

Member States and the rule of law

Dealing with a breach of EU values

SUMMARY

The European Union is founded on values common to all Member States. These are supposed to ensure a level of homogeneity among Member States, while respecting their national identities, so facilitating the development of a European identity and their integration. Article 7 of the Treaty on European Union provides mechanisms to enforce EU values, based on a political decision by the Council with the participation of the Commission and Parliament. Such decisions are exempt from judicial review.

The current mechanism is said to be unusable due to the high thresholds needed to adopt a decision in the Council, as well as Member States' political unwillingness to use it. Various new approaches have been proposed by academics and by political actors, from a new independent monitoring body – the 'Copenhagen Commission', through extending the mandate of the EU Fundamental Rights Agency (FRA), to introducing the possibility for the EU to suspend national measures suspected of infringing EU law.

The European Parliament launched the idea of a 'European fundamental rights policy cycle' with the cooperation of EU institutions, Member States and the FRA, as a 'new Copenhagen mechanism' to monitor the situation in Member States. This mechanism would incorporate an early-warning system, with 'formal notices' to Member States where a breach in the rule of law appears likely, before formal proceedings under Article 7, and a 'freezing procedure' for national measures infringing upon EU values.

In 2014, the Commission announced 'A new EU framework to strengthen the Rule of Law', with a structured dialogue between the Commission and the Member State concerned and Commission recommendations and follow-up. On an initiative of the Italian Presidency, the Council decided in December 2014 to hold an annual dialogue, in the General Affairs Council, on the 'rule of law' in Member States.

This briefing updates an [earlier one](#) published in October 2013.



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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.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 ([Article 49\(1\) TEU](#)). Second, Member States must, following their accession, observe and promote the EU values. [Article 7](#) of the Treaty on European Union (TEU) establishes a procedure to sanction a Member State 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), and 8 TEU).

On the other side of the coin are the national constitutional identities of Member States. According to [Article 4\(2\) TEU](#), the Union must respect Member States' national identities. This provision sets out a vision of a Union founded on values common to all Member States but which preserves the diversity of Member States' political and organisational systems. This so called 'constitutional individuality' of the Member States 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 Member States, 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 Member States, outside the EU framework, rather than using Article 7.³ More recently, in 2010, the expulsion of Roma to their Member State 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 former 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

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.

centralisation, or not serious enough to fulfil the EU's role as guardian of the constitutional principles in the Member States.⁴

The Article 7 TEU mechanisms

Legal vs political approach

The difficulty in ensuring that 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 Member States or EU institutions over specific developments in a given Member State 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 Member States, which can be used to decide whether Member States fall below a common standard. Hence they demand greater respect for the plurality of political values in the EU, and mutual trust between Member States, as a cornerstone 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, Member States 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

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

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 Member State. Before making such a determination, the Member State concerned can address the Council, which may also issue **recommendations**.

The preventive mechanism can be triggered by one third of Member States, 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 Member State 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 Member States 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 Member State. Prior to this determination, the Member State concerned has the opportunity to submit observations to the Council.

In a second step, the Council can **suspend** certain **membership rights** of the Member State 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 Member State 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 Member State concerned do not take part in the votes in the Council and European Council, and are not counted in calculating 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 Member State 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 Member States ([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 Member State 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 reports of the Council of Europe's [Venice Commission](#) (European Commission for Democracy through Law) and 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 Member State 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 Member States 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

The shortcomings of the existing institutional arrangements to enforce the Union's fundamental values have increasingly been the subject of criticism with many, such as former Commission President José Manuel [Barroso](#), demanding more flexible instruments as an alternative in between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 of the Treaty. Commission First Vice-President, Frans Timmermans has [highlighted](#) that 'there are situations which do not fall under the scope of EU law, and cannot be said to meet the threshold of Article 7, but which do raise concern regarding the respect of the rule of law in a particular Member State'.

The proposed solutions are divergent as they include new or modified procedures for the protection of EU values, take a legal or political approach, favour ex-ante or ex-post actions and entrust their enforcement to EU bodies or to independent experts.¹⁰ Many of the proposed new mechanisms would require Treaty amendment, such as lower thresholds for triggering the Article 7 mechanisms, a judicial review by the CJEU, extended powers of the Fundamental Rights Agency (FRA), or abolishing [Article 51](#) of the EU Charter, to make EU fundamental rights directly applicable in all Member States.¹¹

Infringement proceedings

As an alternative to the Article 7 mechanisms, use of 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 mechanisms 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.¹² 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 also apply outside the EU realm, but only when violations are serious enough and persistent.

With relation to infringement proceedings for systematic infringements actions by a Member State, [scholars](#) have proposed to make use of the possibility of the Court to impose a fine or a lump sum to be paid by the Member State in question, and as a last resort to suspend its EU funding. The latter possibility was also proposed by the Foreign Ministers of Germany, the Netherlands, Finland and Denmark.

FRA/Copenhagen Commission

The question of a specific expert body at EU level carrying out systematic monitoring of Member States' 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 Member States for the purposes of Article 7. Its [assistance](#) could, however, 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 Member State.

Alternatively, Jan-Werner Müller, an academic, [proposed](#) setting up a politically independent high-level expert body, to be called the 'Copenhagen Commission', to monitor and investigate the situation of democracy and rule of law in the Member States. Upon the recommendation of the Copenhagen Commission, the European Commission could cut EU funds for the Member State 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 remits 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 Member State, 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.¹³

The EP: consistent advocate of protection of the rule of law

Parliament has played an increasingly important role in the enforcement of EU values. It is on an equal footing with the Member States 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. in 2013 based on the [report](#) by Rui Tavares, Greens/EFA, Portugal) calling on Member States to restore compliance with EU values and for new enforcement mechanisms observing the principle of equality between Member States.

Since the early 1990s, Parliament has demanded stricter monitoring of Member States' 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 Member States. Parliament's [Committee on Petitions](#) (PETI) also receives individual complaints that are a useful source of information on breaches of EU values in the Member States.

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, Member States 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 Member States, 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'.

In 2014, Parliament [repeated](#) (rapporteur Louis Michel, ALDE, Belgium, Committee on Civil Liberties, Justice and Home Affairs) its call to launch a '**new Copenhagen mechanism**' to monitor the situation in the individual Member States through a regular and objective process involving the Fundamental Rights Agency, Commission, Council, EP and national parliaments. The new mechanism should incorporate an **early-warning system** with 'formal notices' to Member States where a breach in the rule of law appears likely, before any formal proceedings start under Article 7, and a '**freezing procedure**' for national measures infringing upon EU values. Parliament again called for a greater role for the **Fundamental Rights Agency**, with stronger powers and a wider remit, including in monitoring individual Member States in the field of fundamental rights. It argued that in the meantime a '**Copenhagen Commission**' be established, composed of independent high-level experts on fundamental rights, to ensure compliance by all Member States with the common values enshrined in Article 2 TEU, and to advise and report on fundamental rights matters. Parliament also recalled the importance of completing the process of acceding to the European Convention on Human Rights.

EU accession to the European Convention on Human Rights and Fundamental Freedoms

The European Commission negotiated EU accession to the ECHR and submitted the provisional text to the Court of Justice (CJEU) for an opinion as to its compatibility with EU law. In December 2014, the Court [rejected](#) the draft accession agreement. It called for the agreement to exclude jurisdiction of the European Court of Human Rights for disputes between Member States, or between Member States and the EU, regarding the application of the ECHR in the context of EU law. Once a new accession agreement has been negotiated, the EP's consent would be required for the Council to conclude the agreement.

In its resolution, Parliament also set further avenues to be explored in order to strengthen the protection of the rule of law and fundamental rights in the EU, including *inter alia* a revision of Article 7 TEU to:

- separate the 'risk' stage from the 'violation' stage, with different thresholds for the necessary majorities,
- strengthen the technical (not only political) analysis to determine the risk and the existence of a serious breach of values,
- enhance dialogue with the Member States' institutions,
- provide for a wider range of detailed and predictable penalties, and
- enable Parliament to launch proceedings on the violation of Article 2 TEU on an equal footing with the Commission and the Council.

New EU rule of law policy framework

The European Commission

In March 2014, the Commission issued a [Communication](#) on 'A new EU framework to strengthen the Rule of Law'. The 'framework' is to address and resolve situations of systemic threat to the rule of law, thus acting before, and complementing the Article 7 mechanisms. It consists of a structured dialogue between the Commission and the Member State concerned, including a Commission **assessment**, a Commission **recommendation** and a **follow-up** to the recommendation.

In a first stage, the Commission would conduct a preliminary assessment and if there is concern that there is a situation of systemic threat to the rule of law, it would initiate a dialogue with the Member State concerned, by sending a 'rule of law opinion' and giving the Member State the possibility to respond. The content of the exchanges with the Member State at this first stage would be kept confidential. During the assessment, the Commission may seek external expertise, including from the FRA, in particular to compare rules and practices in the Member States and in this way ensure their equal treatment. In a second stage, the Commission would issue a 'rule of law recommendation', if it finds objective evidence of a systemic threat and that the authorities of the Member State concerned are not taking appropriate action to redress it. This recommendation would be made public. In a third stage, the Commission would monitor the Member State's follow-up to the recommendation. If there is no satisfactory follow-up by the Member State within the time limit set, the Commission would assess the possibility of activating one of the mechanisms set out in Article 7 TEU.

In his then capacity as Dutch Foreign Minister, Frans Timmermans, now Commission First Vice-President, wrote in 2013, together with three other EU foreign ministers, to the Commission calling for a new 'rule of law mechanism' allowing as a last resort cutting of EU funding. In his [hearing](#) before Parliament he said that Article 7 TEU should be a last resort, the prevention of systemic threat to the rule of law from emerging being a priority. He also [announced](#) his intention to hold an annual colloquium on fundamental rights with the participation of all relevant stakeholders, including the European Parliament.

The European Parliament and the Council would have a passive role in this process, with the Commission committing merely to inform them of progress made in each of the stages.

The Council

Following an initiative of the Italian Presidency, the Council [decided](#) in December 2014 to hold an annual dialogue in the General Affairs Council on the 'rule of law' in Member States. The results of this initiative will be evaluated towards the end of 2016.

Further reading

C Closa, D Kochenov and J.H.H. Weiler, [Reinforcing Rule of Law Oversight in the European Union](#), EUI working papers, RSCAS 2014/25, March 2014.

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

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

Endnotes

- ¹ C Callies, Europa als Wertegemeinschaft- Integration und Identität durch europäisches Verfassungsrecht, 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 B De Witte, G Toggenburg, Human Rights and Membership of the European Union, in The EU Charter of Fundamental Rights, S Peers, A Ward, Oxford 2004, p. 75.
- ⁴ J-W Müller, [Safeguarding democracy inside the EU. Brussels and the future of liberal order](#), Transatlantic Academy, February 2013, pp. 5-8.
- ⁵ Ibidem, pp. 17-18.
- ⁶ Ibidem, p. 15.
- ⁷ W Sadurski, [Adding a Bite to a Bark? A story of Article 7, the EU Enlargement, and Jörg Haider](#), 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), p. 12.
- ¹⁰ C Closa, D Kochenov and J.H.H. Weiler, [Reinforcing Rule of Law Oversight in the European Union](#), EUI working papers, RSCAS 2014/25, March 2014, pp. 14 et. seq.
- ¹¹ Former Vice-President of the European Commission, Viviane Reding, [The EU and the Rule of Law – What next?](#), EPC conference, Brussels, September 2013.
- ¹² A V Bogdnady, M Kottmann, C Antpöhler, J Dickschen, S Hentrel, M Smrkolj, [Reverse Solange - protecting the essence of fundamental rights against EU Member States](#), Common Market Law Review 49 (2012), p. 516.
- ¹³ Ibidem, p. 502. For further criticism of the proposal, see Verfassungsblog, [Rescue Package for Fundamental Rights](#).

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