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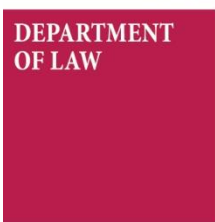
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Busting the myths nuclear: A commentary
on Article 7 TEU

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European University Institute
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**BUSTING THE MYTHS NUCLEAR: A COMMENTARY
ON ARTICLE 7 TEU**

Dimitry Kochenov

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Abstract

Article 7 TEU is unique in that it established the procedures for stating the threat of a breach of EU values by a Member States, the existence of such breach, as well as a possible sanctioning mechanism to bring the recalcitrant Member States back to compliance, while not being confined by the general EU competence limitations. This commentary outlines all the sub-instruments and stages of deployment of the provision in question in order to demonstrate Article 7 TEU eminent usability in the face of the claims by the Institutions to the contrary which are as baseless as they are persistent. The goal of this contribution is to explain the richness and significance of Article 7 TEU, thereby busting the unhelpful ‘nuclear’ myth about it. Such myth proclaims Article 7 TEU to be ‘unusable’ and is deployed by those in search of a valid pretext – however feeble – to exclude EU law from solving the Rule of Law crisis of the European Union. Two Member States, Hungary and Poland, are working hard, day and night, to undermine democracy, the Rule of Law and the protection of fundamental rights, i.e. the foundational values of the Union. The claims that EU law should not intervene are irresponsible and, ultimately, illegal.

Keywords

Rule of Law, EU law, values, Article 7, enforcement, Hungary, Poland

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Introduction*

The number of backsliding Member States in the European Union (EU) has doubled over the last two years. Poland,¹ working hard on dismantling its institutions intended to guarantee the preservation of the Rule of Law, has joined Hungary.² The question is: what is to be done?³

The European Union and the Member States seem to be doing as little as they can to resolve this situation. Each of the EU institutions came up with its own plan on what to do in the current situation, inventing more and more new soft law of questionable quality.⁴ The academic assessment expresses bewilderment:⁵ all that is being done by the institutions seems to reveal one and only one point: there is a total disagreement among pretty much all the actors involved concerning what should be done, and the political will to sort out the current impasse is lacking at the level of the Member States too. The direct outcome of this could be predicted from the very beginning: inaction helps the political elites in the backsliding Member States to consolidate their assault on the values of democracy and the Rule of Law even further, entrenching the breach of EU values.

This brings about a previously unimaginable situation where the EU harbours the Member States which, beyond obviously not qualifying to join the Union should they apply today, work hard to undermine key principles the EU was created to safeguard and promote: democracy, the Rule of Law and the protection

* The first version of this piece has been presented at the Hungarian Europe Society workshop at the Central European University in Budapest on 18 March 2017. I am grateful to the organisers and colleagues for comments and conversation, especially to Gábor Halmi, István Hegedűs, Marcus Klamert, Laurent Pech and Kim Lane Scheppele, as well as Friedrich-Naumann-Stiftung für die Freiheit for support. Research assistance of Jacquelyn Veraldi is gratefully acknowledged.

¹ Scheppele and Pech, 'Poland and the European Commission' (Parts I, II, and III) (*Verfassungsblog*, 2017) <<http://verfassungsblog.de/author/laurent-pech/>> accessed 3 May 2017; Koncewicz, 'Of institutions, democracy, constitutional self-defence' (2016) 53 *Common Market Law Review* 1753.

² Scheppele, 'Understanding Hungary's Constitutional Revolution', in von Bogdandy and Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, 2015); Szente, 'Challenging the Basic Values – The Problems with the Rule of Law in Hungary and the EU's Failure to Tackle Them', in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017) 456; Scheppele, 'Constitutional Coups in EU Law', in Adams, Meeuse and Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017); Tóth, 'Illiberal Rule of Law: Changing Features of Hungarian Constitutionalism', in Adams, Meeuse and Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017).

³ Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' (2014) 52 *Journal of Common Market Studies* 105; Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States' (2014) 165 *Revista de Estudios Políticos* 141; von Bogdandy and Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing, 2015); Closa and Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

⁴ Council of the EU Press Release no. 16936/14, 3362nd Council meeting, General Affairs, [2014] 20–21; European Commission Communication, 'A New EU Framework to Strengthen the Rule of Law' [2014] (COM(2014)158); European Parliament Report with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights [2016] (2015/2254(INL)). cf, on all these instruments, Kochenov, Magen, Pech (eds), 'The Great Rule of Law Debate in the European Union' (2016 symposium), (2016) 54(5) *Journal of Common Market Studies*.

⁵ Scheppele and Pech, 'Poland and the European Commission' (Parts I, II, and III) (*Verfassungsblog*, 2017) <<http://verfassungsblog.de/author/laurent-pech/>> accessed 3 May 2017; Kochenov and Pech, 'Better Late Than Never? On the Commission's Rule of Law Framework and Its First Activation' (2016) 24 *Journal of Common Market Studies* 1062; Oliver and Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 24 *Journal of Common Market Studies* 1075.

of fundamental rights.⁶ Such ‘anti-Member States’ take full part in governing the Union, benefit from unprecedented direct financial support and abuse the international prestige which is associated with the membership of this organization.⁷

The reactions to the current situation from the powers that be underline one thing: the Union is either content with the current situation or entirely powerless. Since the former is hardly convincing given the dangers that Hungary and Poland bring into the Union, as fully expressed in the numerous public statements of the members of the College of Commissioners and heard during European Parliament debates, the latter seems to be the core of the matter: powerlessness of the Union.

The claims that little to nothing can be done under the current legal framework – which are heard with remarkable regularity – are entirely baseless, however, as Hillion, Besselink and other scholars consistently pointed out.⁸ In making such claims the Commission and other institutions point to the fact that the powerlessness is not caused by an absolute lack of Treaty instruments that would warrant intervention. Rather, the instruments that are available, are, apparently, *too strong*, or, to put it differently, *too toxic*, to be used. The EU has a ‘nuclear’ option, we are told: Article 7 TEU, which cannot really be activated: the fallout would be too terrible and the hurdles for starting the procedure are too insurmountable.

The goal of this brief paper is to provide a detailed commentary on Article 7 TEU to demonstrate the absurdity of this perspective yet again.⁹ It is necessary, once and for all, to bust this toxic nuclear myth abused over and over again to justify inaction in these difficult times. The talk of Article 7 TEU as ‘nuclear’ is not only intellectually dishonest since it obviously has little to do with the truth as a simple reading of Article 7 TEU demonstrates. This politically convenient reading for those who do not want any action in the first place amounts to a nihilist position that ignores the letter and the spirit of the Treaties. Most regrettably, it is the ‘guardian of the Treaties’, i.e. the European Commission that we should thank for this unhelpful meme.¹⁰

In what follows – and in order to explain the thinking behind and the mechanisms and procedures of Article 7 TEU, which is long overdue a huge literature on the provision notwithstanding¹¹ in this

⁶ As well as other values expressed in Art. 2 TEU; Pech, ‘“A Union Founded on the Rule of Law”: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’ (2010) 6 *EU Constitutional Law Review* 359; Kochenov, ‘The *Acquis* and Its Principles: The Enforcement of the “Law” Versus the Enforcement of “Values” in the EU’, in Jakab and Kochenov (ed), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).

⁷ Closa, ‘Reinforcing EU Monitoring of the Rule of Law’, in Closa and Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016), 13.

⁸ Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’, in Closa and Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017); Scheppele, ‘Enforcing the Basic Principles of EU Law through the Systemic Infringement Procedure’, in Closa and Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

⁹ Cf., eg, Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the European Union: Rhetoric and Reality’ (2015) 11 *EU Constitutional Law Review* 512; Kochenov and Pech, ‘Better Late Than Never?’ (2016) 24 *Journal of Common Market Studies* 1062.

¹⁰ Eg President Barroso, (2012) State of the Union Address, European Parliament, Speech/12/596.

¹¹ On Article 7 TEU see, most importantly, Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017); Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law* (EUI RSCAS, 2017); Bugarič, ‘Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism’, in Closa and Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Kochenov and Pech, ‘Better Late Than Never?’ (2016) 24 *Journal of Common Market Studies* 1062; Hillion, ‘Overseeing the Rule of Law in the EU: Legal Mandate and Means’, in Closa and Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); Bieber and Maiani, ‘Enhancing Centralized Enforcement of EU Law:

contribution provides a general overview of Article 7 TEU, gives an assessment of its scope of application, analyses the three procedures of this provision and then comes back to the general context of principled and chronic non-compliance with the values of the EU where it does not play a clear role.¹² The conclusion is very simple and does not deviate from the key literature on this provision: there is nothing nuclear in this instrument. Stating otherwise is an outright abuse of Article 7 TEU for uncertain political ends. Such abuse is particularly unhelpful if it is committed over and over again by the institutions destined to defend the values of the Union and entrusted with the right of initiative to trigger the different procedures of Article 7 TEU, especially the European Commission and the Council. A much better excuse for inaction is needed.

Consequently, even if not a panacea, Article 7 TEU should be activated as soon as possible to demonstrate that the values of Article 2 TEU are more than empty proclamations and show beyond any reasonable doubt that the Union cherishes democracy, the protection of human rights, and the Rule of Law. Should this not be the case, and should the Union really be founded on merely procedural principles of supremacy, direct effect and the like, as opposed to the substantive values as the Court of Justice has, regrettably, hinted on a number of occasions now,¹³ serious thought needs to be put into reforming the Union as soon as possible.

Background

The initial versions of the Treaties relied on the presumption of compliance by the Member States with the, then non-codified, values of the Communities expressed in the Schuman Declaration¹⁴ and unwritten founding values of the Union,¹⁵ which got a gradual crystallisation in the context of its enlargements.¹⁶ The enforcement of compliance was strictly confined to the scope of the *acquis* via what are now Articles 258 and 259 TFEU (later reinforced by Art. 260 TFEU).¹⁷ This initial design created an unbalanced picture, where compliance with the rules of EU law was strictly enforced while the enforcement of the core principles on which all the law in question rested remained seemingly out of reach for the supranational institutions in a situation where, ironically, the legal nature of the core principles of EU law in terms of their enforceability and contents remained largely unclear.¹⁸ What this set-up made obvious, however, was that the *acquis* did not necessarily include the key values. As a

Pandora's Toolbox?' (2014) 51 *Common Market Law Review*, 1057; Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2010) 16 *Columbia Journal of European Law* 385; Schmitt von Sydow, 'Liberté, démocratie, droits fondamentaux et État de droit, analyse de l'article 7 du traité UE' (2001) *Revue de droit de l'Union Européenne* 285.

¹² Kochenov, 'The *Acquis* and Its Principles: The Enforcement of the "Law" Versus the Enforcement of "Values" in the EU', in Jakab and Kochenov (ed), *The Enforcement of EU Law and Values* (Oxford University Press, 2017); Pech, "'A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 *EU Constitutional Law Review* 359.

¹³ Opinion 2/13 *ECHR Accession II* [2014] EU:C:2014:2454. cf Kochenov, 'EU Law without the Rule of Law' (2015) *Yearbook of European Law*, 91 (and the literature cited therein).

¹⁴ Weiler, 'The Schuman Declaration as a Manifesto of Political Messianism' in Dickson and Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012).

¹⁵ Perju, 'On Uses and Misuses of Human Rights in European Constitutionalism', in Vöneky and Neuman (eds), *Human Rights, Democracy, and Legitimacy in a World in Disorder* (Cambridge University Press, 2017 (forthcoming)).

¹⁶ Kochenov, 'EU Enlargement Law: History and Recent Developments – Treaty-Custom Concubinage?' (2005) 9(6) *European Integration Online Papers*.

¹⁷ Gormley, 'Infringement Proceedings', in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017); Wenneras, 'Making Effective Use of Article 260', in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).

¹⁸ Kochenov, 'The EU and the Rule of Law – Naïveté or a Grand Design?' in Adams, Hirsch Ballin and Meeuse (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017).

consequence, once one turns to the issue of enforcement, the enforcement of the *acquis* and the enforcement of values could not be regarded to be one and the same thing.

Given the importance of the duty of loyalty and mutual trust lying at the foundation of EU law, the articulation of supranational policing of compliance with the values was only a matter of time.¹⁹ This was particularly so as the diversity of the Member States has been increasing with the numerous successive rounds of enlargement, incorporating a large number of newly-democratised and post-totalitarian states seeking democracy, the rule of law and political stability in the Union.²⁰ From incorporating Greece, Spain and Portugal on to the former republics and satellite states of the USSR, the issue of enforcing the values of the EU in cases of eventual breaches was becoming more and more acute: the tradition of a democratic rule of law-based state in these new Member States, so engrained as the basis of EU law, was largely lacking. Article 7 TEU now attempts to bridge the gap between the presumptions of the founding fathers that all the Member States are good enough not to fall short of the achievement of the values baseline and the need to enforce the values of the Union should this presumption turn out to be untenable. The scope of this provision, which is, like with Articles 2 and 49 TEU, necessarily broader than what has been conferred on the EU under Article 5(1) TEU is key for the understanding of the instruments the Article contains (see below under ‘scope’).

The acuteness of the potential problems arising from the discrepancy between the crucial importance of the presumption of compliance of the Member States with the values of the Union and the latter’s inability to check whether this indeed was the case, let alone intervene, was quite apparent from early on. Already in 1978, the Commission had contemplated a proposal for a sanctions mechanism against the backdrop of Greek accession and an obvious threat of democratic and rule of law backsliding in that economically weak newly-democratised state, fresh from the experience of the colonels’ junta rule.²¹ It is thus not surprising that the draft EU Treaty prepared by the European Parliament in 1984 contained such a mechanism.²²

Since 1991, the EU has included ‘human rights clauses’ in all association and cooperation (‘Europe-’) agreements and incorporated these into the fabric of the pre-accession political conditionality in the areas of democracy, the rule of law and human rights: which are now at the core of Article 2 TEU.²³ Deployed in the pre-accession context of the Copenhagen Criteria²⁴ the sanctions for non-compliance with the values and the core principles of the Union had only limited implications for the Member States once full membership has been secured, creating the so-called “Copenhagen dilemma”. Beyond the so-called Cooperation and Verification Mechanism only applicable post-accession to Bulgaria and Romania, the new Member States were out of reach of values’-enforcement if not Article 7 TEU.²⁵

The current instrument goes back to the Treaty of Amsterdam – thus adopted in direct anticipation of the “big-bang” Eastern enlargement of the EU – and was explicitly linked to ex Article 6 TEC, which

¹⁹ Closa, ‘Reinforcing the Rule of Law: Normative Arguments, Institutional Proposals and Procedural Limitations’, in Closa and Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

²⁰ Sadurski, *Constitutionalism and Enlargement of Europe* (Oxford University Press, 2012).

²¹ Tsoukalis, *The European Community and Its Mediterranean Enlargement* (Harper Collins, 1981).

²² Article 44 of the Draft Treaty Establishing the European Union [1984] (never entered into force). The Court of Justice was supposed to play the key role in stating the breach.

²³ Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2007); Inglis, ‘The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation’ (2000) 37 *Common Market Law Review* 1173.

²⁴ Hillion, ‘The Copenhagen Criteria and Their Progeny’ in Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing, 2004).

²⁵ Vachudova and Spendzharova, ‘The EU’s Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession’ (2012) *European Policy Analysis* (SIEPS).

listed the then “principles” on which the Union is built, which now regrettably came to be recodified as “values” in Article 2 TEU.²⁶

From the very beginning Article 7 TEU followed the principle of equal treatment of the Member States: although clearly designed with the new Member States in mind, the instrument, from the very inception, was framed to apply to all the Members, unlike, for instance, the Cooperation and Verification Mechanism.

The initial version of the provision only contained a sanctioning mechanism for a ‘serious and persistent breach’ of values, which made the provision unusable in the context where a swift reaction to a persistent breach was necessary, exactly the situation in Austria in 2000 as perceived by the majority of the European capitals following the securing of the participation in government in Austria by the extreme-right FPÖ. The reaction to this electoral result came in a series of illegal ad hoc ‘bilateral sanctions’ imposed on Austria by 14 other Member States and orchestrated by the EU Institutions, which besides not relying on Article 7 TEU, were entirely placed outside of the framework of EU law.²⁷ Austria has never been accused by the Commission or any other EU Institution of violating any of the EU’s values and principles. Moreover, the assessment by the ‘three wise men’ of the situation on the ground concluded that ad hoc sanctions were introduced for no good reason at all.²⁸ It is beyond any doubt, thus, that Austria was mistreated in breach of EU law.²⁹

The Austrian story had two important consequences. Firstly, it led to a chilling effect preventing the effective deployment of Article 7 TEU when the problems with values are strongly observable on the ground: Austria being constantly and erroneously cited by the EU Institutions as a tale of caution about the heavy implications of the use of Article 7 while the provision has not been used then.³⁰ Secondly, it led to the upgrade of Article 7 by the Treaty of Nice. The preventive mechanism in Article 7(1) goes back to the Treaty of Nice to deal with the serious and persistent threats of the breach of values. Article 7(5) was changed with the Treaty of Lisbon.

As the provision stands today, it thus incorporates three different procedures deployable to safeguard the values of Article 2 TEU:

1. a procedure to declare the existence of a ‘clear risk of a serious breach’ of the values referred to in Article 2 TEU and the adoption of recommendations how to remedy the situation addressed to the Member States in breach (Art. 7(1) TEU);
2. a procedure to state the existence of a serious and persistent breach of values (Art. 7(2) TEU);
3. and a sanctioning mechanism following the statement of a serious and persistent breach (Art. 7(3) TEU).

²⁶ Pech, “‘A Union Founded on the Rule of Law’: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law” (2010) 6 *EU Constitutional Law Review* 359.

²⁷ EU Council Presidency of 31 January 2010 formally launched the sanctions against Austria on behalf of all the other Member States.

²⁸ Ahtisaari, Frowein and Oreja, ‘Report on the Austrian Government’s Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPÖ’ (The Wise Men Report) (2001) 40 *International legal materials: current documents* 1, 102–123.

²⁹ Lachmayer, ‘Questioning the Basic Values – Austria and Jörg Haider’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017); Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017); von Toggenburg, ‘La crisi austriaca: delicati equilibrismi sospesi tra molte dimensioni’ (2001) *Diritto pubblico comparato ed europeo* 735; Merlingen, Mudde and Sedelmeier, ‘The Right and the Righteous? European Norms, Domestic Politics, and the Sanctions against Austria’ (2001) 39 *Journal of Common Market Studies* 65.

³⁰ E.g. First Vice President Timmermans, ‘The European Union and the Rule of Law – Keynote Speech (Conference on the Rule of Law, Tilburg University, 31 August 2015) <https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en> accessed 3 May 2017.

Article 7 does not exclude the possibility of starting the procedure laid down in Article 7(2) TEU directly: all the three paragraphs of it are thus not part of one procedure with three steps. This fact is constantly forgotten in the political speeches by the key actors responsible for the operation of Article 7 TEU.³¹ The most popular presentation of Article 7 TEU today – a consequence of the post-Austria chilling effect – is to refer to Article 7 as a ‘nuclear option’.³² This is based on the assumption that invoking the provision is extremely difficult and the results of its application are too devastating, to make this practicable.³³ This view clearly ignores the differences between the three procedures of Article 7 TEU and is not justifiable, legally speaking.³⁴

The concerns of the drafters who included Article 7 TEU into the Treaties have recently been proven entirely justified, as outstanding problems persist in the field of adherence to values. Following the ‘reforms’ of the Fidesz party in Hungary starting with the second Orbán government, which used its constitutional supermajority to provide an overwhelming overhaul of the totality of the legal-political system in the country with a view to building an ‘illiberal democracy’ à la Putin, it is clear that the problems Article 7 was designed to tackle are not at all theoretical.³⁵ Adding to the situation in Hungary, where the Constitution, according to the Venice Commission, ended up being turned into a political tool of one-party rule, Poland followed suit after the election of *Prawo i Sprawiedliwość* (PiS) in 2015.³⁶ Lacking a super-majority to change the Constitution, the Polish government has simply ignored it, systematically failing to comply with its own laws: a situation amply documented by scholars and analysed in detail by the Venice Commission.³⁷ Democratic- and rule of law-backsliding is thus on the rise in the EU and there is no guarantee that Poland and Hungary would not be joined by more Member States failing to adhere to the values of Article 2 TEU. The complete inaction of the EU Institutions as far as Article 7 TEU is concerned is most worrisome in the current context and seems to demonstrate a lack of strong political support for the defence of EU’s values.

What Article 7 has to say about the involvement and jurisdiction of the Court begs the qualification of the provision as largely political. As per Articles 19 TEU and 269 TFEU The ECJ only has jurisdiction over procedural issues.³⁸ The observance of the voting arrangements applying to the European Parliament, the European Council and the Council, as laid down in Article 354 TFEU could thus be policed by the Court. Importantly, however, there is no express exclusion of Article 7 from ECJ’s jurisdiction, which could mean that the Court could be called upon to check how the Institutions

³¹ Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017); Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law* (EUI RSCAS, 2017).

³² E.g. President Barroso, ‘State of the Union Address’ (Speech/12/596) (European Parliament, Strasbourg, 12 September 2012) <http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm> accessed 3 May 2017.

³³ For strong arguments against this view, see Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).

³⁴ Kochenov and Pech, ‘Better Late Than Never?’ (2016) 24 *Journal of Common Market Studies* 1062

³⁵ Scheppele, ‘Constitutional Coups in EU Law’, in Adams, Meeuse and Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017); Tóth, ‘Illiberal Rule of Law: Changing Features of Hungarian Constitutionalism’, in Adams, Meeuse and Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press, 2017); Szente, ‘Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).

³⁶ cf Bugarič, ‘A Crisis of Constitutional Democracy in Central and Eastern Europe: “Lands In-Between” Democracy and Authoritarianism’ (2015) 13 *International Journal of Constitutional Law* 219.

³⁷ Konciewicz, ‘Of institutions, democracy, constitutional self-defence’ (2016) 53 *Common Market Law Review* 1753.

³⁸ cf Case T-337/03 *Luis Bertelli Gálvez v Commission* EU:T:2004:106; Case T-280/09 *Morte Navarro v Parliament* EU:T:2010:28; Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017) 128, 133.

involved used their discretion in the concrete case, broadening judicial involvement somewhat, compared with the silence of the provision itself about the Court. Given the limited involvement of the judicial power, as well as the fact that the Commission does not have an exclusive right of initiative, Article 7 TEU remains a blend of law and politics.³⁹ It is fundamental, however, that both these components unquestionably play an important role in the functioning of this provision.

Scope of application

The scope of application of Article 7 TEU is necessarily broader than what is implied by the principle of conferral: it is not confined to the scope of the *acquis*. As explained by the Commission, Article 7 “seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union’s possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Article 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs”.⁴⁰ This position of the Commission finds an overwhelming support in the literature. Only a very broad view of the scope of Article 7 TEU can make this provision an effective tool of safeguarding EU’s values.

This is precisely why any serious breach of the EU values in the context of Member States’ action (or inaction) also in the framework of the CFSP is covered, notwithstanding the fact that those are excluded (for the major part) from the scope of other ‘enforcement’ provisions in the Treaties.

All in all, as a *lex specialis* with a very broad scope of application, Article 7 clearly does not preclude the application of Articles 258, 259 and 260 TFEU in the area of the defence of EU values. While some value violations can clearly fall within or be paralleled by a breach of the *acquis*, a series of systemic *acquis* violations could also amount to a serious breach of values.⁴¹ This is why the Commission in its ‘Rule of Law Mechanism’ insists on approaching Article 7 and standard infringement proceedings as deployable side by side.⁴²

Clear risk of a serious breach: Procedure No. 1

Out of all the three procedures contained in Article 7 TEU initiating 7(1) in order to state a clear risk of a serious breach of values of Article 2 TEU and address recommendations on how to remedy the situation to the relevant Member State can be done by the broadest array of actors: 1/3 of the Member States; the European Parliament and the European Commission. Compare with 1/3 of the Member States and the Commission for the initiation of 7(2) and only the Council for the initiation of the actual sanctioning procedure in Article 7(3) TEU. All the three procedures are in clear deviation from the main principle that the Commission holds the exclusive right of initiative in EU law.

The aim of opening up the procedure to so many possible initiators clearly seems to be to make it easier to use, compared with other elements of Article 7. It is undoubtedly so that both under-enforcement and over-enforcement of Article 2 TEU values could create problems.⁴³ Yet, given that 7(1) procedure cannot possibly lead to sanctions, as for the initiation of 7(3) by the Council the statement of breach

³⁹ Williams, ‘The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK’s Invasion of Iraq’ (2006) 31 *European Law Review* 3, 27.

⁴⁰ European Commission, ‘Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based’ [2003] (COM(2003) 606 final), 5.

⁴¹ Scheppele, ‘The Case for Systemic Infringement Actions’, in Clossa and Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

⁴² European Commission, ‘A New EU Framework to Strengthen the Rule of Law’ [2014] (COM(2014)158).

⁴³ Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law* (EUI RSCAS, 2017).

under 7(2) is required, the essence of 7(1) seems to lie in pushing the Member States where the breach could occur to engage in dialogue with the EU Institutions in order to prevent the possible breach. This is confirmed by the provision's authorization, addressed to the Council, to issue recommendations to the Member State concerned in order to prevent the breach of values from occurring. The same procedure – a 4/5 majority in the members of the Council with the consent of the European Parliament, is used both for the statement of the existence of a serious risk of breach and for the adoption of the recommendations to be addressed to the Member State on the brink of breaching the values. Moreover, basic requirements of the rule of law have to be observed throughout, i.e. the Member State subjected to the procedure has to be heard. The Institutions also have to react to the changes on the ground, by regularly verifying whether the grounds behind triggering Article 7(1) TEU still persist.

With the Commission, the European Parliament and 1/3 of the Member States able to initiate the procedure, it is obvious that the prevailing opinion of Article 7 “nuclear” nature is overwhelmingly exaggerated. Moreover, the 4/5 majorities of the members of the Council is not as difficult to reach, given that the Member State subjected to the procedure will necessarily not be allowed to cast the vote. This threshold, however high it seems to be, is clearly far below unanimity in the European Council required for the statement of an actual breach under Article 7(2) TEU. It is notable in this regard, that Article 7, which requires the opinion behind the initiation of 7(1) to be ‘reasoned’ also required the initiating actors to do their ‘home work’ and prepare the case by collecting and systematising the necessary information and evidence. Such preparatory work is clearly implied in the text of the provision.

Given that 7(1) is easy to trigger the arguments to the contrary underlying the need for the Commission's ‘Rule of Law Mechanism’ – a non-binding explanation on how the Commission will prepare its own activation of Article 7(1) or 7(2) TEU⁴⁴ – are hardly convincing. Published in 2014 and used, most inconsistently, against Poland (but not against Hungary) the mechanism has not had, so far, any positive effect.⁴⁵ In introducing the mechanism, the Commission aimed at introducing some informal dialogue with the problematic Member State before Article 7 – the misnamed ‘nuclear option’ – is triggered. The Commission would then address recommendations to that Member State and receive replies: a procedure criticized by the Council legal service, but for very bad reasons, given that as one of the initiators of the 7(1) (and also 7(2)) procedures the Commission clearly has to have internal rules for the judging the situation on the ground and the collection of evidence to prepare its Reasoned Opinion.⁴⁶ As introduced, however, the Rule of Law mechanism looks suspiciously like a double of Article 7(1) TEU – only with no involvement of other Institutions.⁴⁷

The only effect of the mechanism's deployment can be the delay in the triggering of Article 7 – even though other institutions having the power to trigger Article 7 clearly are not obliged to wait for the Commission to finish with the non-Treaty mechanism of its own creation. In practice the delay is the least of the evils created by the Commission in order, ultimately, not to trigger Article 7, when such triggering was needed: it showed three things.⁴⁸ Firstly it showed that the Commission is incapable of being coherent and consistent in managing its own newly-created procedure (the Mechanism has never being triggered against Hungary, the situation there being as bad – if not worse – than in Poland against which the mechanism was triggered); Secondly, it demonstrated that the Commission is incapable of

⁴⁴ European Commission, ‘A New EU Framework to Strengthen the Rule of Law’ [2014] (COM(2014)158); Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the European Union: Rhetoric and Reality’ (2015) 11 *EU Constitutional Law Review* 512.

⁴⁵ Kochenov and Pech, ‘Better Late Than Never?’ (2016) 24 *Journal of Common Market Studies* 1062.

⁴⁶ Council of the European Union, ‘Opinion of the Legal Service 10296/14’ [2014]; Kochenov and Pech, ‘Monitoring and Enforcement of the Rule of Law in the European Union: Rhetoric and Reality’ (2015) 11 *EU Constitutional Law Review* 512.

⁴⁷ Kochenov and Pech, ‘Better Late Than Never?’ (2016) 24 *Journal of Common Market Studies* 1062.

⁴⁸ *ibid.*

sticking to the steps of its own procedure: following Poland's de facto refusal to cooperate, following the Commission's recommendation under the Mechanism, the Commission, instead of triggering Article 7(1) TEU as its own Mechanism required, came up with a new, supposedly ad hoc recommendation instead, while the situation with the Rule of Law and democracy in Poland continued to deteriorate at an increasing pace; Thirdly, it demonstrated that triggering Article 7 and related mechanisms should be done without committing grave tactical mistakes: having played against one out of two currently backsliding Member States, the Commission handed over the veto power over any serious move under Article 7(2) TEU against Poland to Hungary, making the deployment of the Treaty provision de facto impossible as a result of its own inventiveness masking profound indecision. Should the Rule of Law Mechanism now be regarded as a semi-official step preceding the deployment of Article 7 TEU – which could be a possibility in practice, the undermining of the *effet utile* of this provision by the Commission thus goes even further, creating an unwelcome and dangerous precedent.

The main question that the Rule of Law Mechanism supposedly had to answer is how to decipher a threat of a serious breach of Article 2 values. In this sense, the mechanism is useful in that it builds on the Venice Commission practice (see the discussion of Article 2 TEU) in defining the elements of the rule of law which could be useful to the Institutions in stating the risk of breach under Article 7(1) TEU. Moreover, the Commission relies on the Venice Commission opinions in its Rule of Law recommendations.

It is fundamental that the statement of the existence of a serious risk of breach under Article 7(1) TEU is not necessary to activate Article 7(2) TEU. The same applies, of course, to the Commission's Rule of Law Mechanism, which, as the Commission itself stated, is not obligatory and not legally binding.⁴⁹

Stating the existence of a serious breach (Procedure No. 2)

There is a huge difference between a mere serious threat of a breach of values and a serious breach of values actually observable in a Member State of the Union. This difference explains the existence of a separate procedure in Article 7 TEU for stating such a breach, as well as the infinitely higher thresholds required by this procedure: unanimity in the European Council and consent of the European Parliament. Unlike with 7(1), 7(2) cannot be initiated by the European Parliament, even though the European Parliament can, under its own Rules of Procedure, to call on others to act in the context of both paragraphs in question.⁵⁰ Even taking into account the fact that unanimity does not imply that each member of the European Council (besides the representative of the Member State potentially subjected to 7(2) who will not, logically, take part in the vote) has to vote in favour of triggering the procedure,⁵¹ stating the existence of a serious breach is procedurally very difficult.

This difficulty is not illogical, since a simple breach of Article 2 TEU is not enough to activate Article 7(2) TEU. What is required – and what is meant by 'serious' – is presumably the systemic nature of the breach, which means that the institutions of the MS concerned cannot, on their own, successfully resolve the problem of failing to adhere to the values.⁵² It is only logical, in this context, to have a procedure in place that makes it extremely difficult to over-police Article 2 TEU, which is the objective behind the high thresholds of Article 7(2) TEU. The emphasis on systemic helps understand why the question of Article 7(2) has never been raised with regard to some Member States which are seemingly

⁴⁹ European Commission, 'A New EU Framework to Strengthen the Rule of Law' [2014] (COM(2014)158).

⁵⁰ Rule 83, European Parliament 'Rule of Procedure' [2014] (10296/14).

⁵¹ Article 7 TEU does not limit its activation to one MS per time, so in a situation where more than one MS is suspected of a breach of Article 2 values the activation of Article 7 against both states is indispensable to avoid the blockage of Article 7 procedures by the backsliding MSs supporting each other.

⁵² von Bogdandy and Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 *Common Market Law Review* 59.

underperforming under Article 2 – like Berlusconi’s Italy with its terrible track-record on media pluralism,⁵³ or Sarkozy’s France deporting EU citizens of Romani origin in violation of EU law. If there is a certain ‘spectrum of defiance’, Article 7(2) TEU only covers the absolute extremes of it.⁵⁴ What is required is the constitutional capture of the Member State institutions resulting in the paralysis of the liberal democracy and its institutions, thus making auto-corrections impossible, which allows to distinguish Poland and Hungary on the one hand and, on the other, France and Italy, where clear assaults on EU principles were present, but could be successfully dealt-with by the national system of institutions.⁵⁵ The failure of institutions in Hungary and Poland is thus a very particular case in point, representing an example of ideological defiance: a choice made by the government to reform the Member State organs (in the case of Poland in direct violation of the Constitution and the decisions of the Constitutional Court⁵⁶) in such a way in order to make wholehearted adherence to the values of Article 2 TEU impossible.

While naming and shaming could be a potent tool for change, shaming the Member States having chosen the path of systemic non-compliance, to be effective, needs to be backed by possible sanctions and might, as of itself, produce little effect on the ground. This is why, while the main outcome of a successful deployment of Article 7(2) TEU is the statement of the serious breach by the Member State concerned of the values of Article 2 TEU, the core significance of 7(2) procedure seems to lie in the fact that it opens the way to the triggering of 7(3) by the Council, thus making real sanctions possible, unlike 7(1). Besides. This being said, Member States in a serious and persistent breach of EU values, while they unquestionably remain full Member States of the Union, see the principle of mutual trust not applying to them in full, which is only logical. In one example, recital 10 of the European Arrest Warrant Framework Decision (EAW) states that the implementation of the mechanism of the EAW may be suspended when a state is found in breach of Article 2 values under Article 7(2) TEU.⁵⁷

Suspension of rights and revocation of sanctions (Procedure No. 3)

The third procedure in Article 7(3) TEU, which is about going beyond shaming resulting from the deployment of 7(1) and 7(2) and implies actual sanctioning of a Member State, is initiated by the Council and requires a reinforced QMV, since Article 354 TFEU makes a reference to the requirements of Article 238(3)(b) in this case, implying the support of at least 72% of participating Council Members comprising 65% of the Union population. This, again, with the representative of the Member State subjected to the procedure not taking part in the vote or affecting any counts towards the vote as per Article 354 TFEU. Yet, the procedural threshold is very high, since Article 7(3) TEU cannot be initiated without a successful deployment of Article 7(2) TFEU.

The provision is suitably vague to allow the Council to adapt the exact span of the sanctions as it sees fit with a view of maximizing the likelihood of compliance in the Member State concerned. While the provision speaks of the suspension of ‘certain rights deriving from the application of the Treaty’, it is clear that the sanctions meant to be invoked can be economic and non-economic in nature. Both access to EU funds and voting of the Member State in breach in the Council – just to give two examples, can

⁵³ Case C-380/05 *Centro Europa 7 S.r.l.* [2008] EU:C:2008:59. cf Mastroianni, ‘Media Pluralism in *Centro Europa 7 Srl*, or When Your Competitor Sets the Rules’, in Nicola and Davies (eds) *EU Law Stories* (Cambridge University Press, 2017).

⁵⁴ Jakab and Kochenov, ‘Introductory Remarks’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017), 3.

⁵⁵ Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’ (2015) 21 *European Law Journal* 141.

⁵⁶ *Konieczny*, ‘Of institutions, democracy, constitutional self-defence’ (2016) 53 *Common Market Law Review* 1753.

⁵⁷ Case C-404&659/15 PPU *Aranyosi and Căldăraru* [2016] EU:C:2016:198.

be affected. While the academic literature is sceptical about the effect of the sanctions, in the cases when a Member State is heavily reliant on EU funds and the prestige of the EU Institutions these could probably bring the desired effect, even though there is no successful example to cite here, since Article 7(3) TEU has never been invoked.

What is absolutely clear, vagueness notwithstanding, is that Article 7(3) does not authorise the exclusion of the Member State from the Union: the very issue of membership of the Union cannot be put in question.⁵⁸ Only Article 50 TEU guides leaving the Union.

Lifting the sanctions is very easy under Article 7(4) TEU: again, a simply QMV in Council without the participation of the violator state is required. Importantly, the same procedure applies to altering the substance of the sanctions in place, giving the Council sufficient flexibility to react to the changes on the ground in the Member State concerned.

Conclusion

The erroneous ‘nuclear option’ view held by the EU institutions and the Member States explains the attempts to solve the problems, which Article 7 TEU had been designed to address, via other means, i.e. by designing other mechanisms and approaches assuming that Article 7 TEU is unusable. All the institutions contributed their share to a troubling result that Article 7 TEU has, until the moment of writing, never been used, even in the most outrageous cases. A lot of ink has been spilled to design such possibly unnecessary alternative procedures, which undoubtedly undermined Article 7 by reinforcing the assumption that this provision cannot possibly achieve the goals it was designed to reach.⁵⁹

The Commission, instead of initiating Article 7 TEU, which it could do in the case of both Article 7(1) and 7(2) procedures designed and deployed (with a breach of the Mechanism’s own rules) the Rule of Law Mechanism (analysed above); the Council, instead of working with the other institutions on Article 7, promoted annual rule of law dialogue, based on the idea of peer review and unanimously deemed by scholars as unworkable;⁶⁰ the European Parliament, which could initiate Article 7(1) TEU prepared, instead, a detailed proposal on how to revamp the existing structure of guaranteeing the adherence to values.⁶¹ Select Member States, instead of initiating Article 7 TEU, as it takes 1/3 to launch Article 7(1) or 7(2), were busy writing letters to the Commission to ask it to do something:⁶² the requests, which ultimately resulted in the Rule of Law Mechanism, instead of initiating Article 7 TEU. As a result, both Hungarian and Polish autocrats received the benefit of years and years of time to entrench their regimes even further. Constantly failing to trigger Article 7 TEU the EU emerged as a paper tiger, absolutely incapable to enforce what it officially believes in.

Article 7 TEU is unique in that it established the procedures for stating the threat of a breach of EU values by a Member State, the existence of such breach, as well as a possible sanctioning mechanism to bring the recalcitrant Member States back to compliance, while not being confined by the general EU competence limitations. This commentary has briefly discussed all the sub-instruments and stages of

⁵⁸ Besselink, ‘The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives’, in Jakab and Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017) at 130.

⁵⁹ For a full list and a detailed analysis, see e.g. Bárd et al, ‘An EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights: Assessing the Need and Possibilities for the Establishment of an EU Scoreboard on Democracy, the Rule of Law and Fundamental Rights’, European Parliament Research Paper PE 579328 (Brussels, 2016).

⁶⁰ E.g. Oliver and Stefanelli, ‘Strengthening the Rule of Law in the EU: The Council’s Inaction’ (2016) 24 *Journal of Common Market Studies*.

⁶¹ e.g. European Parliament Report with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights [2016] (2015/2254(INL)).

⁶² E.g. the joint letter of four foreign ministers from Germany, the Netherlands, Denmark and Finland sent to the President of the Commission on 6 March 2013.

deployment of the provision in question and has demonstrated Article 7's eminent usability in the face of the claims by the Institutions to the contrary which are as baseless as they are persistent. The 'nuclear' myth, proclaiming Article 7 TEU to be 'unusable' clearly lacks connection with the observable legal reality. It is deployed by those in search of a valid pretext – however feeble – to exclude EU law from solving the Rule of Law crisis of the European Union, which is a most problematic way of interpreting and employing EU law. In the current situation where two Member States, Hungary, and Poland, have been proven by the Venice Commission and other eminent institutions and commentators to be working hard, day and night, to undermine the foundational values of the Union, the perpetuation the nuclear myths is not the way forward, sending one message: the EU is not disturbed by the dismantlement of its own value-foundations. The claims that EU law should not intervene are certainly irresponsible and, ultimately, possibly illegal.

Annex: Full text of Article 7 TEU

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.