

PROTECTING EU VALUES. A JURIDICAL LOOK AT ARTICLE 7 TEU

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Abstract

Every European state that wishes to become a member of the European Union (EU) must adhere to the values enshrined in Article 2 of the Treaty on European Union (TEU). After accession, it is assumed that all Member States are further bound by these same values, such as the rule of law. However, the successful enlargement of the EU, especially towards the new democracies of Eastern Europe, gave rise to the need for a means to balance this somewhat utopian view of irreversible common ground. Thus, in 1999, in preparation for the wave of accession of 2004, the Treaty of Amsterdam introduced Article 7 in TEU as a means of protecting EU values in the Member States. The study makes a juridical analysis of this text, focusing on its content, its possible legal effects, its pluses and minuses in representing an efficient means of dissuasion in relation to the Member States that have raised concerns of serious breaches of the rule of law in the last few years. The main goal is to identify the vulnerabilities of this legal mechanism in order to find solutions for its improvement and to suggest complementary measures which might aid obtaining positive results. The way this matter is addressed shall shape the future of the EU.

Keywords: *European Union; values; rule of law; illiberalism; Article 7 TEU.*

1. EU values in peril

In the last few years the EU's institutions, especially the European Commission and the European Parliament, have shown an increasing focus on protecting the values enumerated in Article 2 TEU¹. These values are meant to represent the very basis for the Member States' agreement to work together within this original integration organisation, since Article 49 TEU states that respecting and promoting them is a condition for accession to the EU².

For the most part of the EU's existence, neither the EU, nor the Member States, had any cause for concern about the solidity of this common ground. However, at the end of the 1990s and the beginning of the years 2000, the European Union's institutions were preparing to implement the expansion policy towards Eastern Europe and were negotiating with 12 states aspiring to membership status³, some of them still undergoing a complex reform process to consolidate their newly found democracy. The number of Member States was expected to grow from 15 to 27. In this context, the Treaty of Amsterdam⁴ inserted a new text in TEU, former Article F.1⁵, which was supposed to act

as a preventive measure by empowering the EU to determine the existence of a serious and persistent breach by a Member State of EU values and, eventually, to "suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council."⁶ The Treaty of Nice⁷ amended this Article, to allow a public warning that there is a clear risk of a serious breach of EU values by a Member State, further emphasizing that the objective is to have the Member State reconsider its position, rather than act when the damage is already done.

The study shall make a legal analysis of Article 7 TEU, in correlation to Article 2 TEU, then it shall present the steps taken so far by EU institutions in applying this text in response to concerns about serious breaches of the rule of law by some Member States, especially in the last three years.

The matter is not only recent and in development, as it is the first time Article 7 TEU might be applied, but it is also of the utmost importance for the future of the EU, giving rise to a fiery debate about the efficiency of the means to protect EU values at the disposal of EU institutions and about complementary solutions that

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¹ Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." The Treaty on European Union was signed at Maastricht on 7 February 1992 and is in force since 1 November 1993. For the consolidated version of TEU see: <http://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html>, last accessed on 10 March 2018.

² Article 49 TEU first thesis of the first paragraph: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union."

³ In 2004 the EU welcomed: Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and in 2007 Bulgaria and Romania.

⁴ Signed on 2 October 1997. It entered into force on 1 May 1999.

⁵ Currently Article 7 of the consolidated version of TEU.

⁶ Article 1 point 9 of the Treaty of Amsterdam, available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_of_amsterdam_en.pdf, last accessed on 10 March 2018.

⁷ Signed on 26 February 2001. It entered into force on 1 February 2003.

might be adopted, such as infringement actions or the multi-speed EU or the differential allocation of funds.

The study aims to identify the weaknesses of Article 7 TEU and give suggestions on how it could be improved, to present the actions taken so far by EU institutions on its basis and to assess their efficiency, in an effort to see the limits of the current mechanisms and to find complementary ones that would favor constructive solutions.

Given the great interest the subject matter stirs up in legal literature, there are quite a few doctrinal works that have taken up the topic. The study intends to offer a more technical approach, focused on the legal texts and on the juridical aspects of the problems being debated.

2. The legal mechanism for protecting EU values

2.1 The creation and development of Article 7 TEU

The 1993 Copenhagen European Council took the view “that post-communist central and eastern European countries had a vocation to become members of the Union”⁸. One of the three criteria the European Council set out for the candidate country aspiring to membership was achieving the “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”⁹. This led to a development of the normative basis for enlargement, which included amending Article 49 TEU by the Treaty of Amsterdam in the sense of expressly providing the candidate’s obligation to respect the principles the Union is founded on: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law¹⁰.

A complementary legal measure, designed to ensure this criterion is met also post-accession, was the introduction in TEU of current Article 7. The initial text established the competence and described the procedure which allowed the Council to determine the existence of a serious and persistent breach by a Member State of the principles mentioned above and to apply the sanction of suspending certain rights of that

state deriving from membership status, such as the right to vote in the Council.

Further, the Treaty of Nice added a first paragraph that permitted the Council to determine even just the existence of a clear risk of a serious breach of the principles and to address appropriate recommendations to that state¹¹. This leaves the necessary room for a diplomatic solution before the *fait accompli*. The Commission expressed the view that: “By giving the Union the capacity to act preventively in the event of a clear threat of a serious breach of the common values, Nice greatly enhanced the operational character of the means already available under the Amsterdam Treaty, which allowed only remedial action after the serious breach had already occurred”¹².

The last amending treaty that reformed EU constitutional law, the Treaty of Lisbon, inserted current Article 2 in TEU and modified Articles 7 and 49 TEU accordingly, replacing the reference to the principles set out in former Article 6 paragraph 1 TEU with the reference to the values EU is founded on¹³.

It also replaced the words ‘The Council, meeting in the composition of the Heads of State or Government and acting by unanimity’ with ‘The European Council, acting by unanimity’, in order to differentiate between the Council and the European Council. The latter was officially included among EU’s institutions by the Treaty of Lisbon¹⁴. It is composed of the heads of state or government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work. It has a political role, providing the EU with the necessary impetus for its development and defining the general political directions and priorities. It does not exercise legislative functions¹⁵. The Council, on the other hand, is the traditional legislative of the EU and it consists of a representative of each Member State at ministerial level¹⁶.

The other adaptations the Treaty of Lisbon made to Article 7 TEU are of a technical nature¹⁷ and they do not represent fundamental changes to the procedure.

⁸ Hillion, “EU Enlargement”, 193.

⁹ Conclusions of the Presidency of the European Council in Copenhagen, 21-22 June 1993, page 13, available at <http://www.consilium.europa.eu/en/european-council/conclusions/1993-2003/>, last accessed on 10 March 2018.

¹⁰ Article 1 points 8 and 15 of the Treaty of Amsterdam, available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_of_amsterdam_en.pdf, last accessed on 10 March 2018. See also Fuerea, *Manualul...*, 2011, 67.

¹¹ Article 1 point 1 of the Treaty of Nice, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12001C/TXT>, last accessed on 10 March 2018.

¹² *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, Brussels, 15.10.2003, COM(2003) 606 final, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf>, last accessed on 10 March 2018.

¹³ Article 1 points 3, 9 and 48 of the Treaty of Lisbon, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2007:306:FULL&from=EN>, last accessed on 10 March 2018.

¹⁴ For the legal recognition and role of the European Council prior to this treaty, see Craig and de Búrca, 2009, 68-72.

¹⁵ Article 15 paragraphs 1 and 2 TEU.

¹⁶ Article 16 paragraphs 1 and 2 TEU. For a comparison between the Council and the European Council, see Fuerea, 2011, *Manualul...*, 102-103.

¹⁷ For a concurrent opinion, see Gălea, 2012, 28.

2.2. Article 7 TEU's content¹⁸

Since respecting and promoting the common EU values by all Member States represents the foundation of the EU and the basis for the application of the principle of mutual trust, the scope of Article 7 TEU is not confined to areas covered by EU law but extends to areas where the Member States can act autonomously. As recent history proved, it is more often in the fields where there is no obligation to have harmonized legislation that national measures are more likely to be questionable.

Also, Article 7 TEU is not designed as a remedy for individual breaches in specific situations. It is a solution of last-resort, a concerted action for systematic problems, that raise to a certain threshold of seriousness and persistence.

As presented above, Article 7 TEU offers two possibilities for protecting EU values, each with its own procedure:

- a) for the Council to determine the existence of a clear risk of a serious breach of EU's values by a Member State;
- b) for the European Council to determine the existence of a serious and persistent breach of EU's values by a Member State.

In the first case, the first paragraph of Article 7 TEU provides that the Council can act on the basis of a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission and only after hearing the Member State in question and obtaining the consent of the European Parliament. The Council may decide, by a majority of four fifths of its members, either to make recommendations, or to declare that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU.

Thus, the Council has the discretion to appreciate on the grounds of the matter: whether there is a risk, whether that risk is clear and what values are in peril by the national measures the state in question has taken or is about to take; whether the materialisation of the risk would amount to a serious breach. The threat is potential, but it must be clear, obvious, unequivocal.

From a procedural point of view, the discretion is reduced to the nature of its decision: whether it is enough to just make recommendations or to directly declare the existence of the risk. The other procedural conditions are quite restrictive: just three subjects are allowed to start the procedure; the Council cannot start it *ex officio*; the Council has to obtain first the consent of the European Parliament, given with an absolute majority of two thirds of its component members¹⁹; it has to hear the Member State in question; it has to verify regularly if the grounds on which it determined the existence of the clear risk subsist.

It is not clear who has the primary responsibility for starting the procedure and assessing the situation. As 'Guardian of the Treaties', it would seem that the institution with the executive role, the European Commission, is responsible with following the facts and making its findings known to the other institutions. This is confirmed by the Commissions actions in recent years, as it shall be shown in subsection 2.4.

Since there isn't an express interdiction, the Council may follow the procedure and decide to give recommendations and, if those recommendations are not fully observed, it may follow it again and declare the existence of a clear risk.

The second case has two stages, in a logical succession in the sense that sanctions may be applied only after the existence of a serious and persistent breach of EU's values by a Member State is determined.

The second paragraph of Article 7 TEU is dedicated to the first stage. This time the European Council has the discretion to assess the grounds of the matter: whether there is a breach of one or more values; if that breach is serious enough; if it is persistent.

The Commission explained that, in order to determine the seriousness of the breach a variety of criteria will have to be taken into account, including the purpose and the result of the breach", like the fact that vulnerable social classes are affected and that several values are breached simultaneously. Further, the Commission noted that persistence can be expressed in a variety of manners, like: adopting legislation or

¹⁸ Article 7 TEU reads: "1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. 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, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union." Text available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016M/TXT>, last accessed on 10 March 2018.

¹⁹ Article 354 paragraph 4 of the Treaty on the Functioning of the European Union (TFEU).

administrative instruments or mere administrative or political practices of the authorities of the Member State that already form the object of complaints or court actions; systematic repetition of individual breaches; repeated condemnations for the same type of breach over a period of time by an international court such as the European Court of Human Rights and not demonstrating the intention to take practical remedial action²⁰.

The procedure in paragraph 2 of Article 7 TEU is even more restrictive than in paragraph 1. Now there are only two subjects that can start the procedure, a third of the Member States or the European Commission; the prior approval of the European Parliament is still required and the European Council must decide unanimously. However, the vote of the representative of the state in question and the abstentions are not taken into account for achieving unanimity²¹.

The third paragraph of Article 7 TEU sets forth the sanctions. This second stage is a possibility for the Council, not an obligation, as deduced from a grammatical interpretation of the text which contains the verb 'may'. Thus, the Council may decide to suspend certain of the rights of the Member State in question, including the right to vote in the Council, although the state shall still be bound by all the correlative obligations.

The Council must act by a qualified majority and must take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The fourth paragraph of Article 7 TEU allows the Council to modify or to revoke these sanctions, also with a qualified majority, if the situation that determined the European Council to declare the breach changes. The principle of symmetry is applied in part, only with respect to the Council's power to apply and modify or revoke the sanction. But, by doing so, the Council makes an implicit decision on the persistence of a serious breach although it does not have the power to declare its existence.

The fifth paragraph of Article 7 TEU sends to the provisions of Article 354 TFEU for the voting arrangements applying to the institutions involved in the two procedures.

One observation that can be made after reading Article 7 TEU is that there is no obligation to follow first the procedure in paragraph 1 of Article 7 in order to be able to start the procedure in paragraphs 2-4 against the same Member State. There is nothing in the text to limit direct recourse to paragraph 2 if the facts of the matter call for a more firm position from the EU, as there is nothing to limit using them in a successive manner if the facts of the case allow it.

Also, one can even imagine a simultaneous application of both procedures, the first for some national measures that present risk to one or more EU values and the second for other national measures that amount to breaches of other EU values, with regard to the same Member State. However, such an approach might not be practical. It is probably more efficient to treat the matter as a whole and to take the firmer action.

Another observation is that there aren't any legal elements to facilitate the assessment of the risk or of the breach. The Council and the European Council have the discretionary power to qualify the factual elements presented to them about the measures implemented or about to be implemented by a Member State as representing a clear risk for one or more of EU's values or as amounting to a serious and persistent breach of one or more EU values.

Furthermore, many legal notions do not have a definition in the Treaties. The values in Article 2 TEU, such as democracy, the rule of law, respect for human rights, pluralism or tolerance, do not have a predefined content. They are abstract notions and it is not always easy to say if a certain measure poses a risk to or represents a breach of one of them.

Of course, a systematic interpretation of these notions is possible to some extent, as for some, like gender equality, there is subsequent EU legislation.

Sometimes the interpretation of the content of these values can be deduced from the Court of Justice of the European Union's jurisprudence, or from that of other international courts, such as the Court of Human Rights or from other international agreements EU Member States are parties to.

Doctrinal works may also offer pertinent arguments and explanations to aid interpretation.

A detailed analysis of the values the EU is founded on would far exceed the scope of this study, as each of them is a vast subject in itself.

However, it is useful to mention a few details about the rule of law. The notion is complex and there isn't consensus on all of its definitional elements. The interpretation of this term also depends on "specific national historical diversities of a political, institutional, legal"²² and philosophical nature.

Still, there is a rather general agreement that the rule of law has two constituent elements: the formal one, regarding the authority of the lawmaker and the quality of the law (the law should be adopted by a freely and fairly elected majority; the law should be clear, predictable, stable, not retroactive) and the substantive one, concerned with obeying and correctly applying the law (no one is above the law; an independent judiciary;

²⁰ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, Brussels, 15.10.2003, COM(2003) 606 final, page 8, available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf>, last accessed on 10 March 2018.

²¹ Article 354 paragraph 1 TFEU.

²² Bárd, Carrera, Guild and Kochenov, 2016, 53.

access to justice and judicial review; proportionality; equality and non-discrimination; transparency)²³.

Having considered the broad view of the rule of law, two authors defined “rule of law backsliding as the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party”²⁴.

2.3. Legal effects

Article 7 TEU produces, first of all, declaratory effects. The consequence of applying the procedures described in the first two of its paragraphs is, basically, a warning signal from the other Member States for the Member State in question. As we have seen above, only if the Member State has already breached one or more of EU’s values in a persistent and serious manner, concrete sanctions can be imposed, consisting in a suspension of certain rights provided by the Treaties, such as the right to vote in the Council.

The text does not specify what are the rights that may be suspended and offers just the example of the right to vote in the Council. Thus, it is for the institution enabled to apply the sanction, the Council, to choose from the rights established for the Member States by the Treaties that represent EU’s constitutional law. The only obligation of the Council is to choose the sanction taking into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

If this is the only limit for the Council’s discretion, one can wonder if the Council could suspend, for example, the distribution of funds to that state or its right to vote in all the other institutions.

Even if such measures could be imposed it is difficult to get to this point because of the large majorities required for a legal vote and especially because the European Council must decide in unanimity. It is true that the state in question cannot vote (*nemo iudex in causa sua*) and that abstentions are not taken into account, but recent developments have shown that two or more Member States may be in similar situations and express support for each other. The consequence is that the Member States in question could veto the European Council’s decision and avoid being sanctioned by the Council.

Since Article 7 TEU uses the singular when referring to a member state, there is nothing in the text to suggest the European Council could do anything else than deal with the situation in each state separately.

This conclusion is supported by the principle that responsibility is personal.

On the other hand, there is also the argument that if Article 7 TEU is to be interpreted in the light of the *effet utile* principle, then the two or more Member States should lose their veto of sanctions against the other in case Article 7 TEU is triggered against all of them²⁵.

The Member State in question could have resorted to using the annulment action established by Article 263-264 TFEU²⁶ against the Council’s decision and against the European Council’s decision. The legal requirements regarding what acts can be challenged, by whom and against whom would have been met. The state would have had to observe the time limit of 2 months and to present the factual and legal aspects as to amount to one of the reasons for annulment: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers²⁷.

However, such a possibility was precluded by the Treaty of Lisbon, which inserted new Article 269 in the TFEU. This text gives the Court of Justice²⁸ jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TUE. The action may be filed only by the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in Article 7 TEU. There is a time-limit of one month from the date of such determination and the Court is obliged to rule within one month from the date of the request.

This legal remedy appears as a special type of annulment action, with a specific object: the acts adopted by the Council and the European Council on the basis of Article 7 TEU. The parties may only be the Member State in question and the institution that adopted the act. The reasons for annulment are confined to procedural aspects. For example, an infringement of a procedural requirement would be if the Council decides without the consent of the European Parliament.

The Court does not have jurisdiction to substitute itself to the Council or the European Council and decide otherwise on the grounds of the matter, nor can it apply other, lesser or harsher, sanctions.

The procedure is rapid, but, in our opinion, there is nothing to prevent the Member State from asking the suspension of application of the act until the Court gives its judgment²⁹.

²³ See also Kochenov and van Wolferen, 2018, 4-5, Bárd, Carrera, Guild and Kochenov, 2016, 53-56, Leal-Arcas, 2014 and Tamanaha, 2007.

²⁴ Pech and Scheppele, 2017, 7.

²⁵ See Pech and Scheppele, 2017, 24.

²⁶ About the annulment action, see Schütze, 2012, 260-273 and Fuerea, 2016, *Dreptul...*, 65-74.

²⁷ Article 263 paragraph 2 TFEU.

²⁸ The former Court of Justice of the European Communities. Different from the General Court and the former Civil Service Tribunal, but part of the Court of Justice of the European Union.

²⁹ See Article 278 TFEU and Article 39 of Protocol No. 3 to TFEU on the Statute of the Court of Justice of the European Union.

2.4 The first attempts to apply Article 7 TEU

Hungary is the first EU Member State that took national measures which raised concerns about the state's commitment to EU values, especially the rule of law. As early as 2011, the President of the Commission addressed the issue of a new Hungarian law that put all media under the control of a media council which contained only members of the governing party³⁰. With a comfortable majority in parliament, the governing party made a constitutional reform and then passed a number of other laws criticised by EU officials for non-compliance with the rule of law, such as the one that would affect the independence of the Central Bank or the one lowering the retirement age for judges, prosecutors and public notaries. The Commission started infringement procedures³¹.

The Hungarian Prime Minister in office since 2010 explained in multiple speeches that his government has adopted a new approach, illiberalism, which does not reject the fundamental principles of liberalism, but adds a special, national approach³².

By 2013 the idea of a systemic problem started taking shape and the President of the Commission stated that: "Safeguarding its values, such as the rule of law, is what the European Union was made to do, from its inception to the latest chapters in enlargement.

In last year's State of the Union speech, at a moment of challenges to the rule of law in our own member states, I addressed the need to make a bridge between political persuasion and targeted infringement procedures on the one hand, and what I call the nuclear option of Article 7 of the Treaty, namely suspension of a member states' rights.

Experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework. It should be based on the principle of equality between member states, activated only in situations where there is a serious, systemic risk to the rule of law, and triggered by pre-defined benchmarks.

The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe³³."

This new instrument was to be a soft law one, not legally binding, called the Rule of Law Framework³⁴. It was adopted in March 2014 and it is meant to be an early warning tool, a pre-Article 7 TEU procedure. Essentially, it allows the Commission to assess the situation, to issue an opinion about the existence of a systemic threat to the rule of law, to make recommendations and to monitor their implementation³⁵.

We share the opinion that "Article 7(1) TEU implicitly empowers the Commission to investigate any potential risk of a serious breach of EU values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. [...] The Rule of Law Framework merely makes more transparent how the communication between the Commission and the potentially offending government shall proceed"³⁶.

Though it was clearly designed for Hungary, this instrument was to be used first in relation to Poland. After the legislative elections in October 2015, the governing party won an absolute majority and started taking a series of controversial measures. The first was to nullify the election of constitutional judges by the prior parliament and to elect new ones. The Constitutional Tribunal declared the election of the new judges unconstitutional, but the government refused to publish or acknowledge this ruling. This determined the European Commission to follow the Rule of Law Framework and to adopt a Recommendation on 27 July 2016³⁷, but the results were not positive. Poland refused to comply and even threatened to formulate an annulment action³⁸ against the Rule of Law Framework, even if it cannot be the object of such an action, since it is not legally binding.

Poland continued on this path, adopting even more concerning measures, like the Act of 22 July 2016, considered a final act of constitutional capture that strongly limited the independence of the

³⁰ Statement by President of the European Commission José Manuel Durão Barroso at the press conference held after the meeting of the Commission with the Hungarian Presidency of the Council, 7 January 2011, Speech/11/4, available at: http://europa.eu/rapid/press-release_SPEECH-11-4_en.htm, last accessed on 10 March 2018.

³¹ See, for example, the judgment of the Court of Justice in case C-286/12, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129324&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1032099>, last accessed on 10 March 2018. The Court declared that by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – which gives rise to a difference in treatment on grounds of age which is not proportionate as regards the objectives pursued – Hungary has failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³² See, for example, Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, Tuszánfűrdő (Báile Tuşnad), Romania, available at: <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>, last accessed on 10 March 2018.

³³ See State of the Union address 2013, 11 September 2013, http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm, last accessed on 10 March 2018.

³⁴ European Commission presents a framework to safeguard the rule of law in the European Union, Strasbourg, 11 March 2014, press release available at: http://europa.eu/rapid/press-release_IP-14-237_en.htm, last accessed on 10 March 2018.

³⁵ For more details, see Kochenov and Pech, 2016 and von Bogdandy, Antpöhler and Ioannidis, 2016.

³⁶ Pech and Scheppele, 2017, 12.

³⁷ Available at: http://europa.eu/rapid/press-release_IP-16-2643_en.htm, last accessed on 10 March 2018.

³⁸ See Articles 263-264 TFEU.

Constitutional Tribunal³⁹, and the three justice laws that allowed the governing party to appoint the president of the Constitutional Tribunal and to reenact a law that had been declared unconstitutional. Also, four new acts were passed in one month, that allowed the government to fire all judges of the Supreme Court and replace the leadership of the lower courts.

In response, the Commission chose to adopt a second Recommendation on 21 December 2016 and a third one on 26 July 2017 and initiated infringement proceedings arguing that the independence of judges is undermined by the introduction of a different retirement age for female and male judges and by giving the Minister of Justice the discretionary power to prolong the mandate of judges who have reached the retirement age, as well as to dismiss and appoint court presidents, even if independence is required by Article 19 paragraph 1 TEU and Article 47 of the EU Charter of Fundamental Rights⁴⁰. The course of this infringement procedure has only reached the Reasoned Opinion⁴¹.

The European Parliament has supported the Commission's concerns and adopted three Resolutions: of 13 April 2016, 14 September 2016 and 15 November 2017, calling on the Polish Government to comply with all provisions relating to the rule of law and fundamental rights enshrined in the Treaties, the Charter of Fundamental Rights, the European Convention on Human Rights and international human rights standards, and to engage directly in dialogue with the Commission⁴².

The Council, on the other hand, was silent for the most part. It discussed the issue in the General Affairs Council on 16 May 2017 and told the Commission to continue dialogue with Poland, despite criticising Poland for lack of cooperation.

Finally, after two years of unfruitful dialogue with Poland, the Commission decided to activate Article 7 paragraph 1 TEU and to make the formal proposal to the Council. The Commission explained: "It is up to Poland to identify its own model for its justice system, but it should do so in a way that respects the rule of law; this requires it to safeguard the independence of the judiciary, separation of powers and legal certainty.

A breach of the rule of law in one Member State has an effect on all Member States and the Union as a whole. First, because the independence of the judiciary – free from undue political interference – is a value that reflects the concept of European democracy we have built up together, heeding the lessons of the past. Second, because when the rule of law in any Member State is put into question, the functioning of the Union as a whole, in particular with regard to Justice and Home Affairs cooperation and the functioning of the Internal Market, is put into question too⁴³."

On 1 March 2018, the Parliament gave its consent for the Commission's proposal to trigger Article 7 paragraph 1 TEU and to ask Poland to address the risk⁴⁴. The procedure is ongoing and, even if the majorities required by Article 7 paragraph 1 TEU are reached, it is doubtful that new recommendations will be observed by Poland. As to sanctions, Hungary has already declared it shall support Poland and implied it will veto an eventual European Council decision in this respect⁴⁵. We shall have to see if the doctrinal view that the two states could not veto each other's sanctions because that would take away the *effet utile* of Article 7 TEU shall prevail or not.

In Hungary's case the Commission did not activate the Rule of Law Framework, despite multiple resolutions adopted by the European Parliament⁴⁶ and despite continuing to criticise some of the measures adopted by the government, like the laws that allowed political control over the appointment of judges and their individual career and even case assignment to specific judges, or the ones that targeted the Central European University and foreign funded non-governmental organisations. The Commission took the view that, unlike Poland, Hungary never refused dialogue and has made some progress⁴⁷.

In legal literature, the explanations found are of a more practical nature and focus either on the support Hungary receives in the European Parliament as a member of the largest political group, the European People's Party, whereas Poland is part of a much smaller political group or on the gravity of the situation in the sense that Hungary passed these laws after legally modifying its Constitution by virtue of its large majority in parliament, whereas Poland did it after

³⁹ See Śledzińska-Simon and Ziolkowski, 2017, pages 18-21.

⁴⁰ European Commission launches infringement against Poland over measures affecting the judiciary, Brussels, 29 July 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-2205_en.htm, last accessed on 10 March 2018.

⁴¹ Independence of the judiciary: European Commission takes second step in infringement procedure against Poland, Strasbourg, 12 September 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-3186_en.htm, last accessed on 10 March 2018. For more details on the infringement procedure, see Fuerea, 2016, *Dreptul...*, 112-123.

⁴² See, for example, Resolution of 15 November 2017, available at: <http://www.europarl.europa.eu/sides/getDoc.do? type=TA&language=EN&reference=P8-TA-2017-0442>, last accessed on 10 March 2018.

⁴³ Rule of Law: European Commission acts to defend judicial independence in Poland, Brussels, 20 December 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm, last accessed on 10 March 2018.

⁴⁴ Press release available at: <http://www.europarl.europa.eu/news/en/press-room/20180226IPR98615/rule-of-law-in-poland-parliament-supports-eu-action>, last accessed on 10 March 2018.

⁴⁵ Viktor Orbán's speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tușnad), Romania, available at: <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/viktor-orban-s-speech-at-the-28th-balvanyos-summer-open-university-and-student-camp>, last accessed on 10 March 2018.

⁴⁶ For example, the Resolutions of 10 June 2015, 16 December 2015, 25 October 2016 and 17 May 2017.

⁴⁷ Pech and Scheppele, 2017, 19.

infringing the decision of its Constitutional Tribunal, which it refused to publish and observe. Poland continued with measures to undermine the independence and legitimacy of the constitutional court. Thus, constitutionality of national legislation can no longer be guaranteed, which in turn affects the principle of mutual trust between Member States⁴⁸.

Finally, the European Parliament was the one that took the stand and adopted a Resolution on 17 May 2017 in which it stated its belief that the current situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and warrants the launch of the Article 7 paragraph 1 TEU procedure, then instructed its Committee on Civil Liberties, Justice and Home Affairs to initiate the proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7 paragraph 1 of the TEU⁴⁹. The resolution is still being prepared and nothing has been made public yet.

Some concerns have been expressed about certain deficiencies in other Member States, such as Bulgaria, Greece, Italy, Romania and Slovakia⁵⁰, but the EU institutions have not indicated that starting the mechanism for the protection of EU values is imminent. Also, Bulgaria and Romania are still under the Verification and Cooperation Mechanism.

2.5. Solutions for increasing efficiency

As deduced from the presentation above, there is a quest for solutions to improve the efficiency of the mechanism that Article 7 TEU represents and/or for complementary measures.

The text of Article 7 TEU could be improved, for example, by reducing the majorities for a legal vote in the EU institutions involved, by forbidding Member States that are in similar situations to veto each other's decisions in the European Council or by introducing new types of sanctions⁵¹. Still, this might prove to be very difficult because it would mean amending the founding Treaties, a procedure which requires each and all of the Members States to ratify the amending treaty⁵². Of course, the Member State or States in question would refuse to act against their own interest. In such a case, Article 48 paragraph 5 TEU provides the matter shall be referred to the European Council and no

other legal consequence. Thus, a legal vicious circle, which only leaves the possibility of a political solution.

As we have seen, a complementary measure of the Commission was to start infringement proceedings on multiple specific matters. This has the advantage of the intervention of the Court of Justice and the possibility to apply pecuniary sanctions. The disadvantage is having to fit into the frame of Articles 258-260 TFEU, as interpreted so far by the Court of Justice and not being able to tackle the systemic issue, the situation as a whole. In principle, the Commission or another Member State has to argue that specific obligations provided for the Members States by the Treaties have been disrespected.

However, it was suggested that the Commission could adopt a more ambitious interpretation of its infringement powers and adjust them to deal with Member States that systematically challenge the rule of law by bringing together a set of distinct complaints into a single action and by insisting on reversing the damage caused to the uniform application of EU law across the Union or even by arguing a violation of Article 2 directly⁵³.

While we find pertinent the first two doctrinal proposals, the last of them seems to create a parallel system with Article 7 TEU. It would appear that the general rule, that violations of EU law can be the subject of an infringement procedure, would be applied in parallel with the special norm, that provides for specific sanctions for the violation of Article 2 TEU.

Furthermore, as we have seen above, the exact content of the concepts behind the values is difficult to identify and some of the criticised measures are often taken in areas of national jurisdiction, where the Court of Justice of the European Union does not have competence⁵⁴. So, relying directly on Article 2 TEU might mean, at least in part, to subject such measures to the judicial review of the Court of Justice. It is doubtful the Court would agree to take the view of such an extensive interpretation of its powers.

Another complementary measure could be reforming other areas of EU competence in a sense that would affect the rogue state's interests and stimulate it to comply with EU values. A few proposals have been made:

- a) a multi-speed EU⁵⁵ or a two-tiered EU⁵⁶ with a stronger integration for those in the euro group,

⁴⁸ See Pech and Scheppele, 2017, 23.

⁴⁹ Resolution available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0216>, last accessed on 10 March 2018.

⁵⁰ See von Bogdandy, Antpöhler and Ioannidis, 2016, page 1. See also Halmaj, 2017. For an opinion on the causes that make central and eastern European countries more vulnerable to facing a crisis of constitutional democracy, see Bugarič and Ginsburg, 2016.

⁵¹ For introducing graduated sanctions, culminating with expelling, see Bugarič, 2016, 14-15.

⁵² See Article 48 TEU. For a commentary on this Article, including the problem of what would happen if a Member State does not proceed with the ratification of the amending treaty, see Hartley, 2010, 88-92.

⁵³ Pech and Scheppele, 2017, 32. In support of this opinion, see Bárd, Carrera, Guild and Kochenov, 2016, 30.

⁵⁴ For a concurrent opinion, see Bugarič, 2016, 13.

⁵⁵ See the *White paper on the future of Europe – Reflection and scenarios for the EU27 by 2015*, COM(2017)2015, 1 March 2017, page 20, available at: https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf, last accessed on 10 March 2018.

⁵⁶ *Reflection paper on the deepening of the Economic and Monetary Union*, COM(2017) 291 final, Brussels, 31 May 2017, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017DC0291>, last accessed on 10 March 2018.

since some of the central and eastern European countries, including Hungary and Poland, are not in the Eurozone;

- b) withholding or suspending the allocation of EU funds or more strict criteria for funding. Both Hungary and Poland have benefited from important regional and cohesion EU funds;
- c) reform of citizens' initiative and political party funding, in order to increase democratic legitimacy⁵⁷.

Some of these measures could still be blocked because they would require an amending treaty.

The proposal regarding the different levels of integration⁵⁸ offers Member States more choices but might have the effect of discouraging trust in the European project in the countries outside the hard core of integration.

As far as funding is concerned, this would put pressure on the governments of the Member States involved but would affect primarily their inhabitants and the development of those regions of the internal market, diminishing, on the long run, the chances for the state to ever reach the common standards, against the very purpose of the EU funding.

Increasing public participation to decisionmaking and transparency of funding of the parties could have a positive effect on preserving liberal democracy and increasing public trust in the EU, but its results will probably show in some time. It does not provide an answer for the current challenges the rule of law faces in some Member States.

If diplomatic solutions fail, the crisis has the potential to persist for quite a long period of time. The Member State or Member States in question could refuse to observe the Council's recommendations, they could ignore or dismiss the declarations under paragraphs 1 and 2 of Article 7 TEU, they might veto the European Council's decision for another state in a similar situation, they might use their right to file actions on the basis of Article 269 TFEU and even refuse to make any progress after being sanctioned. They could even choose to ignore the Court of Justice's

judgement in infringement procedures, just as the Polish government "publicly indicated its intention to ignore the Court of Justice's interim injunction to suspend all logging"⁵⁹ in a protected forest.

If a state truly no longer shares all of EU's values and the differences are irreconcilable, an amiable separation might be in the best interest of all parties. If they agree, an international convention and/or an amending treaty could be drafted to decide the terms of the split (*mutuus consensus, mutuus dissensus*).

Also, the Member State could unilaterally decide to leave, using Article 50 TEU, just like the United Kingdom of Great Britain and Northern Ireland did.

But what if the other Member States decide expelling is the only solution? This would pose problems because, unlike other international agreements⁶⁰, the Treaties of the EU do not provide for a procedure of expelling, nor the grounds for it. The EU would have to resort to the rules of public international law⁶¹. For example, perhaps it may suspend or terminate the operation of the Treaties in relation to the rogue state on the basis of the violation of a provision essential to the accomplishment of the object or purpose of the Treaties⁶², as Article 2 TEU can be considered such a provision.

It seems unlikely extreme events would take place. However, the loss of mutual trust and the dissolution of common values and standards could have other serious, unforeseen consequences. For example, it was even noted that if the independence of the judiciary in Poland is structurally undermined, this might raise the issue whether Polish courts still constitute 'courts' within the meaning of Article 267 TFEU and can still be permitted access to the preliminary rulings procedure⁶³.

This is why it is important for all the parties to understand the gravity of these circumstances and to get actively involved in finding the proper combination of legal and political solutions, within a reasonable timeframe, to prevent the deterioration of the situation and irreparable damage to the EU's unity and strength.

⁵⁷ *State of the Union 2017 - Democracy Package: Reform of Citizens' Initiative and Political Party Funding*, Brussels, 15 September 2017, press release available at: http://europa.eu/rapid/press-release_IP-17-3187_en.htm, last accessed on 10 March 2018.

⁵⁸ For more about the concept of integration, see Dumitrașcu, 2012, 17-25.

⁵⁹ Pech and Scheppele, 2017, 16.

⁶⁰ Article 6 of the United Nations Charter reads: "A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council." Text available at: <http://www.un.org/en/sections/un-charter/chapter-ii/index.html>, last accessed on 10 March 2018.

Article 8 of the Statute of the Council of Europe reads: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine." Article 3 reads: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I." Text available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052>, last accessed on 1 March 2018.

For an overview of UN and Council of Europe's monitoring instruments, see Bárd, Carrera, Guild and Kochenov, 2016, 15-26.

⁶¹ See Miga-Besteliu, 2010, 104-107.

⁶² Article 60 paragraph 3 letter b) of the *Vienna Convention on the law of treaties*, concluded on 23 May 1969, available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>, last accessed on 10 March 2018. All of the EU's Member States, except France and Romania, are parties to this convention, as results from the status at 10 March 2018: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

⁶³ Pech and Scheppele, 2017, 35. For more details about the preliminary rulings procedure, see Broberg and Fenger, 2010.

3. Conclusions

The developments in some Member States in the last few years, especially the rise of illiberalism in Hungary and Poland, have been interpreted by the European Union's institutions as posing a clear risk of a serious breach of EU values and especially of the rule of law. This brought into the spotlight Article 7 TEU, the mechanism for protecting EU values in the Member States, introduced in the EU's constitutional legislation in 1999 and amended in 2003, in order to prepare for the biggest wave of accession in the EU's history and to welcome central and eastern European fresh democracies.

An overview of Article 7 TEU's content and its possible legal effects is necessary now that the EU's institutions are preparing to apply it for the first time. The study has taken a juridical look at the text's strengths and weaknesses, in an effort to assess its efficiency in being a deterrent, as well as a sanctioning means and has presented the steps taken so far by the EU's institutions involved in the procedure in order to trigger Article 7 paragraph 1 TEU against Poland and

Hungary. The last part was dedicated to an inventory of solutions for improving the protection mechanism, including complementary measures that might help in convincing rogue Member States to reevaluate their interests and their position and to choose a future in the EU.

The main objective of the research was to add to the legal debate and to the doctrinal works which draw attention to the importance and to the gravity of the subject matter in the hope of more involvement from both EU institutions and Member States in using and improving the existing mechanisms for the protection of the common values, values which define EU's identity and which have been so hard to win in the course of our history.

Related topics for further research could be a detailed analysis of each of the values enumerated in Article 2 TEU, in order to determine their definition and their content and a closer look at the proposals for the EU's reformation in the context of the many economic and political challenges it faces, including the first ever exercise by a Member State of its right to withdraw from the Union.

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