

Constructive Absence: A Hungarian Maneuver or a New Institution of EU Law?

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ABSTRACT

By exiting the room in the moment of voting about opening accession negotiations with Ukraine and Moldova, Hungarian representative had laid the foundations for the new institute in the diplomatic, but also institutional law of the EU, a constructive absence. By this agreed maneuver between EU member states leaders, one state expressed its disagreement with the majority without blocking the decision or even limiting its influence. Although, at the moment it cannot be predicted will this maneuver ever be used again, this paper aims to explore it by comparing it to the institutes of constructive and simple abstention and explained through the principle of sincere cooperation. Furthermore, it will be justified from both international law and EU law perspective. Finally, by highlighting its advantages and shortcomings it will be shown that if its exercise becomes more frequent and necessary its legitimacy will have to be ensured by appropriate implementation in the Treaties.

Keywords: constructive absence, constructive abstention, simple abstention, principle of sincere cooperation, customary international law, general principles of law

I. INTRODUCTION

On December 15, 2023, the European Council has decided to open accession negotiations with Ukraine and Moldova as well to grant the status of candidate country to Georgia¹ despite of the fact that Hungarian prime minister left the room at the moment of adopting the decision.

Hungary, obviously, did not wanted to derail the decision to open accession negotiations with Ukraine and Moldova as well to grant the status of candidate country to Georgia despite the fact that it could do so. This is precisely what it has done in case of the decision about EU aid for Ukraine. Moreover, it could have made a formal declaration provided by Article 31(2) of the Treaty on European Union (TEU) in which case, pragmatic consequences aside, it would not be obliged to apply the decision.² Finally, to show its symbolically disagreement with the decision it could have abstain in vote. Unexpectedly and unprecedentedly, it chose to leave the room, creating a new maneuver named—constructive absence.

The question arises what this maneuver in its essence is. Is it a form of constructive abstention, is it simply an abstention in vote or is this a new phenomenon created by diplomatic practice? This paper will explore these questions and analyze benefits and shortcomings of this possible future EU law institute.

Although not proscribed by Treaties, the constructive absence maneuver did not represent their breach. Its justification can be found both in EU law and in international law.

For this purpose, in the second part of this paper, after the introductory part, this maneuver will be compared to the institutes of constructive and simple abstention and explained through the principle of sincere cooperation. The third chapter will explore its justification from international law point of view. The fourth chapter will deal with advantages and disadvantages of this maneuver as a potential new institute of EU law. Finally, the conclusion remarks will follow. At this point, it is of great importance to emphasize that this paper does not deal with concrete situation regarding Hungarian policy nor accession procedure of Ukraine to the EU. It deals only with the maneuver of the constructive absence

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¹ ‚European Council meeting (14 and 15 December 2023) – Conclusions’ (*European Council*) <<https://www.consilium.europa.eu/media/68967/europeancouncilconclusions-14-15-12-2023-en.pdf>> accessed 29 January 2024.

² ME Bartoloni, ‚Simple Abstention and Constructive Abstention in the Context of International Economic Sanctions’ (2023) 7 *European Papers* 1121, 1124.

itself, its characteristics and its grounds from the EU and international law point of view.

II. CONSTRUCTIVE ABSENCE IN EU LAW—CONSTRUCTIVE ABSTENTION, SIMPLE ABSTENTION AND SINCERE COOPERATION

The constructive absence is a novelty in EU law. Nevertheless, it is not, *ipso facto*, illegal. After all every practice has its beginning. The European Council itself was a formalization of an informal practice in 1974.³ The ERTA principle, according to which “each time the community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules, whatever form these may take, the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules”⁴ was also created by practice and confirmed by the Court of Justice of the European Union (CJEU).

In any case, before any research of this maneuver, its difference in relation to constructive abstention must be emphasized. The Treaty of Amsterdam introduced the constructive abstention institution precisely for abolishing the mandatory unanimity of the member states when making a decision.⁵ In turbulent political conditions of today, the importance of this institution and its use is increasingly highlighted.⁶ This institution requires the member state abstaining in a vote to qualify its abstention by making a formal declaration resulting in that member state right not to apply the decision and obligation to refrain from any action likely to conflict with or impede Union action based on that decision. In the case of Hungarian prime minister leaving the room no formal declaration was made, so Hungary is bound by the EU Council decision to open accession negotiations with Ukraine and with the Republic of Moldova. After all, Hungary

³ Philippe de Schoutheete and Helen Wallace, ‘The European Council’ (2002) 19 *Research and European Issues* 3; Emmanuel Mourlon-Druol, ‘Filling the EEC leadership vacuum? The creation of the European Council in 1974’ (2010) 10 *Cold War History* 315.

⁴ Case C-22/70 *Commission of the European Communities v Council of the European Communities* [1972] ECLI:EU:C:1971:32, para 17.

⁵ See D. Lapaš, ‘Zajednička vanjska i sigurnosna politika EU’ in Čapeta Rodin and Goldner Lang (eds.), *Reforma Europske unije, Lisabonski ugovor* (Narodne novine 2009) 283.

⁶ RA Wessel and Viktor Szép, ‘The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting: Towards a more effective Common Foreign and Security Policy?’ (*European Parliament*, 2022 <[https://www.europarl.europa.eu/thinktank/en/document/IPOLE_STU\(222\)739139](https://www.europarl.europa.eu/thinktank/en/document/IPOLE_STU(222)739139)> accessed 29 January 2024, 61; Saban Yuksel, ‘Quick Overview of the Strategic Compass’ (Beyond the Horizon, 6 April 2022) <<https://behorizon.org/a-quick-overview-of-the-strategic-compass/>> accessed 29 January 2024; Steven Blockmans, ‘Ukraine, Russia and the need for more flexibility in EU foreign policy-making’ (2014) CEPS Policy Briefs No. 320 <<https://core.ac.uk/download/pdf/33449689.pdf>> accessed 29 January 2024, 2.

is one of the few states that has used constructive abstention⁷ institution and is fully aware of its potential so it would not hesitate to use it if the decision wasn't in accordance with its national interests. Consequently, the difference between constructive absence and constructive abstention is enormous and the former can hardly be seen as variant of the later.

Furthermore, it is important to distinguish this maneuver from simple abstention when decision is being made within the EU Council. The TFEU establishes consensus as a main model of decision making in European Council as a Union most prominent institution⁸ but it alleviates it by Article 235 (1), according to which abstentions by members present in person or represented shall not prevent the adoption by the European Council of acts which require unanimity. Furthermore, unlike in a case of constructive abstention, decision adopted does create obligation for an abstained state. It can be argued that exiting a room equals abstention, but *in stricto sensu* the aforementioned Article 235 of TFEU clearly states that abstentions by members *present in person or represented* shall not prevent the adoption by the European Council of acts which require unanimity. At the present case, Hungarian prime minister was not present nor represented, but absent from the room in, as it is constantly emphasized, a pre-agreed and constructive manner. Hungary could stay absent from voting in which case the conditions from Article 235 of TFEU would apply.

Moreover, the situation in question, nor any other constructive absence manifestation, could not be considered as one of the situations when a member state can be excluded from discussion and decision-making.⁹ This would be procedures based on Article 7(2) and Article 50(4) of the TEU. According to Article 7(2) of the TEU "the European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2." Article 50(4) proscribes that the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the

⁷ ,Draft minutes, Council of the European Union (Foreign Affairs) 17 October 2022' (*Council of the European Union*, 27 October 2022) <<https://data.consilium.europa.eu/doc/document/ST-13777-2022-ADD-1/en/pdf>> accessed 29 January 2024; ,Foreign Affairs Council: Press remarks by High Representative Josep Borrell after the meeting' (*European Union External Action*, 17 October 2022) <https://www.eeas.europa.eu/eeas/foreign-affairs-council-press-remarks-high-representative-josep-borrell-after-meeting-1_en> accessed 29 January 2024; Wessel and Szép (n 5) 63.

⁸ Luuk van Middelaar and Uwe Puetter, 'The European Council the Union's supreme decision-maker' in Dermot Hodson, Uwe Puetter, Sabine Saurugger and John Peterson (eds.), *Institutions of the European Union* (5 th edn, Oxford University Press 2021) 66.

⁹ *ibid* 63.

discussions of the European Council or Council or in decisions concerning it. This means that rules regulating simple abstention do not govern the situation in question. Finally, this member state is the ‘usual suspect’,¹⁰ the pioneer in blocking of decisions in the CFSP framework,¹¹ so it could have easily vote against opening accession negotiation.

Nevertheless, as it has been stated above, there is no reason to consider this maneuver illegal. Moreover, putting CJEU non-jurisdiction in CFSP questions aside,¹² CJEU could scrutinize this maneuver from the aspect of sincere cooperation obligation, without breaching the principle of conferral.¹³ In the *Deutsche Grammophon* case the CJEU has explained that the obligation of member states “to abstain from any measure which could jeopardize the attainment of the objective of this treaty” forms a “general duty for the member states, the actual tenor of which depends in each individual case on the provisions of the treaty or on the rules derived from its general scheme.”¹⁴ With this extensive approach the CJEU has strengthened this obligation by giving it a strong momentum to the level of ubiquitous principle in all relations between EU and member states.¹⁵ The CJEU has used same approach, for example, in the *Pupino* case to extend the principle of sincere cooperation to the ex-third pillar and in the *Segi* case to extend the same principle to the CFSP. The CJEU has considered that “it would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law”¹⁶ were not also binding even in areas in member states competences.

¹⁰ LNG Alonso, ‘La Unión Europea frente al desafío de la guerra en Ucrania: ¿la ansiada ‘epifanía’ de su política exterior y de seguridad común?’ (2023) 27 *Revista de Derecho Comunitario Europeo* 35, 52.

¹¹ Wessel and Szép (n 5) 64; Nicole Koenig, ‘Towards QMV in EU Foreign Policy: Different Paths at Multiple Speeds’ (*Hertie School Jacques Delors Centre*, 14 October 2022) <https://www.delorscentre.eu/fileadmin/2_Research/1_About_our_research/2_Research_centres/6_Jacques_Delors_Centre/Publications/20221014_Koenig_QMV_V1.pdf> accessed 29 January 2024, 3.

¹² See the approach of AG Capeta: Joint Cases C-29/22P and C-44/22P *KS, KD v Council and Commission v KS, KD* [2023] ECLI:EU:C:2023:901, opinion of AG Capeta, para. 118.

¹³ See e.g. Tomas Verellen, ‘AG Capeta’s Opinion in KS and KD: Reading Away the Treaty Text?’ (*Blog of Thomas Verellen*, 30 November 2023) <<https://www.thomasverellen.com/blog/ag-capetas-opinion-in-ks-and-kd>> accessed 29 January 2024.

¹⁴ Case C-78/70 *Deutsche Grammophon v Metro SB* [1971] ECLI:EU:C:1971:59, para. 5.

¹⁵ Desiree van Iersel and CG Ramaglia Mota, ‘Federalising Tendencies of the Principle of Sincere Cooperation in the Area of Common Foreign and Security Policy’ (2016) 1 *Warwick Undergraduate Law Journal* 16.

¹⁶ Case C-105/03, *Pupino* [2005] ECLI:EU:C:2005:386; C-355/04, *Segi and others v Council* [2007] ECLI:EU:C:2007:116.

According to the sincere cooperation principle, acknowledged by the CJEU,¹⁷ the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. Based on that principle of constitutional importance,¹⁸ TEU creates certain obligations for member states regarding CFSP and each other, more precisely:

- they shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives¹⁹
- they 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 area²⁰
- shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach.²¹

Member states obligation to refrain from any measure, which could jeopardize the attainment of the Union's objectives, or to put it otherwise obligation of abstention, strives to resolve conflicts²² or search for a compromise in cases in which Union's objectives and national interests of member states do not coincide. Hungarian maneuver, putting external and internal policy of Hungary aside, was precisely that-a compromise. After all it was an agreement Hungarian prime minister and chancellor of Germany conceived to fill a new lacuna in EU law emerged as a result of specific political environment. The best way to fill this lacuna is duty of sincere cooperation as a legal principle whose purpose is, among other, "to fill lacunae of the EU law."²³

The member states duty to give full effect to EU law as one of many face of

¹⁷ E.g. case C-78/70 *Deutsche Grammophon v Metro SB* [1971] ECLI:EU:C:1971:59, para. 5.

¹⁸ JT Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions Under Article 10 EC' (2007) 31 *Fordham International Law Journal* 1483, 1530.

¹⁹ Consolidated version of the Treaty on European Union [2012] OJ C326/1 art. 4.3. (Treaty on European Union)

²⁰ Treaty on European Union, art. 24.3.

²¹ Treaty on European Union, art. 32.1.

²² Marcus Klamert, 'Article 3-5' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) p. 61.

²³ Péter Budai, 'Understanding the Principle of Sincere Cooperation Concerning the Ratification of Mixed Agreements: Obligation of Conduct, Obligation of Abstention and Obligation of Result' (2021) *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae* 55, 57.

principle of sincere cooperation²⁴ could not apply in this contest. Of course, Commission's enlargement package of 8 November 2023²⁵ on which the European Council had decided to open accession negotiations with Ukraine and with the Republic of Moldova could not be considered as EU law nor as, at least not yet, as Union's objective or common approach. Nevertheless, as it has been explained above, constructive absence, as a result of political compromise, could be seen as a manifestation of sincere obligation principle. As the CJEU has stated the "mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded."²⁶ Consequently, in the spirit of sincere cooperation, Hungary should not dispute adopted decision in anyway.

III. THE CONSTRUCTIVE ABSENCE IN INTERNATIONAL LAW

According to Article 38 of the Statute of the ICJ, the sources of international law are international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, international custom, as evidence of a general practice accepted as law and the general principles of law recognized by civilized nations. According to the CJEU, the EU as a "order of international law"²⁷ is bound by international custom, as evidence of a general practice accepted as law²⁸ or in other words, by customary international law.²⁹ General principles of law as a source of international law are as well a source of

²⁴ Lang (n 18) 1499.

²⁵ Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement Policy (Communication) COM (2023) 690 final; ,Commission adopts 2023 Enlargement package, recommends to open negotiations with Ukraine and Moldova, to grant candidate status to Georgia and to open accession negotiations with BiH, once the necessary degree of compliance is achieved' (*European Commission Press Release*, 8 November 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_5633> accessed 29 January 2024.

²⁶ Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, para. 30.

²⁷ Case C-26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1

²⁸ Case T-115/94 *Opel Austria v Council of the European Union* [1997] ECLI:EU:T:1997:3, para. 90; Case C-266/16 *Western Sahara Campaign UK* [2018] ECLI:EU:C:2018:118, para. 47; Case C-364/10 *Hungary v Slovakia* [2012] ECLI:EU:C:2012:630, para. 46; See Jens Dammann, 'Paradise Lost: Can the European Union Expel Countries from the Eurozone?' (2016) 49 *Vanderbilt Journal of Transnational Law* 693, 718.

²⁹ See e.g. Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 *EJIL* 523, 541; LR Helfer and IB Wuerth, 'Customary International Law: An Instrument Choice Perspective' (2016) 37 *Michigan Journal of International Law* 563, 569.

the EU law.³⁰

Qui tacit consentire videtur si loqui debuisset ac potuisset or he who keeps silent is held to consent if he must and can³¹ act and *nemo auditur propriam turpitudinem allegans* or no one may rely on his or her own wrongdoing,³² could be considered as both, international custom and general principles of law.

The adage *qui tacit consentire videtur si loqui debuisset ac potuisset* is connected with a concept of acquiescence, “an equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent.”³³ This means that if the state had knowledge about all the circumstances of a certain question and the consequences of its own non-reaction, its silence on a matter will result in a tacit agreement.³⁴ For example, in the *Temple of Preah Vihear Case* ICJ has concluded that since Thailand had remained silent for 50 years with regard to the map according to which a certain territory was placed within the borders of Cambodia, the map had become binding and Thailand’s silence on a matter must be understood as acquiesced. At the same place ICJ has cited the abovementioned adage.³⁵ According to Antunes, for silence to be considered as acceptance, four conditions have to be met: notoriety or the requirement that the facts of the case in question are (or ought to be) known by the acquiescing State, lapse of time, consistency and in cases in which the conduct is attributable to a relevant representative, provenance.³⁶

For determination of Hungary’s reaction and any future constructive absence cases as an acquiescence according to the abovementioned conclusions and

³⁰ Case 4/73 *Nold v Commission* [1974] ECLI:EU:C:1974:51, para. 13; Budislav Vukas, ‘Opća načela prava kao izvor prava Evropskih zajednica’ (1992) 42 *Zbornik Pravnog fakulteta u Zagrebu* 253, 259; TC Hartley, *Temelji prava Europske zajednice* (Pravni fakultet Sveučilišta u Rijeci 2004) 133.

³¹ DA Lewis, NK Modirzadeh and Gabriella Blum, ‘Quantum of Silence: Inaction and Jus ad Bellum’ (2019) Harvard Law School Program on International Law and Armed Conflict <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420959> accessed 29 January 2024.

³² Natalie Holvik, ‘Silence is consent Acquiescence and Estoppel in International Law’ (Örebro University, School of Law, Psychology and Social Work 2018) <<https://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1199344&dswid=4002>> accessed 29 January 2024, 4.

³³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, ICJ Reports 1984, p. 246.

³⁴ Holvik (n 32) 24.

³⁵ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p. 6. See also e.g. *Land, Island and Maritime Frontier Dispute Case (El Salvador v Honduras: Nicaragua Intervening)* Judgment of 11 September 1992, p. 21; Lewis, Modirzadeh and Blum (n 31) 14.

³⁶ NSM Antunes, ‘Acquiescence’ in *Max Planck Encyclopedia of Public International Law* (MPIL 2006) <<https://files.pca-cpa.org/pcadocs/ua-ru/04.%20UA%20Rejoinder%20Memorial/02.%20Legal%20Authorities/UAL-114.pdf>> accessed 29 January 2024., para. 21.

views of ICJ, it is necessary to define it as a silence. As stated before, it cannot be considered as a simple abstention from Article 235 of the Treaty on the Functioning of the European Union (TFEU) nor as constructive one from Article 31 of the TEU. So as a new concept as it is, in its basis, it is a silence. Furthermore, if we apply Antunes conditions on this, or any other constructive absence maneuver, it is very probable that they would be met. In the present case, Hungarian prime minister as a relevant national representative was fully aware of all circumstances of the case as well as of the consequences of his reaction and it is hard to imagine that any other relevant national representative of member state who would reach for this mechanism would not be. This means that constructive mechanism maneuver fulfills the conditions of provenance and notoriety. Even the conditions of lapse of time and consistency could be satisfied if the state's representative absence is in line with that states policy regarding the specific subject for a longer period of time. Consequently, the exercise of *qui tacit consentire videtur* principle should not be disputable in the case of constructive absence.

Furthermore, since the Hungarian prime minister had knowingly left the room at the moment of voting, Hungary cannot dispute decision's binding effect. This means that this mechanism would be in accord with maxim *nemo auditur propriam turpitudinem allegans* also known as *estoppel* principle.³⁷ The CJEU has used this adage in *Ratti* case without mentioning the principle itself, by stating that "a member state which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails."³⁸ In its later case law the CJEU has explicitly referred to the principle *nemo auditur propriam turpitudinem allegans*,³⁹ confirming its status in EU law.

IV. THE ADVANTAGES AND DISADVANTAGES OF CONSTRUCTIVE ABSENCE

At this moment, at least three advantages of the constructive absence maneuver or institution, that can be recognized. Those advantages would be its flexibility, simplicity and cooperativeness. Each of them has its counterpart that can be detected as disadvantages of the same maneuver. Those would be the lack of a foundation in Treaties, inefficiency, and inauthenticity.

³⁷ Marko Petrak, *Traditio Iuridica, Vol.I. Regulae Iuris* (Novi informator 2010) 86.

³⁸ Case C-148/78 *Ratti* [1979] ECLI:EU:C:1979:110, para 22; See Mirna Romić, 'Obtaining Long-term Resident Status in the European Union' (2010) 6 *Croatian Yearbook of European Law and Policy* 153, 157.

³⁹ Case C-520/21 *Arkadiusz Szczęsina v. Bank M. S.A.* [2023] ECLI:EU:C:2023:478, para 81; Case T-330/19 *PNB Banka v ECB* [2022] ECLI:EU:T:2022:775, para 231; Case T-301/19 *PNB Banka v ECB* [2022] ECLI:EU:T:2022:774, para 209.

ADVANTAGES	DISADVANTAGES
flexibility	lack of foundation in Treaties
simplicity	inefficiency
cooperativeness	inauthenticity

Table No. 1: *advantages and disadvantages of constructive absence*

1. *Flexibility and lack of foundation*

Flexibility is not only desirable in complex legal system such as the EU, but also necessary.⁴⁰ The Treaties themselves tend to flexibility mechanisms or clauses to avoid system paralysis when unanimity cannot be reached. From 'opt-outs' via 'passarelle' clauses to 'flexibility' clause from Article 352, Treaties have promoted flexibility over rigidity. After all, the constructive abstention is a 'flexibility clause' itself.⁴¹ It is undoubtedly that the Hungarian maneuver has shown a high degree of flexibility in a situation where the stakes were high, and it was not in the interest of either side to rise tensions to unnecessarily high levels. It was a perfect example of ignoring the elephant in the room. Hungarian prime minister left the meeting, decision to open accession negotiations was adopted by European Council and the incident was not even mentioned in the published European Council conclusion. If this were to become a future practice, one could argue that a new flexibility mechanism has been created.

Nevertheless, the lack of genuine Treaties provision amounts to the legal uncertainty of the whole voting procedure in European Council but the Council as well. If the Hungarian maneuver would become the new institution only in practice, this would be a clear signal that each state in each situation could produce its own maneuver to which majority would have to adapt. It is indisputable that in this specific case, this was the most acceptable solution, but such arbitrary deviation from the Treaties should not become a 'new normal.' Scholz himself has called for limiting the use of constructive abstentions to exceptional cases.⁴²

⁴⁰ Thomas Duttler et al, 'Opting out from European Union legislation: the differentiation of secondary law' (2017) 24 *Journal of European Public Policy* 406, 480.

⁴¹ See more in Carlos Closa Montero, 'Flexibility Mechanisms in the Lisbon Treaty, A Study for the AFCO Committee' (European Parliament 2015) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536474/IPOL_STU\(2015\)536474_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536474/IPOL_STU(2015)536474_EN.pdf)> accessed 29 January 2024, 13.

⁴² Mared Gwyn Jones, 'Will EU leaders continue to sidestep Orbán by asking him to leave the room?' (Euronews, 19 December 2023) <<https://www.euronews.com/my-europe/2023/12/19/will-eu-leaders-continue-to-sidestep-orban-by-asking-him-to-leave-the-room>> accessed 29 January 2024

2. Simplicity and inefficiency

Besides being a manifestation of flexibility, simplicity is another characteristic of this potentially future EU law institution. If the constructive absence would be formalized in Treaties as suggested above, there would be no need for any kind of formal declaration as in the case of constructive abstention. This wouldn't even be necessary since the member state exploiting the constructive absence would still be bound by the decision in question. Nevertheless, it is as unambiguous as constructive abstention.

On the other hand, the constructive absence institution would be of questionable efficiency or even meaningfulness. In the cases of constructive absence, the state that has resorted to this mechanism remains bound by the decision in question. In the cases such as opening accession negotiations the constructive abstention would not have any sense nor could technically mean anything. It would not be possible to achieve such an arrangement in which the decision regarding accession negotiations or accession of a state to the EU itself would be binding for all states except for the one that decided to use constructive abstention. Constructive absence would be a suitable solution in these kinds of circumstances when a state does not want to obstruct the decision-making, but it wants to send a stronger message than simply abstain in a vote. While this could even be considered as, an advantage of unambiguity, in a metaphysical sense, from a utilitarian point of view, is actually without any effect.

3. Cooperativeness and inauthenticity

Finally, the institution of constructive absence would be a clear example of member states cooperativeness, since it would be agreed, exercised, and reasoned in the spirit of sincere cooperation and mutual respect of member states. The exercise of constructive absence would demonstrate the commitment of the majority of member states to the same goal and respect for the different opinions of one or several of them. This institution would achieve a double goal: the decision of the majority would be passed and the member states that disagree would clearly express their stance without limiting decision's effect.

At the same time, however diplomatically innovative and pragmatic this maneuver was and could be in similar future cases, it would actually be a fraud. Just like Potemkin's villages, behind the guise of resourcefulness, diplomacy and commitment to a common goal, there would be a lack of unity that should characterize the adoption of key Union decisions. This issue would not be such a huge problem in the cases of decisions that are not as crucial as the opening of negotiations with a potentially new member state. But the fact that this maneuver is undefined in Treaties and not even mentioned in the European Council's documents contributes to this stance. Consequently, this disadvantage would

be amortized to some extent if the European Council itself would explain the maneuver itself and its exercise in each specific case. Otherwise, the European Council's conclusions like the one from 15 December would appear to cover up the failure of reaching necessary unanimity and failure of Union's policies.

V. CONCLUSION

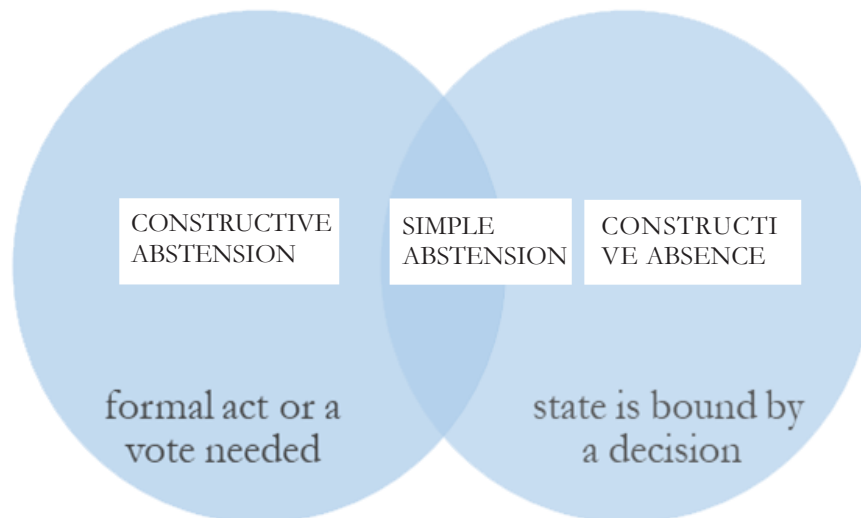
By exiting the room in the moment of voting about opening accession negotiations with Ukraine and Moldova, Hungarian representative had laid the foundations for the new institution in the diplomatic, but also institutional law of the EU. By this agreed maneuver between EU member states leaders, one state expressed its disagreement with the majority without blocking the decision or even limiting its influence. Shall this maneuver ever be used again, and will it really reach the status of a new institution side by side with, e.g., constructive abstention is impossible to know. In any case, the maneuver and its consequences can be justified in both international law and EU law as well.

The maneuver represents the *consentire videtur si loqui debuisset ac potuisset* and the Hungary like any other state that would resort to the use of the maneuver is bound by the decision in question according to the *nemo auditur propriam turpitudinem allegans*. Both adages reflect general principles of law and international custom which apply to the EU according to the CJEU case law.

When considering constructive absence from EU law point of view, it is of great importance not to confuse it with constructive abstention. There are three main differences between them. First, constructive abstention is a legal institution proscribed by Treaties, precisely by the Article 31 (2) of TEU. The constructive absence is still just a diplomatic maneuver. Secondly, for triggering the constructive abstention institution, a formal declaration needs to be made, while constructive absence is completely informal. Thirdly, while the member state that has resorted to the Article 31(2) of the TEU is not itself bound by a decision that was being voted on, in a case of a constructive absence the member state that has performed it, stays fully bound by it.

Furthermore, the constructive absence should not be equalized with the simple abstention from Article 235 (1) of TFEU. Simple abstention, similar to the constructive abstention, differs from constructive absence in fact that it has a legal foundation in Treaties and needs a formal expression. However, in both of these cases the state is bound by a decision that is being considered in the EU Council, of course if the decision was actually adopted in accordance with the Treaties (see Diagram 1).

Diagram No. 1: *Relationship between constructive abstention, simple abstention and constructive absence*



The maneuver itself is in line with the sincere cooperation principle. Hungary could have easily voted against opening accession negotiations but, putting the policy aside, it did refrain from a measure which could jeopardize the attainment of the Union’s objectives. Any other member state that would, in the future, exercise this maneuver would show a certain degree of adherence to this principle. This form of cooperation, together with simplicity in execution and flexibility, which is necessary in complex system such as EU are most obvious advantages of this maneuver.

On the other hand, its main flaws are a lack of a foundation in the Treaties, inauthenticity, and practical inefficiency. Leaving the last one a side, these disadvantages could be mitigated by establishing the maneuver itself as an institution in Treaties. If a general consensus were to be reached, there is no reason not to, for example, amend Article 235 (1) so that its third subparagraph stipulates “Intentional absence or abstentions by one or more members shall not prevent the adoption by the European Council of acts which require unanimity.” Of course, time and political future of EU policies will show if this will be necessary. It will be shown whether constructive absence stays just a Hungarian maneuver or whether it will rise to the level of a new institution of EU law. It will be shown whether constructive absence stays just a Hungarian maneuver or whether it will rise to the level of a new institution of EU law.