Law*, Vol. 27, 559–570, at 560.

³³ Körtvélyesi, Z. and Majtényi, B. (2017), ‘Game of Values: The Threat of Exclusive Constitutional Identity, The EU and Hungary’, *German Law Journal*, Vol. 18, 1721, at 1743.

³⁴ Fabbrini, F. and Sajó, A. (2019), ‘The Dangers of Constitutional Identity’, *European Law Journal*, Vol. 25, 457, at 467. See also with specific reference to the case of Hungary, Halmai, G. (2017), ‘National(ist) Constitutional Identity? Hungary’s Road to Abuse Constitutional Pluralism’, *EUI Working Papers LAW* No. 8.

³⁵ Case C-62/14, *Gauweiler and Others*, Opinion of Advocate-General Cruz Villalon, EU:C:2015:7, para. 59.

³⁶ De Witte, loc. cit.

4(2) TEU and which thus forms part of EU constitutional law; and another one in public international law, resulting from the fact that the EU builds upon treaties concluded by the Member States³⁷. Both dimensions are relevant when testing the validity of the temporary derogation of veto powers introduced at Stage 3 of the Staged Accession model. But does this also mean that the issue is justiciable before both the CJEU and an international court like the European Court of Human Rights (ECtHR)? And is the CJEU bound to apply higher rules of international law in its ruling? To answer these questions, we need to take a step back.

The EU is usually considered a *sui generis* organisation. This special status flows not only from its relationship with its Member States (which indeed differentiates it from other international organisations), but also from its position towards international law. The CJEU tends to underline this special position by referring to the ‘new legal order of international law’ that was created ‘for the benefit of which the states have limited their sovereign rights³⁸’, thus a legal order in which the relationship between the Member States is no longer primarily regulated by international law but by EU law³⁹.

Within the EU legal order, however, this may lead to conflicting norms and over the years the CJEU has had quite a task in finding answers to a number of questions about the hierarchical position and effects of international law within the EU legal order. A striking tension underlies the many judicial cases on the effects of international law in the EU legal order, namely the EU’s struggle to find solutions between autonomy from – and dependence on – international law⁴⁰. To make certain key principles of EU law (including primacy and direct effect) work, the EU needs to stress its autonomy *vis-à-vis* international law. At the same time, as an international actor, there is a need for the EU to live up to the rules that make up the international legal order and are thus binding on it.

The notion of autonomy was a central element in the discussion between the CJEU and the General Court in the *Kadi* saga when the latter argued: ‘the Court of Justice thus seems to have regarded the constitutional framework created by the EC Treaty as a wholly autonomous legal order, not subject to the higher rules of international law (...)’⁴¹.

In other words, the EU is not automatically bound by international law, but only when it is incorporated into the EU legal order. In this legal order, the CJEU provides the judicial backstop.

In the *Kadi* judgments, the EU’s own human rights guarantees were shielded – with the help of the concept of autonomy – from encroachment stemming from an international legal source. The question of autonomy returned in Opinion 2/13 on the accession of the EU to the European Convention of Human Rights, not to give better protection to human rights, but to allow for

³⁷ On this distinction, see Classen, C.D. (2020), ‘Die Gleichheit der Mitgliedstaaten und ihre Ausformungen im Unionsrecht’, *Europarecht*, No. 3, at 255-269.

³⁸ Case C-26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, EU:C:1963:1.

³⁹ Case C-6/64, *Costa v ENEL*, EU:C:1964:66.

⁴⁰ See, e.g., Wessel, R.A. and Blockmans, S., eds. (2013), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Berlin: Springer), 297-312.

⁴¹ T-85/09, *Kadi v Commission*, ECLI:EU:T:2010:418, para. 119.

human rights protection in the CJEU's own way without being hindered by an international actor such as the ECtHR. The principle of autonomy is to a large extent related to the CJEU's exclusive jurisdiction to decide on the validity of EU law and on its interpretation.

As such, potential future **challenges to supposedly flawed EU treaty law, including Accession Treaties which temporarily suspend voting rights in the Council for acceding states, will be caught in a closed loop – they are framed by EU law and settled by the CJEU.**

This is confirmed by the President of the CJEU, who points to three direct implications which flow from 'the principle of equality of the Member States before the Treaties':

'First, the uniform interpretation and application of EU law are key for guaranteeing that equality. Second, the uniform interpretation of EU law needs to be ensured by one court and one court only, i.e. the Court of Justice. Third and last, the principle of primacy underpins the uniform interpretation and application of EU law. That law – as interpreted by the Court of Justice – is the supreme law of the land, as primacy guarantees that normative conflicts between EU law and national law are resolved in the same fashion⁴²'.

Article 4(2) TEU acts as a constitutional device to defuse legal tensions between, on the one hand, the need to ensure the autonomy and the *effet utile* of EU law and, on the other hand, the need to protect the fundamental structures and essential functions of the member states, provided they are compatible with Article 2 TEU⁴³.

The duty to avoid tensions rests on the governments and the national parliaments during the treaty-making process, and on the CJEU in the interpretation and application of the law. If, therefore, the Member States and one or more acceding countries agree to temporarily limit the veto rights of the new Member State/s, and ratify the Accession Treaty/ies in which this derogation features⁴⁴, each according to their own constitutional requirements and procedures⁴⁵, then any lingering claim about the intolerable creation of 'second-class membership', such as that floated in the context of the Stage 3 proposal under review, would thus need to be considered by the CJEU by interpreting standing EU law in both a textual and contextual manner.

⁴² Lenaerts, K. (2020), 'No Member State is More Equal than Others: The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties', *Verfassungsblog*, DOI: [10.17176/20201008-113323-0](https://doi.org/10.17176/20201008-113323-0).

⁴³ Di Giacomo, F. (2019), 'The Potential of Article 4(2) TEU in the Solution of Constitutional Clashes Based on Alleged Violations of National Identity and the Quest for Adequate (Judicial) Standards', *European Public Law* Vol. 25, 347–380.

⁴⁴ Politically, this may be a hard sell in national parliaments or during referenda organised in acceding countries, due to being vulnerable to populist claims about 'second-class' membership. Conversely, it is likely to also play to the political advantage of the French authorities, which are under a constitutional obligation to hold a referendum on each upcoming enlargement.

⁴⁵ Cf. note 3.

4.3 Breach of Article 4(2) TEU?

Article 4(1) TEU opens by recalling the principle of conferral. This means that the duty set out in Article 4(2) TEU presupposes that the EU institutions (including the CJEU) have acted within the scope of their competences. Black letter EU law currently does not foresee the kind of differentiation proposed in Stage 3. But the Staged Accession model presupposes that, as Masters of the Treaties, the EU27 and acceding state(s) would unanimously agree and ratify the Accession Treaty introducing the amendments to the constituent treaties of the EU, including the temporary derogation from exercising veto rights in decision-making procedures subject to the unanimity rule.

Like the adjustment to the weighted votes in Article 238 TFEU⁴⁶, the proposed application of transitional measures to Treaty articles pertaining to unanimity decision-making in the Council (e.g. Article 87(3) TFEU) are subject to ratification by all member and acceding states and thus represent their individual and collective will to be bound. This does not mean that the countries concerned can do whatever they please. The introduction of *permanent* safeguard clauses, such as those pertaining to the free movement of persons, as suggested in the 2005 negotiating framework for Turkey⁴⁷, should be dismissed as an intolerable violation of the ‘very foundations’ on which the EU legal order rests, in particular the principle of non-discrimination based on nationality⁴⁸.

While the Stage 3 proposal would undeniably introduce a temporary differentiation between new and existing Member States regarding their voting rights in the Council, this divergence would not constitute a breach of Article 4(2) TEU *per se*⁴⁹ – or to paraphrase Lenaerts: the limitation would respect the essence of veto rights and not call them into question as such. By its very nature, a temporal derogation from EU constitutional law is supposed to be finite.

Rather than creating a permanent opt-out from the institutional rights of full membership, the Stage 3 proposal reflects the readiness of the existing Member States to grant full voting rights to new Member States in Stage 4. To satisfy the legality criterion, the suspension of veto rights

⁴⁶ Subject to *transitional* arrangements in Protocol No. 36, *nota bene*. Protocols govern the operation of the EU Treaties and are equally binding on the Member States.

⁴⁷ Para. 12, 4th indent of the negotiating framework, which is available at https://neighbourhood-enlargement.ec.europa.eu/turkey-negotiating-framework-october-2005_en.

⁴⁸ See Hillion (2007), loc. cit, with reference to Opinion 1/91 EEA [1991] ECR I-6079 and da Cruz Vilaça, J.L. and Piçarra, N. (1993), ‘Y a-t-il des limites matérielles à la révision des traités instituant les Communautés européennes?’, *Cahier de Droit Européen*, Vol. 29, at 3.

⁴⁹ Nor does the proposal amount to invoking another decision-making modality, such as a switch (*passerelle*) to QMV or triggering the constructive abstention mechanism foreseen in Article 31(1), second paragraph TEU. Three arguments plead against invoking the latter clause to aim for the same effect as the suspension of veto rights: 1) the constructive abstention mechanism applies only to the legally specific regime of the CFSP and does not lend itself to be extended to the domains governed by the community method; 2) following on from the previous point: Article 31(1), second paragraph TEU falls outside of the CJEU’s remit and is ultimately not legally enforceable; 3) the constructive abstention mechanism under Article 31 TEU does not bind the Member State(s) that invoke it in legal and financial terms to the decisions that commit the Union, whereas in the Staged Accession model, the proposed Stage 3 implies that the new Member States would be bound by decisions adopted by the Council.

would have to be applied without exception to all future acceding states and therefore not constitute a tool to discriminate between them⁵⁰.

As the examples in Section 5 (below) show, such differentiation in the application of EU primary law is not a new phenomenon in the accession process. **But the legal validity of the Stage 3 proposal hinges on the proportionality of the derogation of EU primary law.**

The question that still needs to be answered is thus when a temporary derogation from a Treaty provision becomes a quasi-indefinite and therefore an unjustifiable breach of EU primary law. This is where the general principle of proportionality comes into play.

5. Proportionality of a temporal derogation of EU primary law

5.1 A proportionality test

The principle of proportionality is a criterion for the legality of any act of Union law⁵¹. Next to legislative action as provided for in Protocol No. 2, the principle of proportionality applies to the legality of EU administrative acts pursuant to Articles 5(4) TEU and 52(1) CFR⁵².

The principle of proportionality is often considered as the most far-reaching ground of judicial review and of particular importance in testing cases of public law. The CJEU has consistently held that the legislature *‘must be allowed a wide discretion in an area which (...) involves (...) making (...) policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion’*⁵³.

Barring the notion that the Stage 3 proposal verges on the arbitrary (cf. the conscious steps taken during the pre-enlargement IGC and full ratification process), the question needs to be asked whether imposing a temporary derogation of veto rights on new Member States constitutes a collective misuse of power. To establish this, the general EU law principle of **proportionality entails a three-prong test**: 1) is the measure suitable to achieve a legitimate

⁵⁰ As mentioned above, the derogation should allow more time to spur a future change of the constituent Treaties of the EU to mainstream QMV in Council decision-making.

⁵¹ See Tridimas, T. (2018), ‘The Principle of Proportionality’, in Schütze and Tridimas (eds.), loc. cit., 243, at 256–57.

⁵² Article 5(4) TEU states that ‘Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties [...]’.

⁵³ See Case C-426/93, *Germany v Council*, ECLI:EU:C:1995:367; and Case C-84/94, *UK v Council*, ECLI:EU:C:1996:431.

aim, 2) is the measure necessary to achieve that aim or are less restrictive means available, and 3) does the measure have an excessive effect on the applicant's interests⁵⁴.

Applying the above-mentioned test, one can conclude that **the derogation of veto rights to new Member States is...**

1) suitable to achieve a legitimate aim

This is reflected in the Treaties' preambular aspiration 'to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them'.

In recent years, the uptick of single use vetoes has been noticeable. Individual Member States seem increasingly comfortable to enforce outlier positions by using vetoes with which they want to push through particular interests, demand material compensation, or even hope to obtain concessions on other matters that are completely separate from the issue at hand. Cyprus, for instance, vetoed EU sanctions against Belarus in autumn 2020 not because the Cypriot government opposed the measures *per se* or saw their national interests affected, but because it saw an opportunity to push the other 26 Member States to simultaneously adopt a tougher EU stance against Turkey⁵⁵. Hungary's practice of 'vetocracy', in particular, has been akin to hostage-taking tactics that benefit a corrupt and self-declared 'illiberal' government in Budapest and the interests of the EU's systemic rivals, notably Russia (and its Orthodox Church) and China⁵⁶.

Suspending new Member States' veto rights would better insulate Council decision-making against individual Member States' hostage-taking practices and ensure the 'continuity of policies and actions' that Article 13(1) TEU expects from the EU's institutional framework. It would also increase the EU's resilience against malign influences and help to prevent cracks in the EU's international posture from widening.

The temporary derogation may also catalyse EU institutional reform. Several Member States have consistently advocated for mainstreaming QMV in Council decision-making⁵⁷. This was

⁵⁴ See Craig, P. and de Burca, G. (2020), *EU Law: Text, Cases and Materials*, 7th ed., Oxford University Press, with reference to Case C-265/87, Schröder v Hauptzollamt Gronau, *ECLI:EU:C:1989:303*, para. 21; C-343/09 Afton Chemical, *ECLI:EU:C:2010:419*, para. 45; and Joined Cases C-581/10 and C-629/10, Nelson and Others, *ECLI:EU:C:2012:657*, para. 71.

⁵⁵ See Erlanger, S. (2020), 'E.U. Failure to Impose Sanctions on Belarus Lays Bare Its Weakness', *New York Times* September 24.

⁵⁶ See, e.g., Cseh, K. (2021), 'Viktor Orbán's gift to the EU: A glimpse of our dysfunction', *POLITICO*, May 21.

⁵⁷ See, e.g. the Franco-German Declaration of 19 June 2018 at Meseberg, which is available at <https://www.diplomatie.gouv.fr/en/country-files/germany/events/article/europe-franco-german-declaration-19-06-18>; and subsequent speeches by French President Macron and German Chancellors Merkel and Scholz.

also one of the main recommendations of the citizens-driven Conference on the Future of Europe⁵⁸.

Suspending the exercise of new Member States' veto rights is suitable because it does not breach the essence of Article 4(2) TEU on the equality of states before the Treaties and because it is temporary in nature. Any introduction of a clause that would create a permanent procedural opt-out of a new Member State would damage the EU's institutional framework and violate the equal relationship between Member States. Thus, a temporary derogation would need to be agreed prior to entering Stage 3 and laid down in the Treaty of Accession: 'This way, the Treaty, (...) becomes a dam against any attempts to institutionalise or legalise any sort of a permanent second-class membership within the framework of the Staged accession model⁵⁹.

2) necessary to achieve that aim

Currently, the Treaties cover 58 areas where unanimity prevails in Council decision-making. The number of areas might be reduced during the pre-accession negotiations to reflect an agreement between existing Member States to decide through QMV instead of unanimity, but the likelihood of this happening is low.

Barring amendments to the Treaty-based unanimity rules, there exists no other way than to suspend new Member States' veto rights to reduce individual veto opportunities.

The derogation should be imposed for a period no longer than is absolutely necessary, i.e. a reasonable timeframe to envisage an amendment of the constituent Treaties of the EU, and to allow for the representation of new Member States in the functioning of the EU institutions to mature. The exact duration of the temporary derogation is a matter for negotiation and inclusion in the Accession Treaty; it may be subject to how imminent EU Treaty reform is. See below (Section 5.2) for examples on the tolerable duration of derogations from the exercise of rights enshrined in EU constitutional law.

3) does not have an excessive effect on the applicant's interests

Decision-making in the Council happens mostly by consensus⁶⁰, in complicated package deals between Member States, without a formal vote being taken. **In practice, new Member States' interests would therefore be considered in the vast majority of decisions taken.**

⁵⁸ COFEU (2022), 'Report on the final outcome', May 9, at 83: '39: EU decision making process: (...) All issues decided by way of unanimity should be decided by way of a qualified majority. The only exceptions should be the admission of new membership to the EU and changes to the fundamental principles of the EU as stated in Art. 2 TEU and the Charter of Fundamental Rights of the European Union.'

⁵⁹ Subotic and Lazarevic, loc. cit, at 6. CJEU Joined cases 194/85 and 241/85, Commission v. Greece, ECLI:EU:C:1988:95, para. 20: '(...) the provisions of the Act of Accession must be interpreted with reference to the foundations of the Community, as established by the Treaty, and that the derogations permitted by the Act of Accession from the rules laid down by the Treaty must be interpreted in such a way as to facilitate the achievement of the objectives of the Treaty and the application of all its rules.'

⁶⁰ See Mintel, J. and von Ondarza, N. (2022), 'More EU Decisions by Qualified Majority Voting – but how?', SWP Comment 2022/C 61: 'A look at the voting protocols published since 2010 shows that, on average, the member

New member states would be able to participate in the entire decision-shaping procedure, state their case, and take decisions by unanimity with the other Member States. **The only thing they would not be able to do is block the other Member States from adopting an EU measure or certain course of action by wielding their veto.**

To mitigate the impact of the temporary derogation on what may be perceived as the core interests of new Member States (e.g. tax harmonisation, own resources decisions, vital security interests),⁶¹ one might consider **introducing an ‘emergency brake’ into the Accession Treaty** similar to that foreseen in Article 31(2) TEU, adapted here to fit the purpose;

‘If a [new member state] declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by [unanimity], a vote shall not be taken. The [President of the Council] will, in close consultation with the Member State involved, search for a solution acceptable to it. If [s/he] does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.’

One might also consider disapplying the derogation of the unanimity rule to EU treaty-making procedures, such as those foreseen in Articles 48 (Treaty revision) and 49 (enlargement) TEU. As such, this might prevent the backfiring of any suppressed opposition to treaty changes from new Member States during the ratification stage⁶².

5.2 Established practice concerning the duration of transitional measures

Regarding the second element of the proportionality test, i.e. whether less intrusive/restrictive ways exist to achieve the same objective, one should consider the EU’s established practice concerning the duration of transitional measures applied to new Member States.

Previous rounds of enlargement have given a good indication of what has been deemed ‘suitable’ in terms of time limits applied to the suspension of EU primary law.

In the context of the EU’s ‘Big Bang’ enlargement of 2004, transitional arrangements of various length were applied in 15 chapters of the *acquis*: the free movement of goods; freedom of movement of persons; the freedom to provide services; the free movement of capital; company law; competition policy; agriculture; fisheries; transport policy; taxation; employment

states still strive for consensus as far as possible, even when decisions by qualified majority voting are possible. In fact, there has been unanimous agreement in more than 60 per cent of the votes where a decision by QMV would have been possible. If one adds the votes in which there are only abstentions but no votes against the respective proposal, the Council achieves a “consensus rate” of just under 82 per cent on average; in 2021 it was even 87.6 per cent (own calculation). So even under majority conditions, the member states usually seek a compromise that (almost) everyone can agree to in the end. Decisions by QMV in which entire groups of states are outvoted have remained a rarity, even in an EU with 27 members.’

⁶¹ But see n.3 and the accompanying text.

⁶² I’m grateful to Christophe Hillion for raising this point.

and social policy; energy; telecommunications, IT and postal services; culture and audio-visual policy, and the environment.

In most of these cases, derogations have provided acceding countries with only a couple of additional months or years (typically three years) to put their technical and financial arrangements into order before fully applying the relevant parts of the *acquis*. Short-term derogations have also been applied to existing Member States, for instance on the right to acquire secondary residences and/or agricultural land in new Member States.

On institutional modalities, the transitional provisions annexed to the Lisbon Treaty in Protocol No. 36 foresee a 2.5 year-period for the adaptation of weighted votes laid down in Article 238 TFEU.

In other cases, much longer derogations from EU primary law have been agreed. It is this category of transitional measures that interests us in determining the validity of the length of the transitional measures proposed in Stage 3⁶³. A couple of examples suffice to further make the point.

Example 1: Transitional measures

The transitional arrangements that applied to the workers of eight central and eastern European countries that joined in 2004 are particularly well known. They extended up to seven years from the date of accession, giving the existing Member States considerable discretion to continue applying pre-existing national restrictions on workers from these countries and, consequently, left little room for interference from the European Commission. Thus, the transitional system applied to workers sacrificed certain EU citizenship rights for all new Member States' nationals (except Cypriots or Maltese⁶⁴) on the altar of the existing Member States' preoccupation with maintaining their flexibility to exclude CEEC Member State nationals from their labour markets.

In some cases, these transitional arrangements have lasted for much longer. Poland, for instance, benefitted from a **13-year derogation** in the field of the environment *acquis*, specifically over large combustion plants until 2017⁶⁵.

Example 2: Post-accession Cooperation and Verification Mechanism (CVM)

In December 2006, the European Commission set up the CVM as a safeguard measure to assist Bulgaria and Romania to remedy shortcomings in the fields of judicial reform, corruption and

⁶³ Internal market and 'regular' JHA safeguard measures are not dealt with here because they are temporary suspension measures to be activated only in economic or rule of law crisis situations when mutual recognition cannot be guaranteed. See Inglis, K. (2004). 'The Union's Fifth Accession Treaty: New means to make enlargement possible', *Common Market Law Review*, Vol. 41, 937–973. The rule of law Cooperation and Verification Mechanism for Bulgaria and Romania is reviewed below because of its extended duration.

⁶⁴ Ibid., 966–7. See also Inglis, K. (2004). 'The Accession Treaty and its Transitional Arrangements: A Twilight Zone for the New Member States', in Hillion, C. (Ed.), *EU Enlargement: a legal appraisal*, Hart Publishing, 77–109.

⁶⁵ See Annex XII, 13.A.-E. + 5.1.(a)(II)(bb) and 5.2. of the Act of Accession.

(for Bulgaria) organised crime in the period after their accession on 1 January 2007⁶⁶. The approach was to continue with the Union's pre-accession conditionality in the first few years after accession and thereby ensure the integrity of the *acquis* in an enlarged EU, avoid rifts between the Member States and any protectionist backlash against the two new Member States.

In contrast to temporary derogations, which are automatically discontinued after the end of the transitional period, the CVM was open-ended in time and thus permanent in legal terms⁶⁷, only being terminated once the European Commission positively assessed that Bucharest and Sofia had met the required benchmarks.

Meeting the CVM benchmarks has been invoked by existing Member States as a condition for cooperation with Bulgaria and Romania on criminal and civil matters and for both countries to join Schengen. Despite their apparent connection (judicial reforms, the fight against money laundering and corruption), the European Commission has never made a link between the CVM and the two countries' Schengen applications.

To the dismay of those following the agonising demise of the rule of law in Bulgaria, the European Commission announced in October 2019 that it '*consider[ed] that the progress made by Bulgaria under the CVM [was] sufficient to meet Bulgaria's commitments made at the time of its accession to the EU*⁶⁸.' The CVM was officially closed for Bulgaria in December 2019. In November 2022, i.e. 16 years after its inception, the Commission concluded that Romania had also made enough progress on judicial reform and the fight against corruption to stop monitoring the country under the CVM⁶⁹. However, the Commission's decision to terminate the CVM has not yet translated into a positive decision by the JHA Council to admit Bulgaria and Romania into Schengen⁷⁰.

While politically attractive to the existing Member States because of its open-ended nature and spill-over effects into other policy areas, the CVM has been heavily criticised for those same reasons, as well as its limited impact on reforms in the post-accession context. For the present investigation into the viability of our Stage 3 proposal, the CVM model represents a legally permanent measure which would unlikely pass muster when challenged before the CJEU in relation to a perceived violation of the hard core of Article 4(2) TEU.

⁶⁶ Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ 2006 L 354/56.

⁶⁷ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, ECLI:EU:C:2021:393, para. 165: 'Consequently, as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty of Accession and continues to produce its effects as long as it has not been repealed.'

⁶⁸ https://ec.europa.eu/commission/presscorner/detail/en/qanda_19_6137.

⁶⁹ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7029.

⁷⁰ <https://www.rferl.org/a/bulgaria-romania-schengen-eu-netherlands/32120507.html>.

6. Conclusion

Whether or not the EU can suspend the exercise of Treaty-based veto rights for new Member States ultimately depends on the conditions under which the CJEU deems a time-limited exception to the principle of Member States' equality before the Treaties (Article 4(2) TEU) to be justifiable. There are indeed good reasons to derogate from this general principle of EU law, if applied in a proportional manner.

Temporarily suspending the exercise of veto rights by new Member States would better insulate Council decision-making against individual Member States' hostage-taking practices and ensure the continuity of policies and actions that Article 13(1) TEU expects from the EU's institutional framework. It would also increase the EU's resilience against malevolent foreign influences and help prevent cracks in the EU's international posture from widening. The temporary derogation may also trigger the mainstreaming of QMV decision-making in the Council and thus further enhance the democratic and efficient functioning of the institutions so as to enable them better to carry out the tasks entrusted to them.

While the Stage 3 proposal would undeniably introduce a temporary differentiation between new and existing Member States, specifically over the exercise of voting rights and institutional representation in the Council, this divergence would not constitute a breach of Article 4(2) TEU *per se*; instead, the limitation would respect the essence of veto rights and not call them into question as such. By its very nature, a temporal derogation from EU constitutional law is supposed to be finite. Rather than creating a permanent opt-out from the institutional rights of full membership, the Stage 3 proposal reflects the readiness of the existing Member States to automatically grant full voting rights to new ones in Stage 4, when the temporal limit would expire.

The duty to avoid any tensions rests on the governments and the national parliaments during the treaty-making process, and on the CJEU in the interpretation and application of the law. While transitional measures laid down in past Accession Treaties have not established a hard deadline for derogations from the application of EU primary law, our review reveals that **suspending the exercise of constitutional rights for around a decade or more have been deemed justifiable under EU law**. Whether such a derogation is politically palatable is a matter for negotiation and public expectations management.



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