



Breach of EU values by a Member State

SUMMARY *The European Union is founded on values common to all Member States (MS). These are supposed to ensure a level of homogeneity among MS, while respecting their national identities, so facilitating the development of a European identity and the integration process.*

Article 7 of the Treaty on European Union (TEU) provides mechanisms to enforce EU values. These are based on a political decision by the Council with the participation of the Commission and the Parliament, and are exempt from judicial review.

Many call for new instruments to be set up as the current Article 7 mechanism is said to be unusable due to the high thresholds needed to adopt a decision in the Council as well as MS' political unwillingness to turn to it.

Diverse new approaches have been proposed by academics and by political actors, ranging from setting up an independent monitoring body called the 'Copenhagen Commission' or extending the mandate of the EU Fundamental Rights Agency, to introducing the possibility to suspend national measures suspected of infringing EU law.

The European Parliament (EP) launched the idea of a 'European fundamental rights policy cycle' with the cooperation of EU institutions, MS and the Fundamental Rights Agency, to ensure effective monitoring of respect for EU values.

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Article 2 TEU

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.

A Union of values

EU values and national identity

The EU values were enshrined in the Treaties only with the Treaty of Lisbon, replacing the previous, less extensive "principles". However, it has been clear from the very beginnings of the Communities that, to succeed, the European integration process needs a common basis of values to secure a degree of homogeneity amongst the Member States (MS).¹

The EU values are supposed to be the basis for a common European "way of life", facilitating integration towards a political, not just a "market", Union. They support the development of a European identity, while ensuring the legitimacy of the EU as founded on democratic values. However, when it comes to detailed definitions of each of the values, there are few accepted unreservedly.

The EU values enjoy two-fold protection. First, since the 1993 Copenhagen European Council, they form part of the accession criteria for candidates for EU membership



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([Article 49\(1\) TEU](#)). Second, MS must, following their accession, observe and promote the EU values. [Article 7 TEU](#) establishes a procedure to sanction a MS which does not uphold the values, through the suspension of membership rights. Moreover, the Union exports its values outside its territory, with the EU values underlying the international relations of the EU (Articles 21, 3(5), & 8 TEU).

On the other side of the coin are the national constitutional identities of MS. According to [Article 4\(2\) TEU](#), the Union must respect MS' national identities. This provision sets out a vision of a Union founded on values common to all MS but which preserves the diversity of MS' political and organisational systems. This so called 'constitutional individuality' of the MS can be reflected *inter alia* in state-organisational, cultural, including language, and historical heritage aspects.² Hence, the common EU values represent limits to the diversity of MS, reflected in their constitutional identities.

Some examples

Although the Article 7 sanctions mechanism was introduced with the Amsterdam Treaty, as a precursor to the Union's enlargement, it has yet to be activated. However, use of the procedure was first considered well before the 2004 enlargement, in the case of Austria, in response to the arrival in government of the Freedom Party (FPÖ) of Jörg Haider. In the end, however, bilateral sanctions were imposed on Austria by the other 14 MS outside the EU framework, rather than using Article 7.³ More recently, in 2010, the expulsion of Roma to their MS of origin by the French authorities was discussed as a possible violation of the EU values. Since then, Hungary's constitutional reforms as well as the impeachment procedure against Romanian President Traian Băsescu have been subject to scrutiny based on the rule of law principle. Calls from the European Commission and Parliament to restore compliance with the EU values, and the infringement proceedings launched by the

Commission have been widely criticised. Political actors either regarded these measures as too intrusive in national sovereignty, accusing the EU of trying to achieve further centralisation, or not serious enough to fulfil the EU's role as guardian of the constitutional principles in the MS.⁴

The Article 7 TEU mechanisms

Legal vs. political approach

The difficulty in ensuring national constitutional identities respect the EU values derives *inter alia* from the fact that political choices are seen by some as the legitimate result of a democratic debate, whereas others regard them as a breach of EU values. Some commentators and [political actors](#) tend to see the outrage of particular MS or EU institutions over specific developments in a given MS as ideologically motivated, as the battle between left-wing and right-wing convictions, or as a battle between different cultures (*Kulturkampf*). Many argue that there is no single model of liberal democracy, common to all MS, which can be used to decide whether MS fall below a common standard. Hence they demand greater respect for the plurality of political values in the EU and mutual trust between MS as a corner stone of European integration.⁵

In this context some argue that possible EU intervention needs to be based on a legally founded decision subject to review by the Court of Justice of the EU (CJEU). This would reduce the risk of, on the one hand, discretionary and opportunistic decisions, and on the other, MS refusing to act against each other. Others claim that legal criteria alone cannot determine whether there is a breach of values, so legitimising EU intervention, and see the more political approach as a step towards democratisation of the Union through its politicisation.⁶

The political approach was chosen in the EU, with proposals to involve the Court of Justice in the sanctions procedure of Article 7 TEU being discarded during

discussions on the Amsterdam Treaty and the Council instead taking centre stage.⁷

Procedure and requirements

Preventive mechanism

While the sanctions procedure was introduced by the Amsterdam Treaty, it was not until the Treaty of Nice that the preventive mechanism was added. This type of mechanism, allowing action before a country has breached the values, is unprecedented in international practice.

Under the preventive mechanism (Article 7(1) TEU), the Council may determine that there is a **clear risk of a serious breach** of the EU values by a MS. Before making such a determination, the MS concerned can address the Council, which may also issue **recommendations**.

The preventive mechanism can be triggered by one-third of MS, by **Parliament** or by the Commission. The Council has to adopt a decision by a majority of **four-fifths** of its members after having received **Parliament's consent**. Parliament's consent requires a two-thirds majority of the votes cast, representing an absolute majority of all Members (Article 354(4) TFEU).

Sanctions mechanism

The sanctions mechanism is independent of the preventive one, meaning that it is not necessary for a MS to be subject first to a decision under the preventive mechanism in order to be sanctioned for a persistent breach of EU values. In contrast to the preventive mechanism, it may be triggered by one-third of MS or the Commission, but not by the EP.

The sanctions procedure has **two phases** (Article 7(2) and (3) TEU). In a first step, the **European Council** determines by **unanimity** and after obtaining Parliament's consent (by a two-thirds majority of the votes cast and absolute majority of Members) the **existence of a serious and persistent breach** of EU values by a MS.

The CJEU has a very limited role in Article 7 procedures. According to Article 269 TFEU, it can be called upon by the MS concerned to review only the procedural requirements stipulated in Article 7 TEU.

Prior to this determination, the MS concerned has the opportunity to submit observations to the Council.

In a second step, the Council can **suspend** certain **membership rights** of the MS concerned, including voting rights

in the Council. This decision is adopted by **qualified majority**. The Treaties award a two-fold discretion to the Council—regarding the decision to determine the existence of a breach of values as well as regarding the sanction to be imposed on the MS in question. It should be noted that Parliament's consent is necessary only for the first phase of the sanctions mechanism, but not for a decision on the suspension of membership rights (second phase).

The representatives of the MS concerned do not take part in the votes in the Council and the European Council, and are not counted in the calculation of the majorities necessary to trigger sanctions or a preventive determination, or to adopt other decisions (Article 354(1) TFEU).

The breach of values, necessary in order to apply the Article 7 sanctions mechanism, must be systematic and persistent, and must therefore go beyond individual violations of fundamental rights, the principle of the rule of law or of other EU values. For individual breaches of these principles, remedy may be sought before national courts, as well as the European Court of Human Rights and, through the infringement and preliminary ruling procedure, the CJEU. The political response under Article 7 TEU addresses, as a last resort only, systematic violations.⁸ The seriousness of a breach of values can, according to the Commission, be based on the vulnerability of the social group affected (immigrants, ethnic groups, etc.) or the range of EU values affected (fundamental rights, rule of law, democracy, liberty). Moreover, failure of a MS to act can also constitute a serious and persistent breach.⁹

Sources of EU values

The Treaties offer no definitions of the EU values but they result from the constitutional traditions common to the MS ([Article 6\(3\) TEU](#)) as well as through the case law of the CJEU on the general principles of EU law. A further source of EU values is the [EU Charter of Fundamental Rights](#). The mechanisms established in Article 7 TEU constitute an exception to the rule that the Charter applies only within the scope of EU law, giving the EU institutions the power to intervene in areas of exclusive MS' competence. The Charter itself refers to the European Convention on Human Rights and Fundamental Freedoms. The judgments of the European Court of Human Rights as well as the reports issued by the Council of Europe's [Venice Commission](#) (European Commission for Democracy through Law) and by the UN Commissioner for Human Rights can provide evidence of a clear risk or the existence of a serious breach of EU values.

Effects and usability of Article 7

Some commentators regard any intervention against a MS on the grounds of breach of values as counter-productive, since it is likely to increase internal support for the government in question and increase levels of euroscepticism in the population. This is because Article 7 measures are understood by citizens as sanctions against them more than against their government. The report by three 'wise men' on the Austrian situation in 2000 confirms that both effects were observed in Austria. However, the [report](#) also concluded that the sanctions imposed by the other 14 MS against Austria intensified the government's efforts to ensure compliance with the EU values, and prompted Austrian civil society to defend these values.

Furthermore, the Article 7 sanctions mechanism has recently been described as unusable due to the large majorities (four-fifths or unanimity) needed in the Council. In

this context, Parliament has repeatedly [bemoaned](#) the political unwillingness to use the instruments provided for by Article 7, and called for objective criteria for its implementation to be established.

Proposals for new instruments

In his [speech](#) to the EP of 12 September 2012 on the State of the Union, President Barroso pointed to the shortcomings of the existing institutional arrangements to enforce the Union's fundamental values, and demanded new instruments as an alternative to the "soft power" of political persuasion and the "nuclear option" of Article 7 of the Treaty". Commission Vice-President and Justice Commissioner Viviane Reding [proposed](#) recently that the Commission should issue "formal notices" to MS where a breach in the rule of law appears likely, before any formal proceedings start under Article 7. She also called for new, more flexible mechanisms requiring Treaty amendments:

- to lower the thresholds for triggering the Article 7 mechanisms,
- to introduce judicial review by the CJEU,
- to extend the powers of the Fundamental Rights Agency (FRA), and
- to abolish [Article 51](#) of the EU Charter to make EU fundamental rights directly applicable in all MS.

Infringement proceedings

As an alternative to the Article 7 mechanisms, the infringement procedure (Articles 258 and 259 TFEU) is often suggested. This raises the question of whether only the Article 7 procedure is available to address breaches of EU values, meaning that the EU institutions cannot have recourse to any other proceedings in such cases. Many argue that the political approach of Article 7 should not be circumvented by applying legal remedies. Conversely, it is noted that while the earlier Treaties kept the EU values out of the jurisdiction of the Court of Justice, the Lisbon Treaty subjects Article 2 TEU to it,

which suggests that a breach of EU values could also be addressed through a legal approach.¹⁰ However, both instruments are largely seen as complementary: while infringement proceedings would take place in the case of non-compliance with EU law, the Article 7 mechanisms apply outside the EU realm also, but only when violations are serious enough and persistent.

FRA/Copenhagen Commission

The question of a specific expert body at EU level carrying out systematic monitoring of MS' compliance with the EU values was widely discussed at the time the European Union Agency for Fundamental Rights (FRA) was set up. In the end, the FRA was not [entrusted](#) with systematic monitoring of MS for the purposes of Article 7. Its [assistance](#) could be sought by the political actors engaged in an Article 7 procedure, to establish whether there is a persistent, serious breach of EU values or a clear risk thereof in a MS.

Alternatively, Jan-Werner Müller, an academic, [proposed](#) setting up a politically independent high-level expert body, called the 'Copenhagen Commission', to monitor and investigate the situation of democracy and rule of law in the MS. Upon the recommendation of the Copenhagen Commission, the European Commission could cut EU funds for the MS in question or impose fines.

A 'freezing enforcement procedure'

As a complement to the existing procedures (Article 7 and infringement), scholars have [proposed](#) establishing a new preventive mechanism, which could suspend any contested national policies and practices falling within the remit of EU law. The mechanism would be activated based on evidence provided by the FRA, and would entail accelerated infringement procedures.

Reverse "Solange" approach

Inspired by the [Solange doctrine](#) of the German Federal Constitutional Court, a group of scholars proposes to apply a

'reverse *Solange*' approach to a persistent breach of fundamental rights by a MS, based on the individual action of EU citizens. This means that national courts would protect fundamental rights of EU citizens and no EU intervention would be indicated, as long as ("solange") there is no systemic violation of the very essence of fundamental rights. If that was the case, EU citizens would be able to invoke EU fundamental rights even in cases falling outside the EU framework. The promoters of this approach admit though that there could be no individual legal action to enforce objective principles like democracy or the rule of law, which are also among the EU values.¹¹

The role of the European Parliament

The EP has played an increasingly important role in the enforcement of EU values. It is on an equal footing with the MS and the Commission as regards triggering the Article 7 preventive mechanism. Moreover, it has oversight over the Council, through the consent procedure, regarding the determination of whether a serious breach of the common values exists, or there is a clear risk of one. It has adopted several [resolutions](#) (e.g. based on the [report](#) by Rui Tavares, Greens/EFA, Portugal) calling on MS to restore compliance with EU values and for new enforcement mechanisms observing the principle of equality between MS.

Since the early 1990s, Parliament has demanded stricter monitoring of MS' compliance with human rights and the other EU values. Its [annual report](#) on the situation of the fundamental rights in the EU is recognised by the Commission as providing a diagnosis of the situation in the MS. Parliament's [Committee on Petitions](#) (PETI) also receives individual complaints that are a useful source of information on breaches of EU values in the MS.

In its [Resolution](#) of December 2012 on the situation of fundamental rights in the EU, the EP launched the idea of a 'European fundamental rights policy cycle' with the

cooperation of EU institutions, MS and the FRA to take joint measures and involve in their work NGOs, citizens and national parliaments. To this end, Parliament called on the Commission to propose a "clear-cut monitoring mechanism and early warning system, as well as a freezing procedure, to ensure that MS, at the request of EU institutions, suspend the adoption of laws suspected of disregarding fundamental rights or breaching the EU legal order". The Resolution also called for the setting up of "a yearly inter-institutional forum in order to assess the EU fundamental rights situation".

Further reading

[Safeguarding Democracy inside the EU. Brussels and the future of liberal order](#) / J-W Müller, Transatlantic Academy Paper Series, 2012-2013 Paper series, No 3, February 2013.

[Protecting the Fundamentals. Article 7 of the Treaty on the European Union and beyond](#) / C Pinelli, Foundation for European Progressive Studies, September 2012.

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<http://www.library.ep.ec>

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Endnotes

- ¹ Europa als Wertegemeinschaft- Integration und Identität durch europäisches Verfassungsrecht / C Callies, in JZ 2004, 1033.
- ² See case law of the Court of Justice of the EU in the cases [Groener](#), [Sayn-Wittgenstein](#), [Runevic-Vardyn and Wardyn](#).
- ³ Human Rights and Membership of the European Union / B De Witte, G Toggenburg, [The EU Charter of Fundamental Rights](#), S Peers, A Ward, Oxford 2004, p. 75.
- ⁴ [Safeguarding democracy inside the EU. Brussels and the future of liberal order](#) / J-W Müller, Transatlantic Academy, February 2013, pp. 5-8.
- ⁵ Ibidem, pp. 17-18.
- ⁶ Ibidem, p. 15.
- ⁷ [Adding a Bite to a Bark? A story of Article 7, the EU Enlargement, and Jörg Haider](#) / W Sadurski, Legal Studies Research Paper No 10/01, Sydney Law School, University of Sydney, January 2010, p. 394.
- ⁸ [Communication from the Commission to the Council and the European Parliament on Article 7 TEU. Respect for and promotion of the values on which the Union is based](#), COM(2003)606 final, 15.10.2003, p. 7.
- ⁹ European Parliament, [Resolution on Commission communication on Article 7 TEU](#) (rapporteur J. Voggenhuber), (COM(2003)606 – C5 0594/2003 – 2003/2249(INI)), p. 12.
- ¹⁰ [Reverse Solange - protecting the essence of fundamental rights against EU Member States](#) / A V Bogdady, M Kottmann, C Antpöhler, J Dickschen, S Hentrel, M Smrkolj, Common Market Law Review 49 (2012), p. 516.
- ¹¹ Ibidem, p. 502. See to further criticism towards this proposal, [Verfassungsblog Rescue Package for Fundamental Rights](#).