

The power of sincere cooperation in the EU

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Advisory Council on International Affairs

The Adviesraad Internationale Vraagstukken (Advisory Council on International Affairs, AIV) is the advisory body to the Dutch government and parliament on foreign policy. It provides advice, both on request and at its own initiative, on international issues. Its particular areas of focus are European cooperation, human rights, cooperation around development, and security policy.



The Minister of Foreign Affairs (demissionary)

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Subject: Advisory letter 'The Power of Sincere Cooperation in the EU'

Dear Minister,

The unity of the European Union (EU) is put to the test on a regular basis. Reaching compromises can often take a long time. However, the frequent differences of opinion regarding climate policy, agricultural spending, foreign policy and trade agreements pale in comparison to the attempts by some member states to weaken or undermine the Union as a whole. This has also been noted by the House of Representatives of the Netherlands.

'Considering that Hungary has been systematically thwarting European decision-making in recent years', so states the motion submitted by member of parliament Tom van der Lee *et al.* With this motion, the House of Representatives asked the government to identify options for putting a halt to Hungarian obstruction within the European Union.¹ The Hungarian government's stance in the EU is causing a degree of irritation in the Netherlands' House of Representatives and in many member states. Hungary holds a different view from the EU on relations with Russia and often promotes that view actively. The Hungarian government opposed the sanctions packages, opposes Ukraine's accession to the EU, undertook its own 'peace mission' to Moscow and is also on a collision course with the EU with regard to LGBTI rights, freedom of the press and freedom for civil society organisations campaigning for human rights. The EU has now become adept at 'managing' and 'circumventing' Hungary, so that sanctions against Russia and negotiations with Ukraine about EU membership can still go ahead. Hungary has finally formally agreed with proposals in the Council or has constructively abstained from decision-making on these issues, albeit in many cases only after considerable diplomatic pressure or political concessions.

All member states are of course free to bring their various interests and positions to bear in negotiations on common policy or legislation in the EU and to vote against such policy or legislation if they feel that those interests have not been sufficiently taken into account in the joint decision-making process. At the same time, they must adhere to agreements that are reached and ensure that they do not undermine the Union's position in their foreign policy. The question is: when is a dissenting vote, an opposing view or an international action an expression of a legitimate national interest and when does it undermine the Union? This advisory letter addresses that question.



This question relates to the principle of sincere cooperation (also referred to as loyalty or loyal cooperation), a keystone of European cooperation. In a general sense, loyalty can be defined as allegiance to an individual, a cause, an organisation or a principle. Loyalty also requires trust that others share the same values and principles. Much has been written in the academic literature on the difference between 'high trust' and 'low trust' societies. A high degree of mutual trust is considered necessary for the functioning of the rule of law, democracy, government and society as a whole.² The EU was designed as a 'high trust' partnership: in accordance with the treaties, the common legal order must be recognised and respected by every member state.

Mutual trust between member states is always fragile, however: successive enlargements have increased diversity within the EU, which means that greater efforts are required to interpret and understand the conduct of other member states. In some areas of European cooperation new divisions emerged between north and south, east and west, but these eventually faded again. Historian Ivan Krastev describes how, after the fall of the Berlin Wall, Eastern Europe found itself in a situation in which 'the West' offered a model worth imitating.³ In that spirit, three former Soviet states (annexed by the Soviet Union in 1940) and five former Eastern Bloc countries joined the Union in 2004. Adoption of the Union *acquis* was self-evident and desirable; diversity was expected to give way to more European uniformity. 'Imitation' has since become a thing of the past, however: Eastern European member states are each adopting their own position and cracks have appeared in the European unity of the older member states, culminating in the departure of the United Kingdom (UK) from the EU. Despite heated debate about it in many member states, European cooperation has broad support among the public in almost all of them. The desired form and scope may vary, however. In a diverse Union, sincere cooperation is a necessity. It requires mutual trust, and loyal conduct serves time and time again to perpetuate that trust.

Loyalty and mutual trust are essential for translating common values and goals into actual policy. The European Union is no different from any other partnership in this respect. Membership of a club – be it a football club, a political party, a homeowners' association or an international alliance – requires a certain loyalty to the club, particularly through dedication to its objectives and compliance with the rules laid down in the regulations. Such loyalty is often an implicit norm. For the European Union, sincere cooperation is explicitly laid down in the Treaty on European Union (TEU, Article 4(3)) and therefore has legal significance. The principle of sincere cooperation is thus part of the European legal order. Member states can therefore be called to account for conduct that is at odds with this principle, whether or not before the Court of Justice of the EU (CJEU). This legal enshrinement supports a culture of sincere cooperation within the EU. Nevertheless, the principle is not a panacea for all cooperation problems: it cannot be used in its own right to compel mutual trust between member states.

Sincere cooperation helps the EU move forward, and conduct that is at odds with (the spirit of) sincere cooperation affects the Union as a whole. The vast majority of actions by member states are well within the scope of sincere cooperation: generally speaking, member states and EU institutions alike are committed to working together to achieve agreed objectives. Nevertheless, from the early years following the establishment of the EEC up to the present day, there have been examples of less than loyal – and 'disloyal' – conduct; in other words, conduct at odds with the principle of sincere cooperation. In the 1960s, the French government caused what was known as the 'Empty Chair Crisis'. Due to disagreement over proposals relating to the Common Agricultural Policy and the transition to qualified majority voting, France blocked progress by staying away from all official meetings and negotiations, thus undermining the entire system. Even now, a common position, a declaration or a bill will occasionally be undermined, but this can by no means always be legally classified as 'disloyal' conduct.



The EU has procedures for calling to account member states that violate the principle of sincere cooperation, but does not, unlike many other associations, have an expulsion clause: 'disloyal' member states cannot be expelled from the Union. This means that appropriate procedures are required to deal with such conduct. Over the past decades, the Court of Justice has built up case law regarding the application of Article 4(3) TEU. This has frequently involved cases concerning the single market. For example, the Court ruled that the French government had acted contrary to the principle of sincere cooperation when it failed to take action against border blockades by French farmers preventing Spanish strawberries from reaching the French market. A recent example of a different order is the sale of passports to Russian nationals and others by certain member states, including Malta. The holder of a Maltese passport is entitled to all rights accorded to EU citizens, including entry to all member states. The sale of these 'golden passports' therefore reflects a lack of loyalty towards other member states. The CJEU has condemned Malta for this, partly on the basis of Article 4(3) TEU.⁴ These cases involve non-compliance with European rules and the CJEU is competent to rule on them through infringement proceedings initiated by the European Commission. In this dynamic, there is mutual trust that these matters can be resolved via legal proceedings. Mutual trust also plays a major role in Hungary's aforementioned stance in negotiations on support for Ukraine. However, the Court cannot rule on this because it does not relate to compliance with European rules. As regards potentially 'disloyal' actions outside the Union, there are more possibilities, but the Court's jurisdiction remains limited in the European foreign policy domain.

On 26 August 2023, the Advisory Council on International Affairs (AIV) received a request for advice from the Minister of Foreign Affairs on promoting sincere cooperation. This was prompted by the motion on obstruction referred to above. In this request, the government stated 'we have increasingly seen situations in which member states did not, in the eyes of other member states, act in the spirit of the principle of sincere cooperation'. This could 'undermine the effectiveness of EU decision-making, the proper implementation of EU policy or the unity of the EU'.⁵ The government therefore wishes to gain a better understanding of the motives for perceived and actual 'disloyal' conduct by EU member states and of the boundary between such conduct and a breach of the obligation of sincere cooperation. It also asks about possible courses of action to promote sincere cooperation.

In this advisory report, the AIV examines the possibilities and limitations of the principle of sincere cooperation. The AIV thus aims to provide insight into the importance and the effect of this principle. The first section explores the concept in both a legal and political sense and points out that the boundary between 'disloyal cooperation' and 'subversive conduct' is not always clear-cut. This advisory letter goes on to define sincere cooperation in relation to internal policy and external action. This will form the basis for conclusions and recommendations.



1. The principle of sincere cooperation: definitions

Sincere cooperation in the Treaty on European Union

Sincere cooperation has been part of the European treaties since the establishment of the European Economic Community (EEC).⁶ For example, it was acknowledged that the EU could only function by virtue of a certain degree of mutual loyalty between the member states and a common loyalty towards EU institutions, even if that was not always obviously in their own immediate interest. This principle of loyalty is laid down in Article 4(3) TEU:

'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.⁷

Sincere cooperation is therefore a legal provision which applies to member states and their interactions with each other as well as to EU institutions and which can be regarded as a 'core standard'⁸ for European cooperation. On the one hand, member states have a positive obligation to facilitate the Union's tasks and to take all necessary measures to ensure compliance with European legislation and agreements. This also includes consulting the relevant institutions and member states when necessary.⁹ On the other hand, there is also a negative obligation to refrain from taking any measures that could jeopardise achievement of the Union's objectives. This means that member states must implement EU policy, transpose directives correctly and promptly and, for example, refrain from adopting legislation that conflicts with established EU measures. With the entry into force of the Treaty of Lisbon and the disappearance of the former three-pillar structure, the principle of sincere cooperation has become more broadly applicable, thereby increasing its importance and legal power. In other words, the principle¹⁰ now has a clear basis in primary Union law as a whole. It can be invoked in relation to a wide range of issues. In 2004, for example, Belgium was ordered, on the basis of sincere cooperation, to review its approval procedure for refuse bags because it was hindering the single market, in this case the free movement of refuse bags. A relatively minor issue, but nonetheless important for the Italian complainant. The Maltese passport issue referred to earlier is of more fundamental importance.¹¹

Distinction between decision-making and compliance with obligations

In order to properly assess compliance with the principle of sincere cooperation, it is important to distinguish between conduct when policy and legislation are created on the one hand and sincere cooperation when EU legislation and agreements are being implemented on the other. Once legislation and agreements have been established, for example in relation to the single market,



they must be observed. During internal negotiations and voting on new legislation and policy, however, 'sincere cooperation' as a legal principle does not apply: each member state is free to express its views and to vote for or against. There is, however, a standard of political conduct which requires a willingness to reach a consensus that is acceptable to at least the necessary majority of member states. Mutual trust between member states that everyone will adhere to this implicit standard of conduct is, therefore, extremely important.

Voting behaviour during the decision-making process may on occasion be perceived as 'disloyal', but it cannot be characterised as such in a legal sense. For example, the fact that Cyprus blocked sanctions against Belarus because it also wanted sanctions against Turkey was a cause of irritation.¹² If Hungary only allows joint support for Ukraine on condition that European subsidies are released, it will generate resentment.¹³ Milder resentment may arise if a member state votes against a commonly agreed position even after its original objections have been taken account of in the compromise. For example, the Netherlands was one of the countries that voted against the Nature restoration Law despite the fact that many of its national policy preferences had been incorporated in the final text. From a legal standpoint, it is not possible and it is certainly not desirable to intervene in voting behaviour through the courts. The only recourse is to make a political appeal invoking the principle of sincere cooperation and the political conduct norm of mutual goodwill, and move forward together. Once legislation or agreements have been adopted, the Court often has jurisdiction to act in cases involving a violation of the principle of sincere cooperation or non-compliance with European obligations. The legal situation is thus clearer: member states have made decisions at European level and member states must therefore comply with them.

Before Brexit, the United Kingdom understood this difference between behaviour during decision-making and compliance with obligations better than anyone else. Successive British governments often took positions that were at odds with the broad consensus among the majority of member states, in the social domain in particular, but also in other areas. Although some member states – including the Netherlands in many cases – were frequently glad that the British were the ones 'doing the dirty work', the UK's behaviour was also regarded as problematic. Once the rules were laid down in directives and regulations, however, the British often implemented them quickly and accurately, regardless of their political views during the decision-making process. The UK's position was therefore not contrary to the principle of sincere cooperation.

Unity and diversity within the EU

EU member states have committed to the treaties and thus to the values and objectives of the Union. This overarching consensus in no way prevents member states from taking very different positions when deciding on specific issues. The decision-making process, in which different views are discussed and considered, usually ends with the adoption of a common position. With regard to the Common Foreign and Security Policy (CFSP), where unanimity is normally required for decision-making, this is often more difficult than in many other domains where qualified majority voting (QMV) applies. The possibility of being outvoted contributes to the willingness to compromise. This does not mean that differences of opinion outside the CFSP are futile; the single market and environmental rules also affect a wide range of national interests and it can take a long time to reach a compromise in these areas too. However, QMV does make decision-making more effective than in the CFSP. As stated above, sincere cooperation cannot be invoked as a legal principle in the decision-making phase. A dissenting vote or even a veto cannot therefore be regarded as a violation of that principle.

Unanimity in respect of the EU's overarching objectives and values is necessary, but does not have to translate into uniformity. On the contrary, diversity is rightly a celebrated characteristic in the



EU and, despite the challenges it poses, diversity in national preferences within the EU should be protected.¹⁴ Under Article 4(2) TEU, the EU must respect the equality of member states as well as their national identities, inherent in their fundamental structures. Sincere cooperation therefore does not compel member states to adopt an approach of complete and blind loyal conformity imposed by EU institutions. Furthermore, there is often scope within jointly agreed rules for individual countries to deviate from the EU's general interest. This could be necessary to protect vital interests or national preferences. For instance, the Netherlands has long been able to use manure derogations and, like many other countries, to invoke exemption clauses relating to water quality. Deviations, derogations and exemption periods are responses to the diversity within the EU that are recognised by EU law and the Court.

The tension between loyalty and diversity is, however, problematic when it comes to the *overarching* values and objectives of the Union.¹⁵ Hungary and various other member states and political parties have expressed their intention to actively undermine the EU in its current form and to fight it from within. It is difficult to see that intention as a constructive expression of diversity. Viktor Orbán: 'We are the grain of sand in the machinery, the stick jammed between the spokes, the splinter under the fingernail... We are the David whom Goliath had better avoid'.¹⁶

Hungary's Mathias Corvinus Collegium and Poland's Ordo Iuris Institute have jointly drafted a pamphlet ('The Great Reset') that emphasises the urgency of protecting national sovereignty, whereby national interests must take precedence over 'self-proclaimed EU values'.¹⁷ This project is supported by the American conservative think tank The Heritage Foundation and by far-right political parties in Europe, such as Spain's Vox party. The words of Orbán and the measures proposed by The Heritage Foundation run counter to the idea of an 'ever-closer union among the peoples of Europe', the fundamental values expressed in Article 2 of the TEU, the consensus that has developed and existing case law. An 'ever-closer union' is most certainly not a roadmap to a European federation,¹⁸ but it is a starting point for addressing common challenges effectively in the spirit of mutual solidarity.¹⁹

'The Great Reset' would require an amendment to the Treaty on European Union. The pursuit of treaty amendments – major or minor – is legitimate and is part of the democratic process, provided that member states follow existing procedures and adhere to existing agreements until any amendments are implemented. The question is: when are statements and conduct surrounding this problematic. Firstly, this is the case if European core values, such as the rule of law or the other values set out in Article 2 TEU, are at stake. Any undermining of EU values by a member state must be taken extremely seriously by other member states.²⁰ To talk about 'self-proclaimed EU values' is to misrepresent the situation: EU values are not imposed by anonymous European Commission officials but are established jointly in EU treaties by all member states. Secondly, conduct is problematic if it obstructs the effectiveness of EU action. The positions taken by Hungary or other member states, such as Poland or Slovakia, become problematic if other member states are denied further cooperation, if established rules or agreements are not observed or if the common international position is undermined. This could be seen as subversive conduct. The vast majority of member states would prefer the approach taken by the UK: acting as a loyal member state of the Union and, in the event of deep dissatisfaction with the Union, taking the decision to leave.



Grey zones

The boundary between violation of the principle of loyalty and failure to fully comply with obligations is not always clear-cut. One example of a grey zone is Sweden's decision not to join the eurozone. Under the Maastricht Treaty, Sweden is required to join the eurozone as soon as it has fulfilled the conditions. Up to now, Sweden has not taken the necessary steps to do so. That could be categorised as 'disloyal' conduct, but there have been no official moves to pursue this. It is highly unlikely that the European Commission would try to force Sweden to give up its own currency through legal proceedings. Going to court for infringement proceedings is ultimately a political choice. With regard to undermining core values, legal action would be desirable and possible – whether or not on the basis of Article 4(3) or Article 2 TEU – but this is not entirely straightforward.²¹

Grey zones often arise in interactions between member states. Decisions by one member state have implications for others. Take, for example, Spain's decision to legalise 800,000 migrants, the Netherlands' drugs policy around the turn of the century and the construction of the Nord Stream 1 pipeline between Russia and Germany, bypassing Poland. In the case of the latter, a ruling was sought from the Court, which found in Poland's favour.²² However, there is often a lack of case law, which means that there are still many grey zones in relation to sincere cooperation: it is not clear in advance what the legal significance of the principle will be in any given situation or where the boundaries lie.

Sincere cooperation is therefore an important principle with legal significance, but it also entails legal uncertainty in a number of grey zones. It is clear, however, that positions taken during the decision-making process can never be deemed 'disloyal' in a legal sense. Furthermore, a legal approach to possible or alleged disloyal conduct is not always desirable. A political approach can be considered if the behaviour is regarded as problematic.

Definitions

To summarise, the AIV uses the following definitions:

- *Sincere cooperation*: conduct that is in accordance with Article 4(3) TEU. This concerns compliance with and implementation of existing agreements and legislation.
- *Disloyal cooperation*: conduct in specific situations that is not in accordance with Article 4(3) TEU, for which legal action may be taken, for example through infringement proceedings.
- *Perceived disloyal cooperation*: conduct in decision-making that is seen as problematic but which is covered by the right of all member states to adopt their own position. It is conduct that does not comply fully, if at all, with informal norms of behaviour, such as the willingness to compromise, give and take, mutual goodwill, and so on. This conduct cannot be addressed through legal action, nor is it desirable to do so.
- *Subversive conduct*: conduct by a member state which systematically undermines the core objectives, interests and/or values of the EU. In other words, conduct that undermines an established position or agreement, for example in relation to the CFSP or fundamental values and the rule of law. This conduct is problematic but cannot always be addressed through legal proceedings solely on the basis of Article 4(3) – at least, no attempt has been made to do so up to now.

These definitions are intended as a guide; they are not completely watertight. For example, the boundary between perceived disloyal cooperation and subversive conduct is not always clear-cut. If a member state prevents a large majority of other member states from making progress and the motives do not stem from the issue or the decision itself, this is not strictly speaking subversive conduct. It could, however, be seen as such. Political and legal tools and/or measures could be used to promote sincere cooperation and address disloyal conduct. These two tracks coexist: one does not preclude the other. The figure below summarises the main points and the two following sections explore the internal and external dimensions.

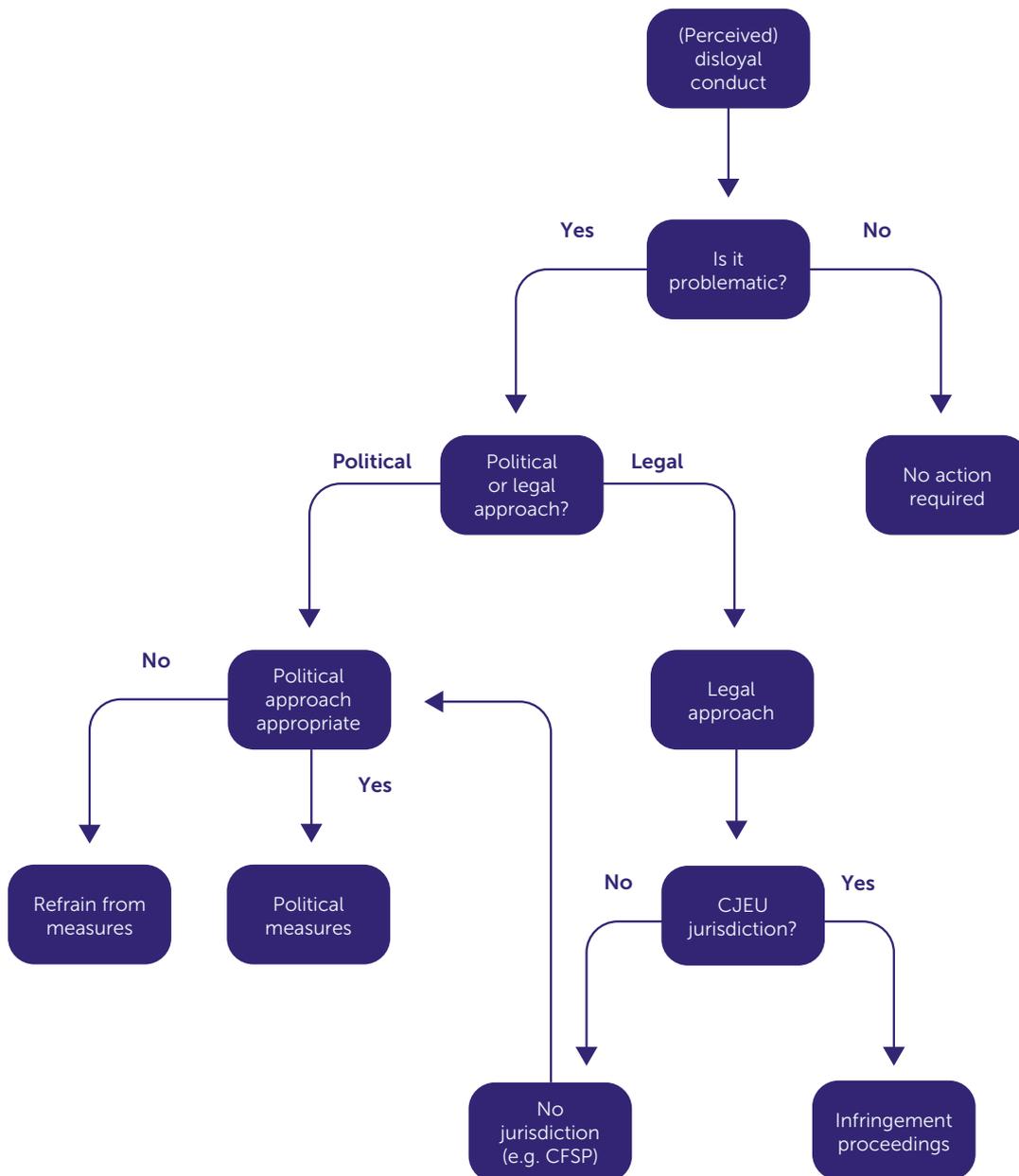


Figure 1 Overview of courses of action in the event of (perceived) disloyal conduct in the EU



2. Sincere cooperation in internal policy

The CJEU and the Commission have the power to enforce the principle of loyalty as a legal norm, and they do so.²³ There are hundreds of Court judgments referring to 'sincere cooperation'. These judgments have been given in infringement proceedings, preliminary ruling proceedings and other types of proceedings. Only in some judgments is a violation actually established. This is partly due to the large proportion of preliminary rulings, in which the Court responds to a question from national courts regarding the application of EU law and does not rule on a violation. It is then for the national court to determine whether a violation has occurred. All other judicial bodies in the Union must then adopt the CJEU's interpretation in the preliminary ruling and apply it in any subsequent cases.²⁴ The impact of the principle of sincere cooperation is thus greater than the number of violations identified would suggest.

In many CJEU judgments, sincere cooperation is used only as a supporting argument. That is understandable, as such cases almost invariably concern a violation of another EU norm. In these cases, the principle of sincere cooperation alone is not a deciding factor and other articles have greater legal effect. There are, for example, countless infringement proceedings, often initiated by the European Commission, in which a member state fails to comply with EU rules.²⁵ Member states can also initiate proceedings against each other (known as an inter-state complaint), but this is a rare occurrence. As the 'guardian of the treaties', it is the Commission that is responsible for ensuring that member states correctly apply and enforce internal EU agreements. It is also politically sensitive for member states to take each other to court. To date, there have been nine judgments by the Court on the basis of infringement proceedings brought by one member state against another.

There are very few judgments that refer exclusively to sincere cooperation. It is precisely among the proceedings in which sincere cooperation is cited as part of a number of violations that cases may be found that raise doubts about the independent legal significance of the loyalty principle. Nevertheless, the judgments in which only a violation of Article 4(3) TEU has been established show that the principle also has legal significance of its own. Although mutual trust may not be legally enforceable, Court judgments can clarify the specific obligations of member states and thus contribute to a culture of sincere cooperation within the EU.

Motives for disloyal conduct in internal cooperation

Article 4(3) TEU can be used in infringement proceedings in which member states are called to account for not complying (fully) with European rules. Non-compliance can relate to various situations. It could be a question of complacency, where little value is placed on EU rules. Sometimes, however, it is unclear to one or more member states how they should implement a particular obligation in their own legal order. The Dutch implementation of the European Network and Information Security Directive (NIS2) has, for example, been delayed because of the complexity and scope of the legislation designed to strengthen the EU's cyber resilience. It is important for the responsible ministries to consider implementation during what is often a lengthy negotiation process in order to be able to guarantee the loyal implementation of agreed policy and legislation.

Specific circumstances in a member state may make it difficult or highly problematic to comply with an obligation. Greece, for example, under the leadership of its Minister of Finance, Yanis Varoufakis, opposed the spending cuts imposed on it by the Troika of the International Monetary Fund (IMF), the European Central Bank (ECB) and the European Commission. Dissatisfaction



with existing rules could result in less active compliance. In the case of directives, the quality of the legislation can play a role in whether or not member states implement them properly and thus whether or not they comply with them fully, if at all. For example, the Commission recently initiated infringement proceedings against 26 member states for failing to properly implement the revised directive on renewable energy. The question is: how effective is the directive if only one member state (in this case Denmark) manages to implement it fully?²⁶ Non-compliance with European obligations may also relate to financial gain, such as in the sale of passports. The making of calculated choices – on the basis that the costs attached to compliance would exceed the potential fines for non-compliance – cannot be ruled out, but there are few clear known examples of this kind.

When it comes to fundamental values, the motives are probably more principled. Values in respect of the family, homosexuality or the desired composition of the population could appeal to a sense of identity that runs counter to 'imposed' European values. However, these values have been established by the member states themselves, and newer member states commit to them voluntarily on accession. Nevertheless, these values are the subject of heated political and public debate in many member states, not only in eastern Europe, but also, for example, in founding member state Italy.

Possible legal courses of action

A legal response to suspected or actual instances of disloyal conduct is an obvious solution. Case law has now been established on the basis of infringement proceedings brought before the Court (whether or not with specific reference to Article 4(3) TEU). However, a distinction should be made between violation of or non-compliance with, on the one hand, 'ordinary' European rules and agreements and, on the other, the fundamental values of the Union.

For 'ordinary' cases relating to non-compliance, there are appropriate legal procedures that can be initiated by the Commission, member states, members of the public and legal persons. In the Netherlands, there are relatively high numbers of court cases, for instance with respect to the nitrogen standard. As a result, this matter is also under scrutiny in Brussels. The European Commission, as the guardian of the treaties, must be willing to enforce compliance. The more political the role of the European Commission, for example in relation to foreign policy or defence, the more dependent it will be on consent from member states, which could lead to a degree of reticence. Another way to enforce compliance is through the national courts. Any citizen or organisation dissatisfied with the way in which a directive has been transposed into national legislation or with the way it is being observed can (if the requirements for direct effect are met) pursue the matter through the national courts or can ask the Commission to take action. However, it is not usually necessary to invoke the principle of sincere cooperation.

There is debate among experts about the legal force of Article 4(3) TEU in protecting *fundamental* EU values. In cases where core values are systematically undermined by member states, Article 2 TEU would appear to provide a stronger legal basis. On 5 June, the Advocate General of the CJEU issued an opinion in a case against Hungary (C-769/22), concerning a law that restricts access by minors to content portraying homosexuality and transgender identities.²⁷ The Advocate General considers the violation of Article 2 and others to be well founded. Although the opinion is not binding, it does carry considerable weight. A ruling on the basis of Article 2 TEU could be important in calling member states to account for democratic backsliding. Article 4(3), which relates to sincere cooperation, is not mentioned in this opinion and has less legal force in terms of enforcement of core values.²⁸



Possible political courses of action

There is of course a vested interest in preventing non-compliance. Five possible political courses of action can be considered. First, member states themselves could do more in terms of joint supervision, which would reduce the need for enforcement through infringement proceedings. Sharing knowledge and experience concerning the implementation of EU legislation could be useful in this respect. This is already taking place in regard to many parts of the EU acquis.

A second option is to increase the focus on the quality and feasibility of legislation within the EU: wherever possible less complexity, less accumulation of legislation and perhaps more focus on objectives rather than measures. The Netherlands is consistent in its efforts in this respect. There are examples of legislation where the usual impact assessment procedure was omitted, to the detriment of the quality control of the legislation. Impact assessments normally only concern the Commission's proposal. Expanding them to include amendments by the Council and the European Parliament could benefit the quality of legislation. Actively encouraging a broad range of stakeholders to input their expertise and views during EU consultations, including their take on implementation, could increase the workability and quality of the legislation. As coordinator of EU policy in the Netherlands, the Ministry of Foreign Affairs could play a role in this regard.

Thirdly, greater flexibility could be built into legislation; this too already features in the approach of the Netherlands. For example, nature conservation in densely populated countries is a completely different task from that in sparsely populated areas, while efforts to protect nature and biodiversity are needed in all areas. That is precisely why it is important to provide flexibility in legislation to allow each country to assess whether the proposed laws will actually be effective and feasible, taking account of local circumstances and specific challenges. Here too, much progress has already been made.

A fourth option involves 'sunset clauses', provisions which allow for a directive or an agreement to be reviewed after a certain period of time. Once rules or agreements have been adopted, an initiative from the Commission is required to amend them through legislative procedures. The Commission is not always willing to do this, much to the disappointment of member states that want change. Sunset clauses offer the possibility of an easier way of making amendments to directives on the basis of actual policy practice. The 'take back control' sentiment is familiar to many member states. Sunset clauses could be one of the solutions.

Prevention is better than cure. A fifth option therefore involves active use of the opportunities available to national parliaments to consider EU policy at an early stage, for example by carrying out a subsidiarity check. The principle of subsidiarity assumes that the EU will only take action if EU-level measures are more effective than national, regional or local measures in EU countries. National parliaments can raise objections at an early stage if they think that a proposal does not conform to the principle of subsidiarity. This requires cooperation with other parliaments. If at least one-third of the national parliaments issue an opinion that proposed legislation does not comply with the principle of subsidiarity, the Commission must revise the proposal.²⁹ Parliaments also have other instruments they can use to assess proposed EU legislation in advance, as the rapporteur on EU implementation noted recently in the House of Representatives.³⁰

Unworkable directives or poor supervision need not be a hindrance to sincere cooperation, but they can reduce the motivation to engage in it. It is better to focus more on drafting workable legislation than to constantly run up against the limits of sincere cooperation. The Netherlands Court of Audit warned that the perception could arise in Brussels that the Netherlands is pushing the boundaries of what is legally permissible, given the government's handling of the



European Water Framework Directive, the nitrogen strategy and the 'corona voucher' scheme.³¹ The implementation of EU legislation in the Netherlands also requires constant attention.³² These five options could all contribute to better compliance with legislation and thus with the principle of sincere cooperation. They would not, however, help against subversive conduct or an underlying lack of trust in European institutions, or against a deliberate attack on European core values.

Mutual trust and dialogue are precisely what is so important for the functioning of the high-trust partnership that is the European Union. In the event of a violation of core values, the Treaty offers the possibility of initiating an Article 7 procedure, the most powerful instrument in the Union's toolbox for forcing member states to abide by EU core values. This procedure provides the option of suspending a member state's voting rights in the Council. The European Council itself has the authority to conduct the Article 7 procedure. In practice, this procedure is rarely used because it requires the consent of 27-minus-1 member states and is therefore ineffective if two member states are protecting each other. In addition, there is political reluctance among member states; they are often wary of setting a precedent or damaging bilateral relations. As set out in the AIV report on EU reforms, the Netherlands could nonetheless play a leading role in this regard, for example by focusing on strengthening the role of the European Union Agency for Fundamental Rights. Under certain circumstances, it is also possible to decide by qualified majority to cut off funding, for example in the event of a violation of the rule of law.³³

Grey zone

A notable new development is the above-mentioned case against Malta for issuing EU passports to, for example, Russian citizens in exchange for payment. The recent judgment *Commission v. Malta ('Golden Passports')* established that there had been a violation of both Article 4(3) TEU and Article 20 of the Treaty on the Functioning of the European Union (TFEU)

Rulings by the Court of Justice are helpful, especially in the case of grey zones. However, the tension between unity and diversity cannot always be resolved by the courts, nor can the courts enforce mutual trust. As well as the legal route, therefore, the AIV regards political dialogue as an appropriate avenue. On the basis of the Malta judgment, member states – in their mutual relations – can expect each other to take account of the consequences that unilateral decisions in areas outside the Union's competence may have in other countries. Political dialogue takes place on many fronts, from coordination meetings at civil service level to meetings of the Council. It is important to focus discussions specifically on issues in the 'grey zone' as well.



3. Sincere cooperation and external action

Although the European Union essentially began as a single market, an external dimension has also been an integral part of its functioning from the outset. At first, this was through the common commercial policy and development cooperation. In addition, almost all internal policy areas, such as environmental protection, have an indisputably external dimension. Since the Maastricht Treaty, the EU has also had a Common Foreign and Security Policy (CFSP), which includes a common sanctions policy and the Common Security and Defence Policy (CSDP).

The obligation to engage in sincere cooperation also applies in general to the EU's external relations. In a sense, internal loyalty is even more relevant in the context of external affairs: it is important to avoid situations in which common positions or strategies are undermined by disagreement on the world stage, as this would damage the collective interests and security of the EU.

External representation

To ensure that common positions are not undermined in external negotiations, the Court has ruled, on the basis of the principle of sincere cooperation, that member states may not enter into any agreements with third countries that would affect existing EU rules or detract from their significance.³⁴ This is what is referred to as the ERTA doctrine, which has been applied by the Court since 1971. However, even outside situations in which the ERTA doctrine applies, member states can sometimes be called to account for disloyal conduct that is at odds with Article 4(3) TEU.

With the exception of the CFSP (see the following section), the Court has ruled clearly in a number of judgments regarding international negotiations or international organisations in which member states are represented and in which the EU has observer status only, such as the International Maritime Organization (IMO).³⁵ The reason for this is to guarantee the unity of the Union's international action. Another example is the case *Commission v. Sweden (PFOS)*, C-246/07. The Swedish government proposed, within the framework of the Stockholm Convention on persistent organic pollutants, a more stringent PFOS standard than the agreed EU position. The Court found that Sweden's unilateral action had undermined the Union's credibility and reputation on the international stage and that this had harmed the effectiveness of the Union's international action. Another example is *Commission v. Germany (COTIF)*, C-620/16, in which the Court found a violation of Article 4(3) TEU and, as in the PFOS judgment, did not invoke any supporting provisions.³⁶ This too related to a member state that had taken a position in an international organisation that was not in line with the previously established EU position.³⁷ Both cases underline the importance of coherence in external action by the EU, particularly where member states are acting in their own name. Member states are free in terms of their input in the EU's internal decision-making process, but not in external forums. In the COTIF judgment, the Court refers to the requirement of unity in the external representation of the Union on the basis of Article 4(3):

*'Consequently, compliance on the part of the Member States with a decision adopted by the Council under Article 218(9) TFEU is a specific expression of the **requirement of unity in representation of the European Union, arising from the obligation of sincere cooperation.**'*³⁸

These cases strengthen the legal basis for the obligation of member states to comply with jointly agreed EU positions and strategies in international forums. The fact that member states are not free to use their seat in an international organisation to exert their influence because of their obligations as loyal EU member states could be seen as a hindrance, but it does promote the effectiveness of the external representation of the EU.³⁹



The CFSP

The CFSP is an exception to other policy areas. For the CFSP, unanimity is essential. Unlike most other policy areas, decisions in respect of the CFSP are taken unanimously, on the premise that member states can thus continue to ensure their sovereignty in relation to foreign policy. As with internal policy, dissenting opinions or use of the right of veto in the European Council and the Council of the European Union cannot be classified as disloyal. These are sometimes matters involving clear political interests or emotions, particularly for the member state concerned. Take, for example, Greece's position on Macedonia's candidacy for membership before it adopted the name 'North Macedonia'. For Greece, the name Macedonia was a legitimate reason to exercise its veto. This was not, therefore, at odds with the principle of loyalty, but use of the right of veto can nonetheless be perceived as problematic or as contrary to the spirit of sincere cooperation.

Furthermore, the CJEU's jurisdiction with regard to the CFSP is limited, although some experts believe that case law is opening up more and more possibilities.⁴⁰ Although the CFSP does not include the adoption of legislative acts (Article 24(1) TEU), it does involve binding decisions and rules. There is therefore uncertainty about the applicability and enforceability of the principle of sincere cooperation in Article 4(3) TEU. Given that the principle of sincere cooperation is mentioned at the beginning of the Treaty on European Union, some people, including Christophe Hillion, argue that it applies to all policy areas of the EU, including the CFSP.⁴¹

On the other hand, Article 24(3) TEU is also worthy of mention. This is particularly relevant to the question of whether the CJEU is competent to rule on violations of sincere cooperation in relation to the CFSP. Article 24(3) is part of the chapter on the CFSP and therefore applies to this policy area only:

'The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.

The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The Council and the High Representative shall ensure compliance with these principles.'

This could be regarded as a specific form (*lex specialis*) of the principle of sincere cooperation for the CFSP. As the Council and the High Representative are mentioned specifically here and loyalty is referred to in conjunction with 'political solidarity', loyalty would appear to be more of a political norm in this context. It could therefore be argued – contrary to what Hillion contends – that the exclusion of the CFSP from the CJEU's jurisdiction also applies to issues of sincere cooperation in this area.

The experts who argue that case law provides grounds for applying sincere cooperation to the CFSP are still awaiting confirmation: thus far, the principle of sincere cooperation has not been invoked before the Court in situations relating to the CFSP. According to some experts, the Court's broadly worded ruling on the COTIF case referred to above allows scope for this to be applied to other topics, such as the external representation of the Union.



The fact that the Court refers explicitly to the requirement of unity in the representation of the Union could, for example, provide grounds for initiating proceedings against Hungary in the light of Prime Minister Orbán's visit to Moscow and Beijing at the start of the Hungarian Presidency of the Council of the EU in July 2024. By prominently displaying Hungary's EU Presidency logo and presenting the visit in this way in the Chinese and Russian press, the visit appeared to have the backing of the EU. Orbán thus undermined the common EU position. This was interpreted by many as disloyal conduct, in violation of the treaties. According to public reports, the Council Legal Service also explicitly classified it as such.⁴² The Lisbon Treaty stipulates that the rotating presidency must at all times coordinate initiatives relating to external representation of the EU with the permanent President of the European Council. The response by the president at the time, Charles Michel, on X shows that this did not take place.⁴³ Given the many sanctions packages imposed by the EU on Russia, it is unlikely that it was not clear to Orbán that his visit was at odds with the Union's position. Nor is it possible to make such a visit in a personal capacity during the presidency. Orbán himself claimed that the visit was an attempt to improve relations with Russia to bring peace a step closer. The reaction from the High Representative clearly shows that it was not Orbán's place to do so:

*'Prime Minister Orbán has not received any mandate from the EU Council to visit Moscow. The EU position on Russia's war of aggression against Ukraine is reflected in many European Council conclusions. That position excludes official contacts between the EU and President Putin. The Hungarian Prime Minister is thus not representing the EU in any form.'*⁴⁴

Consequently, there are strong arguments to be made that Orbán violated the principle of sincere cooperation. This has the effect of undermining the order of the EU and is as such highly reprehensible. A ruling by the Court on this issue would set a powerful precedent for similar situations in the future. As mentioned above, however, there is still doubt as to whether the CJEU actually has jurisdiction in this respect. The repercussions if such a case were to fail would be so great that it should only be undertaken if success is virtually guaranteed and the Court's jurisdiction is for all intents and purposes undisputed.

This case, and perhaps all perceived and actual disloyal conduct within the CFSP, should for now be regarded as a grey zone. The Council did not agree with Orbán's defence, but neither the Commission nor the member states took any legal action against Hungary. For the sake of legal clarity, however, it is important that cases where there is a high probability of success be brought before the Court.

Sanctions

A consistent approach by member states is vital when it comes to sanctions imposed by the EU on third countries, such as Russia, and associated companies and individuals. Russia is attempting to circumvent the sanctions by, for example, using what is referred to as a 'shadow fleet' of ships without Western insurance, owned by shipping companies that are not registered in the EU. This shadow fleet consists mainly of outdated and poorly maintained ships that pose a threat to the environment, maritime safety and international security. In response, the EU and its allies have imposed targeted sanctions on specific ships and intensified international cooperation to counter these practices.⁴⁵ In 2023, the Dutch government published a non-paper setting out five possible courses of action to counter the circumvention of sanctions. These are still relevant today.⁴⁶

EU member states themselves do not always comply with sanctions either. This is a serious violation of EU law that damages mutual trust within the Union and the credibility of the Union itself. Failure by one or more member states to comply with sanctions has the effect of undermining EU sanctions policy as a whole. There are numerous examples of non-compliance



with sanctions by individuals, companies and EU member states, for example trade conducted via third countries in order to export indirectly to Russia. Russia is a member of a customs union with countries that are not subject to EU sanctions, including Armenia, Kazakhstan and Kyrgyzstan. In 2023, EU exports to Kyrgyzstan increased by 1000% compared to 2021.⁴⁷ Furthermore, some member states are using other legal loopholes. Gas imports via pipelines fall under the sanctions, but the import of liquefied petroleum gas (LPG) from Russia by sea transport (the shadow fleet) has long been exempt. Although imports of Russian gas have fallen dramatically, member states continue to import LPG.⁴⁸

Compliance with EU legislation, and thus with sanctions, is enforced at national level. For example, the Dutch shipbuilder Damen is being prosecuted by the Dutch Public Prosecution Service on suspicion of non-compliance with sanctions.⁴⁹ Some EU countries are reluctant to impound luxury yachts belonging to Russian oligarchs, even though they are on the sanctions list. And some countries, for example Malta and Cyprus, do not always seize Russian assets. The fact of the matter is that member states have very different ways of enforcing sanctions and that is not conducive to their effectiveness.⁵⁰

The European Commission may, under Article 258 TFEU, initiate infringement proceedings against a member state if it fails to comply fully with these sanctions, and could if necessary refer the case to the CJEU. The Court has jurisdiction here because it concerns regular EU legislation that has been adopted to implement sanctions decided under the CFSP. The Commission recently started infringement proceedings for the first time against 18 countries for failing to effectively criminalise the circumvention of EU sanctions.⁵¹ Sincere cooperation could also be a supporting argument in such infringement proceedings. Legislation on this issue is still under development: in May 2024, a directive was adopted to establish EU-wide minimum rules concerning the definition of criminal offences and penalties for the violation or circumvention of EU sanctions. Member states were given a year to implement this directive, so it has only been in force since May 2025.⁵² The effect of the directive therefore still remains to be seen. More precise agreements on the implementation of sanctions by member states, for example with fixed time lines for specific steps, would be welcome. If the rules are clearer, it will be easier to call member states to account for non-compliance, also on the basis of the principle of sincere cooperation.

Causes of disloyal conduct

The position taken by Hungary and a number of other Eastern European member states, such as Slovakia and Poland, is understandable to some, given the events of recent history. As described in the introduction, 'the West' is no longer the default model and there is greater diversity in expectations of and opinions about the EU. Following the spectacular rise of China and its burgeoning technological superiority midway through the second decade of this century, the Western model of democracy and free trade is no longer the only model. Add to that the fact that the US government is wielding the axe against the institutions of the rule of law and democracy in various places. That creates space for alternative views on the desired European order, but it does not directly explain Orbán's 'peace mission' or other subversive conduct. The exact underlying causes of this conduct are complex and they differ per country.⁵³ A comprehensive description cannot be given in the context of this advisory letter. It should again be noted that using the scope available to pursue a different Union need not be problematic, as long as member states adhere to the procedures of the Treaty.

It would be unfair to attribute disloyal conduct – or perceived disloyal conduct – solely to Eastern Europe. Other member states also have their own strongly held opinions and desires, which they sometimes express in the international arena. Foreign policy is rooted in the history of the member states and differences are not always easy to bridge. For example, it is proving difficult for the EU to formulate a clear position on Israel and the war in Gaza.⁵⁴



Possible legal courses of action

Case law has now reinforced both the positive and negative obligations of sincere cooperation. However, this applies primarily to external representation and not yet to the domain of sanctions rules. This is slowly changing now that the Commission has launched the first infringement proceedings against 18 member states for failing to fully comply with and implement the sanctions policy against Russia. In the external dimension, particularly in relation to the CFSP, there are many grey zones in which legal courses of action are still being developed. These also go hand in hand with political and diplomatic efforts.

Possible political courses of action

The AIV again refers to the fact that a dissenting political vote in the European Council or the Council of the EU cannot legally be classified as disloyal or subversive, even if it may be seen as such politically. The AIV would stress that member states may have legitimate and genuine reasons for voting against something. What is more, different perspectives and diversity are fundamental to the EU. A court cannot assess whether reasons for a veto are legitimate.

Outside the domain of external representation, possible political steps need to be considered urgently. Hungary previously blocked the decision to start accession negotiations with Ukraine. Only after the European Commission had decided to release €10.2 billion in frozen funds for Hungary could Prime Minister Orbán be persuaded to lift his blockade and leave the chamber during the vote. In the near future, a unanimous position on the part of the EU will be of vital importance: the security of our continent is at stake. The ability to collaborate in mutual trust and the spirit of sincere cooperation in pursuit of an effective and more autonomous European defence will be a deciding factor. The EU can build on and learn from the experience of recent years.

Political dialogue is and will of course remain the first option: even when positions are widely divergent, mutual rapprochement can help to promote 'constructive abstention'. Whenever unanimity within the European Council or the Council has proved impossible, constructive abstention has been the best alternative. Constructive abstention means that when one or more member states disagree with the common policy, they undertake to refrain from any action that would undermine the joint initiative. This requires trust. Hungary has contributed to this through its relatively constructive position in the decision-making on arms supplies to Ukraine. Constructive abstention includes a specific reference to sincere cooperation. The European Council could perhaps do more to define constructive abstention further, and the Netherlands could play a role in this. Appealing to reciprocity could serve as a starting point for determining what forms of subversion should be avoided, while ensuring that the 'abstaining' member state is also acknowledged.

In its recent report about EU reforms, the AIV referred to several options for achieving effective policy despite the diversity of views.⁵⁵ Making better use of the possibilities for introducing QMV on certain issues is a good option: by proposal of the European Council or the High Representative, 'implementing decisions' can be taken by qualified majority. If there is evidence or suspicion that a member state is being pressurised by third parties to adopt a particular position, applicability of the 'anti-coercion instrument' could be considered.⁵⁶ Economic coercion is a means that is being used increasingly in the geopolitical economy. It is vital that this is addressed in order to protect the EU's autonomous position as much as possible.⁵⁷ Unanimity within the Council is not required for the anti-coercion instrument.⁵⁸

If constructive abstention and majority decision-making are not possible, closer cooperation or a coalition of the willing or enhanced cooperation between EU member states could offer a solution. But there is also a simpler solution: issuing a 'Europe-minus-1' declaration.



Following the meeting between the American and Russian presidents, European leaders issued a statement in the summer of 2025 declaring that the EU would continue its political, financial, economic, military and diplomatic support to Ukraine, with a footnote stating that *'Hungary does not associate itself with this statement'*.⁵⁹ Even without Hungary's participation, European declarations can thus convey a political message, not only to world leaders but also to member states: there are limits to Hungary's ability to 'thwart' EU decision-making. However, in order for this to work all of the other member states must be willing to ignore Hungary.

The political courses of action would likely be stronger if the EU had an expulsion clause, as dialogues would then be more binding and it would be clear that there are also limits to the willingness to agree to ad hoc solutions. Consideration is now being given to possible ways of expelling a member state from the EU. One option – suggested by former Dutch prime minister Mark Rutte and others – is to dissolve the EU and re-establish it the same day in identical form but without the subversive member state concerned.⁶⁰ Another option is a political agreement that clearly states that repeated violations of the European rule of law and/or fundamental values, or recurring subversive conduct, will be construed as a withdrawal request under Article 50 TEU, whereupon formal negotiations on withdrawal will be initiated.⁶¹

These 'expulsion options' are far-fetched and difficult to implement. Other options require treaty amendments. One possibility is to relax the unanimity requirements of the Article 7 procedure, thus making it easier to suspend member states' voting rights. Another possibility is to define the 'expulsion procedure' for both new and existing member states upon enlargement of the EU – despite the obvious disadvantages of treaty amendments via accession protocols (see the AIV advisory report on EU Reforms). This could be laid down in a protocol added to the accession treaties, stating that recurring and systematically subversive conduct would be regarded as a desire to leave the EU, whereupon negotiations for expulsion should commence.⁶² However, this could make it difficult for candidate countries to join, as member states that object could immediately block their accession. The AIV notes that while it is good to consider these and other options, threats of expulsion should not be made lightly. Subversive conduct could always change with a new government and expulsion would also affect parts of the population that do not support the subversive conduct.



4. Conclusion and recommendations

Strictly speaking, the ‘thwarting of decision-making’ or subversive conduct referred to at the start of this advisory letter does not occur very often. In the current geopolitical and geo-economic climate, however, undermining the European Union is extremely high-risk. Our security, our competitiveness and our foundation of mutual trust in the form of the rule of law are at stake. Subversive conduct must therefore be countered vigorously. The question is where to start. This advisory letter maps out the full breadth of disloyal cooperation: from ‘simple’ single market issues to serious subversion. There is, however, no direct line from non-compliance with EU legislation to subversive conduct; there is no sliding scale on which the tipping points are already pencilled in. The AIV would note, however, that there is a common underlying challenge in all the highly diverse issues. Mutual trust and the culture of sincere cooperation are under pressure and require constant attention at all levels of decision-making as well as implementation.

The principle of sincere cooperation is a driving force for the EU as a political community, legal order and international player. In this legal order, every member state needs to be able to trust that all other member states will implement decisions and agreements in the same way. Sincere cooperation also serves as a political norm: in the decision-making process, member states are expected to cooperate in the pursuit of unanimity or broad consensus. Nevertheless, most member states occasionally exhibit conduct that is less than loyal or even problematic. Including the Netherlands. It is imperative that all member states continue to uphold a culture of sincere cooperation. It is precisely that principle of sincere cooperation that is so important for the functioning of the European legal order that distinguishes the EU from a loosely organised issue-based partnership which member states can join and leave at will. Sincere cooperation is not a silver bullet for all cooperation issues, however. Mutual trust is also required. At a time when the EU is facing major challenges, it is crucial that sincere cooperation is not taken for granted but is actively nurtured and strengthened. Every member state has a role to play in that regard.

Firstly, this requires that the legal effect be used to the full where the implementation of rules and agreements is concerned. Judgments by the Court clarify the obligation of member states to act with loyalty. Compliance with some EU rules is lacking on occasion, although it must be said that the cause is by no means attributable in all cases to a lack of loyalty. It is important, therefore, not to overestimate the legal force of Article 4(3) TEU, but it should certainly not be underestimated either. Overestimation occurs when there is a belief that the courts can put an end to inadequate compliance with European rules which cannot actually be properly implemented. It would be better to invest in good legislation that is meaningful in all member states. *Overestimation* of a different order is the idea that ‘sincere cooperation’ can be invoked against opinions and conduct which cause resentment or run counter to a broad European consensus, but which are inherent to the pluralism and diversity of the Union. There is no legal solution for inadequate political dialogue. *Underestimation* occurs where the CJEU does have jurisdiction but where no legal action is taken because of uncertainty about the outcome or because of reluctance to call member states to account for undesirable conduct. In a mature Union, there should be a culture in which the Commission and the member states hold each other to established agreements and rules.

Secondly, sincere cooperation needs to be explicitly defined as a political norm. The political impact of the principle of sincere cooperation cannot be precisely defined, but a distinction should be made between problematic conduct and subversive conduct. Problematic conduct, in terms of voting and otherwise, does not constitute subversion and could be part of the regular and desirable diversity in the EU. That does not mean that some views do not cause irritation

among others: a preference for continuing to purchase Russian oil, inappropriate frugality or the refusal to contribute to the reception of refugees can all be perceived as conduct that is less than loyal or even disloyal. In a culture of sincere cooperation, it is crucial to continue to engage in cases such as these, as dissenting opinions are not necessarily disloyal and solutions can usually be found to accommodate a variety of preferences and interests. Constructive abstention may also provide an appropriate solution. However, subversive conduct requires a different approach. By refusing to contribute proportionately to a culture of sincere cooperation, a member state will not necessarily lose its legal rights but rather its political credibility. In that case, dialogue needs to be accompanied by more robust options, such as bypassing or ignoring the member state concerned or, where possible, cutting off funding to prevent the Union from being undermined. The culture of sincere cooperation requires constant reinforcement and a clear red line for conduct that does not uphold it.

This advisory letter also identifies possible courses of action for various situations. The figure below summarises the options in the ‘toolbox’ that could promote sincere cooperation within the EU.

“Toolboxes” for the promotion of sincere cooperation

<p>Potential political courses of action</p> <p>Internal and external policy</p> <ul style="list-style-type: none"> • Policy dialogue <p>Internal policy</p> <ul style="list-style-type: none"> • Supervision of legislation / impact assessments / sunset clauses • Financial conditionality • Article 7 procedure in the Council / European Council (including suspension of voting rights) <p>External policy</p> <ul style="list-style-type: none"> • Constructive abstention (e.g. in the CFSP, Art. 31(2) TEU) • Scaling back veto power (e.g. implementing decisions, anti-coercion instrument) • Coalitions of the willing (e.g. proposed deterrence force for Ukraine) • Europe-minus-1 solutions (e.g. statement by 26 member states, plus presidents of the Commission and European Council) 	<p>Potential legal courses of action</p> <p>Infringement proceedings in the event of a violation of the principle of sincere cooperation</p> <ul style="list-style-type: none"> • Under Art. 4(3) TEU, either exclusively or in combination with other norms • May be initiated by the Commission or member states • Requires jurisdiction of the CJEU, which often does not apply under the CFSP <p>Infringement proceedings in the event of a violation of fundamental values</p> <ul style="list-style-type: none"> • Under Art. 2 TEU and possibly other norms • May be initiated by the Commission or member states
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Figure 2 ‘Toolboxes’ for the promotion of sincere cooperation



Recommendations

1. Ensure that subversive conduct does not pay. Draw a red line.

- a. Make good use of the political toolbox. Prevent subversive conduct by continuing to invest in diplomatic bridges, between East and West, North and South and old and new member states. Seek agreement and build on it wherever possible. Acknowledge – where relevant – the constructive abstention or position of other member states.
- b. Sidestep subversive conduct by using QMV wherever possible within the CFSP too. In the meantime, try to resolve subversive conduct within the CFSP diplomatically (in the Council) and with active pressure, with the help of the President of the European Council and the High Representative, for example through second-best ad hoc solutions, such as the Europe-minus-1 construction. If this fails, invest in enhanced cooperation. Here too, continue to invest in political dialogue: reciprocity can help to promote constructive abstention.
- c. Where legal action is a potentially meaningful option in future cases of the same nature as Orbán's 'peace mission': take that action or explore the possibilities for doing so described in Recommendation 3b.
- d. Consider possible options for, as a last resort, expelling from the Union a member state that repeatedly engages in subversive conduct. Emphasise that steps towards expulsion are highly unusual, serious and radical.

2. Use the political toolbox to help strengthen the culture of sincere cooperation and essential mutual trust.

- a. Put sincere cooperation on the agenda in the European Council and the various Council configurations. Discuss the importance of mutual goodwill. Emphasise common interests and security challenges. Define constructive abstention as precisely as possible. Call other member states to account for non-compliance with rules or agreements, and show loyalty yourself, both in the implementation of rules and agreements, and in your political conduct in negotiations on desired new policy.
- b. Do not be too quick to interpret dissenting views as disloyal conduct, but seek productive ways to deal with diversity. Do not class dissenting views as subversive conduct either in advance or in public.
- c. Continue to focus on political dialogue in which member states take a genuine interest in each other's motives and views in order to promote rapprochement and to continue to support mutual trust. The necessary diplomatic rapprochement requires investment in the European mission network, for which 'Brussels experience' is crucial.
- d. Prevent loopholes in internal issues by discussing complacency and indifference, monitoring the quality of legislation, ensuring flexibility where necessary and addressing any dissatisfaction with existing legislation. Actively involve the national parliament in new legislation at an early stage. If European rules do not have clear added value, compliance is more likely to be controversial.
- e. In the event of a violation of fundamental values, use the Article 7 procedure and seek and expand opportunities to suspend European subsidies intended for the country in question.⁶³



3. Use the 'legal toolbox' to tackle disloyal cooperation head-on.

- a. In the event of non-compliance with rules and agreements, use existing procedures such as infringement proceedings and referral to the Court. This applies to 'internal' issues as well as to sanctions policy and external representation. The Netherlands and other member states have a role to play in reporting disloyal cooperation among themselves and to the Commission and in initiating infringement proceedings themselves.
- b. Investigate the options for taking legal action in relation to the CFSP. Situations involving external representation abroad and security policy, such as Orbán's 'peace mission', should not fall outside the scope of the loyalty obligation. Together with as many like-minded member states as possible and the Commission, the Netherlands should, in the event of systematic subversive conduct, take the initiative to launch infringement proceedings against the member state in question. If the EU's fundamental values are being undermined, individual member states (or a coalition) should make use of infringement proceedings under Article 2 TEU.
- c. Support the European Commission in its role as guardian of the treaties. Encourage the Commission to promote a culture of sincere cooperation by consistently taking the lead in infringement proceedings in internal issues and where external representation is concerned. Support the High Representative in his or her task of ensuring sincere cooperation in the CFSP.

The AIV hopes that this advisory letter will contribute to a better understanding of the principle of sincere cooperation in the EU. The power of sincere cooperation can never be taken for granted and should be demonstrated by the way in which the EU addresses current and future common challenges in a united front. The culture of sincere cooperation therefore needs constant attention, especially at a time when Europe is being tested as never before.

Sincerely,

Bert Koenders
Chair

Endnotes

- ¹ [Motion 36259-13](#) (25-05-2025) submitted by MP Tom van der Lee et al. regarding the AIV's advice on possible strategies and means of pressure to halt Hungary's obstruction (in Dutch).
- ² Francis Fukuyama has written extensively about trust. See for example: Fukuyama, F., *Political order and political decay, from the industrial revolution to the globalisation of democracy* (Profile Books, 2014). And: Fukuyama, F., *Trust: the social virtues and the creation of prosperity* (Simon & Schuster, 1996). Steven Levitsky and Daniel Ziblatt set out in *How Democracies Die* (Crown, 2018) that democracies collapse when democratic norms and institutions are no longer respected.
- ³ Krastev, I. and Holmes, S., *The Light that Failed* (Atlas, 2019).
- ⁴ In combination with EU citizenship (Article 20 of the Treaty on the Functioning of the European Union, TFEU), see: NOS.nl, ['European Court: Malta must stop issuing 'golden passports'' \(29 April 2025\)](#) (in Dutch).
- ⁵ See: ['Request for advice on promoting sincere cooperation' \(25 August 2023\)](#) (in Dutch).
- ⁶ [Treaty establishing the European Economic Community](#), Rome, 25 March 1957, Article 5. This principle has been present in all successive versions of the European treaties. The precursor to the current provision was Art. 10 of the EC Treaty. The English version of the Treaty refers to 'sincere cooperation' (after the Lisbon reforms), but most other language versions use the form 'loyal cooperation' (e.g. 'loyale Zusammenarbeit', 'coopération loyale', etc).
- ⁷ [Treaty on European Union](#) (Treaty of Maastricht), Maastricht, 7 February 1992.
- ⁸ Smulders, B., 'De loyale samenwerkingsverplichting tussen de EU en haar lidstaten: bespiegelingen over de praktische uitvoering van deze kernnorm' [The sincere cooperation obligation between the EU and its member states: reflections on the practical implementation of this core standard] in A Campo, L. et al. (eds) *Loyale samenwerking binnen de EU [Sincere cooperation in the EU]* (The Hague, Boom Juridisch, 2020) 15–22 (in Dutch).
- ⁹ See ruling: [C-266/03, Commission v. Luxembourg](#) (Inland Waterways).
- ¹⁰ This advisory letter concerns the 'principle of sincere cooperation' or the 'principle of loyalty'. This refers to the legal provision and/or treaty-based norm. 'Principle' also has its own meaning in a legal sense, which is not intended here.
- ¹¹ With regard to the interaction of the institutions, sincere cooperation is mentioned again in Article 13(2) TEU. The principle of sincere cooperation applies not only in areas where the EU has exclusive competence, but also in areas of shared competence, such as the single market or environmental policy. Example of a case in which exclusive competence applies: *Commission v. Greece* (IMO); example of case in which shared competence applies: *Commission v. Sweden* (PFOS).
- ¹² Schmidt, C., (21 September 2020), [Cyprus blocks EU sanctions decision against Belarus](#), Trouw (in Dutch).
- ¹³ Lambert, P., (14 December 2023), ['Why Ukraine is Hungary's trump card \(and Viktor Orbán wants to hold on to it as long as possible\)'](#), VRT Nieuws (in Dutch).
- ¹⁴ Scientific Council for Government Policy (2018), 'WRR report no. 99: European variations'.
- ¹⁵ The Treaty on European Union lays down the values in Art. 2, including respect for human dignity, democracy, respect for human rights and the rule of law. According to Art. 3, the Union's aims include promoting peace, its values and the well-being of its peoples, combating social exclusion and discrimination and, in its relations with the wider world, protecting its citizens and contributing to peace, security and the strict observance and the development of international law.
- ¹⁶ [Abouthungary.hu, Speech by Prime Minister Viktor Orbán on the 176th anniversary of the Hungarian Revolution and War of Independence of 1848–49](#), (15 March 2023).
- ¹⁷ Mathias Corvinus Collegium and Ordo Iuris Institute, ['The Great Reset: restoring member sovereignty in the European Union'](#) (2025).
- ¹⁸ In contrast to, for example, the explicit objective of the East African Community to ultimately form a 'political federation' (Art. 5(2) of the [Treaty for the Establishment of the East African Community](#)).
- ¹⁹ The concept of an 'ever-closer union' has been part of European law since the Treaty of Rome. It has led to much debate, particularly in relation to the ratification of the European Constitution and the subsequent Treaty of Lisbon. Critics feared that the wording suggested the formation of a European state. To clarify this, the European Council stated in June 2014 that member states should be free to follow their own integration path.

'In this context, the European Council noted that the concept of ever closer union allows for different paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further..' (Conclusions 26/27 June 2014, Point 27, <https://data.consilium.europa.eu/doc/document/ST-79-2014-INIT/en/pdf>); see also AIV advisory report 'Differentiated integration'). This statement followed British concerns about the future of the Union. The wording 'ever closer union' refers to deeper cooperation on common goals, but also underlines the fact that there is no consensus about a European federal state.

- ²⁰ Hillion, C., 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' (January 30, 2014), and van Elsuwege, P., 'How Viktor Orbán Challenges the EU's Common Foreign and Security Policy', [Verfassungsblog.de](https://www.verfassungsblog.de) (9 July 2024).
- ²¹ See Opinion of Advocate General Ćapeta: [EU values: Advocate General Ćapeta considers that, by prohibiting or restricting access to LGBTI content, Hungary infringed EU law](#), 5 June 2025.
- ²² OPAL judgment on the basis of Art.4(3) TEU.
- ²³ See the *Francovich v. Italy* judgment: the Court held that, given the obligation of sincere cooperation, member states could even be held liable if they act in breach of EU law; cases C-6/90 and C-9/90, concerning the failure to implement a directive in national legislation on time in relation to the protection of employees in the event of, for example, bankruptcy. See: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=cecli%3AEC%3AC%3A1991%3A428&>; (2019/C 247/01) on the recovery of unlawful state aid is also based in part on the principle of sincere cooperation. The Commission refers to a Court judgment in which the Court found in favour of the Commission and required Germany to cooperate in order to recover unlawfully granted state aid.
- ²⁴ Dutch Ministry of Foreign Affairs, Centre of Expertise on European Law, 'The preliminary ruling procedure'. (In Dutch). Last visited on 22/09/2025.
- ²⁵ For example, in the case *Commission v. France (1997) C-265/95* on the free movement of goods in the EU. This case arose from Spain's dissatisfaction about the sabotage of Spanish strawberries imported by France.
- ²⁶ See: [Commission takes action to ensure complete and timely transposition of EU directives](#), concerning European Parliament and Council Directive 2023/2413 of 18 October 2023.
- ²⁷ Court of Justice of the European Union, [EU values: Advocate General Ćapeta considers that, by prohibiting or restricting access to LGBTI content, Hungary infringed EU law](#), 5 June 2025.
- ²⁸ It should also be noted that complaints about violations of fundamental rights can also be lodged with the European Court of Human Rights, but that is separate from Article 4(3) TEU.
- ²⁹ This is also known as a 'yellow card'. This has been 'shown' on three occasions so far. If the Commission decides to proceed without amending the proposed legislation, it is referred to as an 'orange card'. This has never arisen. See: [The subsidiarity control mechanism - European Commission](#).
- ³⁰ <https://www.tweedekamer.nl/kamerstukken/detail/detail?id=2025D23446&did=2025D23446> (in Dutch).
- ³¹ <https://www.rekenkamer.nl/publicaties/rapporten/2023/06/15/eu-recht-in-de-praktijk> (in Dutch).
- ³² De Ruiter, R., et al., 'Omzetting en uitvoering: een literatuurstudie' [Transposition and implementation: a literature study] (2023), part of the IOB evaluation of Dutch influence on the European policy process (2025). [Literature studies on influence in the EU policy process | Policy and Operations Evaluation Department \(IOB\) \(in Dutch\)](#).
- ³³ See AIV, 'Decisiveness: EU Reforms to the Common Foreign and Security Policy, Budget and Rule of Law' (2025) and the European Commission's [Rule of law conditionality regulation](#).
- ³⁴ CJEU, judgment C-22/70, *Commission v. Council* (31 March 1971).
- ³⁵ CJEU, judgment C-45/07, (2009).
- ³⁶ CJEU, judgment C-620/16 (2019), para. 98. See also *Commission v. Greece (IMO) judgment C-45/07*, in which the Court found a violation of sincere cooperation as well as a violation of number of other articles.
- ³⁷ The case of *Commission v. Sweden (PFOS)* concerned Sweden's submission of a proposal within the framework of the Stockholm Convention on persistent organic pollutants. In this international forum, Sweden acted unilaterally in proposing more stringent PFOS standards than those covered in the relevant EU strategy. In the case of *Commission v. Germany*, the Court found a violation of Article 4(3) TEU because Germany had voted against an EU position in the Intergovernmental Organisation for International Carriage by Rail (OTIF).

- ³⁸ CJEU, [judgment C-620/16](#) (2019), para 94.
- ³⁹ Cited from: van Elsuwege, P.: 'The duty of sincere cooperation (Art. 4 (3) TEU) and its implications for the national interest of EU Member States in the field of external relations'. See: https://hpops.tk.hu/uploads/files/UACES_Bilbao_PVE_%282%29.pdf?utm.
- ⁴⁰ Two exceptions are set out in the treaties: the Court may rule on individual sanctions (Art. 275 TFEU) and on whether the CFSP is the correct legal basis for EU actions (Art. 40 TEU).
- ⁴¹ Hillion, C., 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' (January 30, 2014). Available via <http://dx.doi.org/10.2139/ssrn.2388165>.
- ⁴² Financial Times, 'Viktor Orbán's trip to Moscow in breach of EU treaties, legal service says' (11 July 2024).
- ⁴³ Charles Michel on X: 'The EU rotating presidency has no mandate to engage with Russia on behalf of the EU. The European Council is clear: Russia is the aggressor, Ukraine is the victim. No discussions about Ukraine can take place without Ukraine.' / X.
- ⁴⁴ EEAS, [Russia: Statement by High Representative on the visit of Prime Minister Orbán to Moscow](#) (5 July 2024).
- ⁴⁵ European Parliament, [Russia's 'shadow fleet': Bringing the threat to light](#).
- ⁴⁶ [Non-paper on strengthening EU sanctions capacity and countering sanctions circumvention](#) (2023).
- ⁴⁷ European Commission, DG Trade, 'European Union, Trade in goods with Kyrgyz Republic'. See: [details_kyrgyz-republic_en.pdf](#).
- ⁴⁸ Audience question: [Could EU sanctions policy towards Russia be more effective? | Clingendael and European imports of liquefied natural gas from Russia at 'record levels' | Gas | The Guardian](#). In this context, the European Commission announced that it would try to restrict the import of Russian gas more quickly. See: [NOS.nl, EU wants to bring forward import ban on Russian liquefied gas after pressure from Trump](#) (22 September 2025) (in Dutch).
- ⁴⁹ [NOS.nl, Public Prosecution Service prosecutes Damen for corruption and violation of sanctions against Russia](#) (25 April 2025) (in Dutch).
- ⁵⁰ Bonifassi, S. and Bastien, J. 'A closer look at EU sanctions enforcement following adoption of new directive', [Global Investigations Review](#) (30 June 2025).
- ⁵¹ This is mandatory under Directive (EU) 2024/1226. Member states had until 20 May 2025 to implement this directive. Infringement proceedings are directed at Belgium, Bulgaria, Czech Republic, Germany, Ireland, Greece, Spain, France, Croatia, Cyprus, Italy, Hungary, Malta, Austria, Poland, Portugal, Romania and Slovenia.
- ⁵² See [Directive \(EU\) 2024/1226 of the European Parliament and the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive \(EU\) 2018/1673](#).
- ⁵³ See for example: de Gruyter, C., *Beter wordt het niet. Een reis door het Habsburgse rijk en de Europese Unie* [It doesn't get any better than this. A journey through the Habsburg Empire and the European Union] (De Geus 2021).
- ⁵⁴ CNN, [France recognizing a Palestinian state is a bold move by Macron, with a hint of desperation](#) (25 July 2025).
- ⁵⁵ AIV, ['Decisiveness: EU Reforms to the Common Foreign and Security Policy, Budget and Rule of Law'](#) (2025).
- ⁵⁶ Regulation (EU) 2023/2675 of the European Parliament and the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries.
- ⁵⁷ Farrell, H. and Newman, A., ['The Weaponized World Economy: Surviving the New Age of Economic Coercion'](#), [Foreign Affairs](#) (19 August 2025).
- ⁵⁸ See European Commission, ['Protecting against coercion'](#), (2023).
- ⁵⁹ European Council, ['European Union Leaders' Statement on Ukraine'](#) (12 August 2025).
- ⁶⁰ Chamon, M., [Nederlandsrechtsstaat.nl 'An EU without Poland and Hungary, would that be possible?'](#) (9 November 2020) (in Dutch).
- ⁶¹ See Dougan, M. and Hillion, C., 'The EU's duty to respect Hungarian sovereignty: an action plan', [Common Market Law Review](#) 59 SI: 181–202, 2022. It would be difficult to implement this option through to the end result, because withdrawal requires mutual agreement. Nonetheless, such a position adopted by the European Council could have a political impact.
- ⁶² It should be noted that unilateral revocation is possible on the basis of the Wightman judgment; see CJEU [judgment C-621/18](#) (2018).
- ⁶³ See also the AIV advisory report: ['Decisiveness: EU Reforms to the Common Foreign and Security Policy, Budget and Rule of Law'](#) (2025), Recommendation 4c.

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