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## Safeguards of EU Integration?

An Analysis of the Impact of Article 7 TEU and Article 50 TEU on the  
European Integration Project

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# Summary

There has been a surge in nationalism and populism in Europe. As these movements increasingly gain political influence in the Member States, the EU has been affected in several ways. This thesis will examine two of these instances: the alleged rule of law breaches in Poland and the probable future withdrawal of Britain from the EU. These situations are governed by Article 7 TEU and Article 50 TEU respectively, and their individual as well as mutual impact on the integration of the EU are therefore analysed. Are they capable of safeguarding the European integration project against national constitutional disruptions and populism?

A better understanding of the theoretical and constitutional framework that shapes the EU will enable an analysis of the Articles that takes their legal and political context into account.

The thesis begins with examining the constitutional foundation of the EU through its legal and political development. This shows that the integration project has expanded into covering not only its initial goal of economic integration through the internal market, but broader policy areas. For example, human rights are now entrenched in EU law through the enactment of the Charter<sup>1</sup> and Article 2 TEU establishes the fundamental values in the EU. In relation to this, the centrality of the rule of law to the functioning of the EU and its integration project must be underlined. Moreover, the political and legal orders are evaluated from the perspective of theories of intergovernmentalism and supranationalism in order to determine the structure of the European integration. This illustrates an EU with a mix of both intergovernmental and supranational aspects in its structure and operations.

It proceeds with an evaluation of the procedures under Article 7 TEU and Article 50 TEU. Article 7, which provides the EU with the power to sanction a Member State in breach of the fundamental values in Article 2 TEU, show two major weaknesses. The first is its high thresholds. The second is the constitutional nature of the act allegedly in breach as well as the fact that its scope is extended to cover situations where the Member State has acted within its exclusive competence. The complementary procedures adopted as pre-Article 7 mechanism are different due to opposing understandings of monitoring powers over Member States. This backwards development shows an increased focus on intergovernmental governance in the EU. Article 50, which allows for the unilateral withdrawal of a Member State from the EU, further underlines this. However, after an examination of its terms in respect of the negotiations and subsequent withdrawal agreement, it appears to be shaped to the EU's advantage. It can therefore be concluded that it incorporates supranational and federal aspects in its structure and operations.

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<sup>1</sup> Charter of Fundamental Rights of the European Union

Furthermore, the thesis shows that these Articles, and their effects, are inter-linked to a certain extent. This is due to their impact on the power relation between the Member States and the EU in terms of national sovereignty and the conferral of competences.

Lastly, it is analysed whether Article 7 TEU and Article 50 TEU can safeguard the European integration. Article 7 TEU, although theoretically equipped with tools to safeguard compliance with the fundamental values in Article 2 TEU, these are not effectively utilised because of the intergovernmental and political aspects of its structure. This is problematic, as compliance with the fundamental values in Article 2 TEU are essential to uphold the functioning of the EU. However, it is equally important that the Member States remain in the EU. Although providing for the unilateral withdrawal from the EU, Article 50 TEU has proven to be more than a purely intergovernmental tool for disintegration. Firstly, it is supranational in its operations. Secondly, it can further integration through allowing a let-out for Member States that do not want to cooperate. Combined, these aspects show the inefficiency of increased intergovernmental governance and the importance of an open discussion of the constitutional basis on which the European integration should be carried forward.

# Sammanfattning

På senare år har såväl nationalismen som populismen varit på framväxt i Europa. Dessa rörelser har kommit att få ett allt större politiskt inflytande i EU:s medlemsstater, med en påverkan på EU som institution som följd. I denna uppsats undersöks två av de sätt på vilka EU har påverkats av de politiska strömningarna i Europa: de påstådda brotten mot rättsstaten i Polen samt Storbritanniens potentiella utträde ur EU. Dessa situationer regleras av artikel 7 FEU respektive artikel 50 FEU. I uppsatsen analyseras därför nämnda artiklars individuella, gemensamma och ömsesidiga påverkan på integrationen inom EU. Utgör artiklarna ett tillräckligt skydd för det europeiska integrationsprojektet mot nationell konstitutionell populism?

För att analysera bestämmelserna utifrån såväl deras rättsliga som deras politiska kontext krävs en bättre förståelse för det teoretiska och konstitutionella ramverk som formar EU.

Uppsatsen inleds med en undersökning av EU:s konstitutionella grund, varvid hänsyn tas både till dess rättsliga och politiska utveckling. Av undersökningen framgår att integrationsprojektet har expanderat; från att ursprungligen ha haft som målsättning att uppnå ekonomisk integration genom den inre marknaden omfattar det numera flera olika politiska områden. Till exempel är de mänskliga rättigheterna förankrade i EU:s lagstiftning sedan antagandet av Rättighetsstadgan och genom artikel 2 FEU fastslås även de grundläggande värdena inom EU. I samband härmed understryks hur centralt rättsstatsbegreppet är för att EU och dess integrationsprojekt ska fungera. För att vidare kunna fastställa hur den europeiska integrationen ser ut, utvärderas de politiska och rättsliga ordningarna utifrån teorierna om mellanstatlighet och överstatlighet. Vid en sådan utvärdering blir det tydligt att EU:s struktur och verksamhet genomsyras av både mellanstatliga och överstatliga element.

Uppsatsen fortsätter därefter med en utvärdering av förfarandena enligt artikel 7 FEU och artikel 50 FEU. Artikel 7 FEU, som ger EU befogenheten att införa sanktioner mot medlemsstater som bryter mot de fundamentala värdena som stadgas i artikel 2 FEU, brister i två viktiga avseenden. Det första är artikelns höga tröskel. Det andra är den konstitutionella karaktären av den lag som påstås stå i strid med artikeln, liksom det faktum att artikelns räckvidd är utsträckt till att omfatta situationer där medlemsstaten har agerat inom sin exklusiva kompetens. Beroende på att det finns olika uppfattningar om vilka kontrollbefogenheter EU har över sina medlemsstater har olika förberedande artikel 7-förfaranden tagits fram. Denna utveckling visar ett ökat fokus på mellanstatlig styrning inom EU. Artikel 50 FEU, som låter medlemsstater ensidigt utträda ur EU, understryker detta ytterligare. Vid en undersökning av artikel 50 och vad densamma föreskriver om förhandling och avtal om utträde ur EU, förefaller artikeln emellertid vara utformad till EU:s fördel. Sett till sin struktur och sin funktion kan artikel 50 därför sägas innehålla både överstatliga och federala element.

Dessutom framgår det av uppsatsen att dessa artiklar och deras effekter är sammanlänkade i viss utsträckning. Detta beror på att de påverkar maktrelationen mellan medlemsstaterna och EU vad avser nationell suveränitet och delegeringen av befogenheter.

Uppsatsen avslutas med en analys som undersöker om artikel 7 FEU och artikel 50 FEU kan skydda den europeiska integrationen. Även om artikel 7 FEU teoretiskt är utrustad med verktyg för att säkerställa efterlevnaden av de grundläggande värdena i artikel 2 FEU, utnyttjas inte verktygen effektivt på grund av mellanstatliga och politiska aspekter och strukturer. Detta är problematiskt, eftersom efterlevnaden av de fundamentala värdena i artikel 2 FEU är avgörande för att upprätthålla EU:s funktion. Det är emellertid likaledes av betydelse att medlemsstaterna förblir en del av unionen. Även om artikel 50 FEU föreskriver ett ensidigt utträde ur EU har artikeln också visat sig vara mer än ett rent mellanstatligt verktyg för desintegration. För det första är den överstatlig till sin karaktär. För det andra kan den främja integrationen genom att tillåta medlemsstater som inte vill samarbeta att lämna unionen. Tillsammans visar dessa aspekter på ineffektiviteten av ökad mellanstatlig styrning och vikten av en öppen diskussion om det konstitutionella fundament som ska ligga till grund för den vidare europeiska integrationen.

# Preface

Först och främst vill jag tacka mina vänner, både de som lämnat Lund och de som är kvar. Utan er hade tiden här inte varit lika bra! Jag vill också särskilt tacka min familj som känner mig allra bäst och alltid kommer med goda råd i de brådaste av tider. Tack även till min handledare Xavier Groussot för all inspiration och vägledning. Nina, Tilda, Matilda, Fanny och Agneta, tack för att ni fanns där in i det sista och hjälpte mig att simma förhållandevis lugnt in i kaklet.

Som så många gånger tidigare blir allt lite finare när man lämnar det bakom sig: Lund, jag kommer alltid att minnas dig med glädje och värme även om du kunde vara lite påfrestande ibland.

Moa Arvidsson  
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# Abbreviations

CJEU	Court of Justice of the European Union
EU	European Union
ItL	Integration through Law
MEP	Member of Parliament
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

# 1 Introduction

## 1.1 Background

Europe is currently facing a nationalist and populist surge that threatens the principles at the very core of the European Union (EU).<sup>2</sup> There are increasing numbers of rule of law crises among the governing powers and the consequences of Brexit have yet to play out its role. This is, however, not a new phenomenon. In fact, the EU was created as an attempt to deflate the negative implications of excessive nationalism.<sup>3</sup> This new-old populism claims to free national democracy from EU's bureaucracy and tends to align with authoritarian interpretations of national sovereignty.<sup>4</sup> How do we reinforce the basis of the European integration project despite national constitutional disruptions?

Two articles become particularly relevant in relation to this. The first is Article 7 TEU, a mechanism which, at its most severe, allows for the suspension of voting rights in case of a serious and persistent breach violations of the fundamental values in Article 2 TEU by a Member State. The second is Article 50 TEU, which lays down the procedure for Member State withdrawal from the EU.

Both Article 7 TEU and Article 50 TEU are inherently connected to the EU's integration project. Firstly, the fundamental values laid down in Article 2 TEU establishes a homogeneity among the Member States. This communality of values enables the creation, and subsequently also protection, of a European identity. Secondly, the voluntary nature of the cooperation within the EU has a great impact on the integration project. In fact, the form of cooperation is what defines the integration project, and can be theorised in terms of intergovernmentalism and supranationalism. Its impact is, however, not as straightforward as the importance of compliance with the established fundamental values. Whilst it is essential that the EU is comprised of Member States that want to continue the integration project, the existence of the EU is conditional on their continued membership.

Although these Articles relate to the constitutional foundation of the EU, they seem to pull at different directions. Whereas Article 7 TEU means to protect and promote the fundamental values of the EU, Article 50 TEU presents the opportunity of unilateral withdrawal from the same. Hence, it is not a stretch to define them in terms of symbols of integration and disintegration. However, a closer examination of the two Articles will call this perception into question.

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<sup>2</sup> Bugaric, *The End of the European Union as We Know It*.

<sup>3</sup> Craig/de Burca (2015), p. 2

<sup>4</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity*, p. 3.

## 1.2 Purpose and research questions

The purpose of this thesis is to analyse whether Articles 7 TEU and 50 TEU can safeguard the European integration project based on their mutual impact. A better understanding of the theoretical and constitutional framework that shapes the EU will enable an analysis of the Articles that takes their legal and political context into account.

### *1. What conception of the EU integration project do I find convincing?*

It is essential to understand the constitutional foundation of the EU as it forms the basis of the integration project. How has the European integration developed and how can the EU be conceptualised today? This will further explore the tensions between national sovereignty and the conferral of competences, as well as aspects of the legal and political interplay.

### *2. What are the intentions and implications of Article 7 and Article 50 in relation to the integration project?*

More precisely, what criteria do they constitute of, which actor has power with regards to them and how do they practically affect integration? To what extent have they been applied yet and what are the practical problems with their application? This allows for a better understanding of their respective constitutional foundation which, in turn, provides the framework for an analysis of their abilities and limitations.

### *3. Is there a nexus between them?*

The analysis of the two Articles will be complemented by an evaluation of how they interrelate to get a fuller analysis of their combined effect on the integration project. This will further be divided into three sub-questions. Namely, do they hinder each other, do they mutually reinforce each other and is there a core they protect together?

## 1.3 Methodology and structure

This thesis analyses the European legal and political system through combining normative reflection and empirical analysis, as both norms and facts are essential parts of social and political reality.<sup>5</sup>

The thesis will therefore apply a descriptive and evaluative legal method. Descriptive research tries to establish what the law is and aims to merely describe the characteristics of the legal provisions. This will be done through a textual and theoretical interpretation of Article 7 TEU and Article 50 TEU. In contrast, an evaluative research examines the effect of legal provisions and

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<sup>5</sup> Neyer (2012), p. 27.

whether they are in line with certain desirable goals.<sup>6</sup> This enables a discussion about whether Articles accomplish what they set out to do. The thesis will also apply an interdisciplinary method to take constitutional theories into account. Article 7 TEU and Article 50 TEU, as well as their correlative impacts, will be critically assessed through analytical and political legal reasoning.<sup>7</sup>

Consequently, the structure consists of two parts. The first part describes the constitutional foundation of the EU. The second part presents the two Articles and examines what type of constitutional theory they represent. The concluding chapter will analyse them in light of their respective constitutional theory and their subsequent, individual as well as mutual, impact on the integration against the findings in the previous chapters.

In understanding how and to what extent Article 7 TEU and Article 50 TEU could safeguard the integration of the EU, it first needs to be clarified what type of integration it is meant to protect. The second chapter will therefore examine the integration project in the EU. It begins with a brief introduction to the legal and political development of the European integration and illustrates its progressive adaptation and transformation. It then proceeds to evaluate and define the constitutional foundation of the EU through an analysis of its legal and political orders, based on the theoretical concepts of intergovernmentalism and supranationalism.

The constitutional chapter facilitates the evaluation of Article 7 TEU and Article 50 TEU in the third and fourth chapters. A better understanding of their respective constitutional components enables a more informed analysis of their abilities as well as limitations in the context of the European integration. Both chapters will begin with a description of their substantive and procedural conditions and, with regards to Article 7 TEU, complementary mechanisms. They proceed with a summary of the current events related to both Articles and, lastly, a legal reflection on their interpretations as well as practical effects on the integration project.

The last, and fifth, chapter draws on the evaluation and analysis in the previous chapters and presents conclusions to the given research questions.

## 1.4 Delimitations

To decipher what constitutional theories best describe the EU polity of today, this thesis will be delimited to intergovernmentalism and supranationalism as they connect to notions of national sovereignty and central governance, which, in turn, are essential to both Article 7 TEU and Article 50 TEU.

As this thesis attempts to reach a better understanding of the EU integration project through analysing its relation to governance, it will not expand on the

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<sup>6</sup> Jovanović, *Legal Methodology & Legal Research and Writing*.

<sup>7</sup> Sandgren (2015), p. 48.

theories of integration as such. Namely, the different explanatory models of how the EU furthers the integration project through increasing its areas of competence.

Although important, the contemporary populism behind the forces that make Article 7 TEU and Article 50 TEU relevant will not be explored further, as that would fall outside of the legal scope of this thesis. It follows from this that a deeper analysis of what the Member States have against closer integration must also be exempted. For example, such opposition might go beyond the established theories and rather spring from notions of (a lack of) influence in a hierarchal structure. Furthermore, the many interesting alternatives and modifications to Article 7 TEU or Article 50 TEU will not be included, since it would render the topic too broad. Lastly, the thesis will, for the same reasons, as far as possible not touch on any other related legal provisions.

# 2 Constitutional foundation of the EU

## 2.1 The legal and political development of European Integration

What kind of political animal is the EU? Can we identify certain elements that are fixed over time and that define its identity? Some argue that the EU is a moving target that is continually changing and adapting to new challenges and Member State preferences, others claim to have identified some basic structures that have prevailed throughout the integration project.<sup>8</sup>

From the very beginning, the aim of the EU has been to facilitate the conditions necessary for the European nation-states to function together in interdependence. Its core structure is therefore comprised of both vertical legal integration and horizontal political integration.<sup>9</sup> Although the furthering of the integration process has been referred to as a political inevitability, it seems like it has come to a halt. How does the EU handle this issue?<sup>10</sup>

The Treaty of Rome came into force on January 1, 1958, establishing the European Economic Community (EEC). The first recital stated the goal of ‘an ever closer union among the peoples of Europe’<sup>11</sup> and permanent institutions were given centralised power in a structure that differed significantly from the traditional body of intergovernmental cooperation. In this new structure, the Commission took the role as the central executive and administrative authority<sup>12</sup> and the Member States yielded significant sovereign powers to the central institutions and thus ‘created a Community of unlimited duration’.<sup>13</sup>

The ‘Integration through Law’ (ItL) School developed in the mid-1980s and is one of the most influential theories of European integration. It viewed the integration of the EU as both *of* and *through* law, creating a mutual condition for the legal and political structure where law is a product of the polity and the polity is a product of the law. Focusing on a broad normative vision of convergence with an aim to create a European identity, it used positive law to integrate modern societies in areas of politics, economics, and culture. However, it also reflected on the implications of this dual integration. For example, the states that signed the Treaty of Rome agreed on a set of common rules for

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<sup>8</sup> Neyer (2012), p. 36.

<sup>9</sup> Neyer (2012), p. 5.

<sup>10</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity* p. 1.

<sup>11</sup> Now Article 1 TEU

<sup>12</sup> Craig/de Burca (2015), p. 5.

<sup>13</sup> Judgment of 15 July 1964, *Costa v ENEL*, C-6/64

intergovernmental cooperation motivated by their self-interest did not necessarily know that it would lead to the creation of an autonomous European legal order.<sup>14</sup>

The creation of a common market drove the early integration process. Seen as both an end and a means to reach political stability, the common market meant to revive Europe's post-war economy as well as control political power through economic interdependence. Subsequently, the European Court of Justice (ECJ) laid the foundation of a supranational legal order by establishing the principles of supremacy and direct effect which challenged the traditional division between constitutional and international law. However, resistance to surrender more national sovereignty and constitutional rights stalled further integration efforts until the Maastricht Treaty came into force in 1993. With it, the EU received more state-like features and legal integration and human rights were judicially recognised as general principles of Community law. This was later politically endorsed through the adoption of the EU Charter of Fundamental rights. The Maastricht Treaty also increased the EU's democratic legitimacy by enhancing the European Parliament's powers and introducing a European citizenship. Furthermore, the introduction of the principle of subsidiarity strengthened the rule of law by restricting the EU's competence creep in relation to the Member States. These institutional reforms both enhanced the political legitimacy of the EU and limited the impacts of EU integration on Member States' legal and political systems.<sup>15</sup>

These functional spill-overs into policy domains beyond the internal market has enabled the EU to increase its regulatory power over domestic politics.<sup>16</sup> Today, it has an expanding authority over environmental politics, foreign and security policy, domestic policy, and judicial politics. This level of coordinated governance clearly limits the national autonomy of the Member States to an extent that has never been possible before.<sup>17</sup> The territorial expansion of EU, however, posed new challenges to the integration process in respect of solidarity and social cohesion among the European people.<sup>18</sup> Furthermore, the aim to enhance the political legitimacy of the EU sparked a discussion about the end-point of the integration process and the constitutional fate of the EU. Should the existing EU supranationalism be reduced to an intergovernmental cooperation in a confederation or should it rather be expanded into a federal state? In 2004, the Draft Constitutional Treaty for the European Union was signed. Although endorsed by all governments, it also had to be ratified by all Member States to enter into force. As the Treaty failed to gain support by the French and Dutch people in national referendums, it was consequently rejected. Nonetheless, many provisions suggested in the Draft Treaty were incorporated into EU law through the Lisbon Treaty in 2009.<sup>19</sup>

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<sup>14</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity*, p. 1.

<sup>15</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity*, p. 1-2.

<sup>16</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity*, p. 2.

<sup>17</sup> Neyer (2012), p. 12.

<sup>18</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity*, p. 2.

<sup>19</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity*, p. 2-3.

Parallel to this, signs of legal disintegration have accompanied the development of the EU. Firstly, the creation of the Eurozone through the implementation of a ‘differentiated integration’ divided the unitary space EU law intended to integrate. Secondly, the heterarchy of the constitutional landscape and the conflicts of authority between the EU and the Member States opened up for the notion of constitutional pluralism.<sup>20</sup> This resulted in competing national conceptions in the EU legal order which, thirdly, led to constitutional conflicts that paved the way for softer modes of legal integration with flexible standards and negotiable goals.<sup>21</sup>

The EU can be described as the most developed region in terms of denationalisation, political internationalisation and economic de-bordering. It follows that it is inextricably linked to global processes and cannot be isolated from comparison to other international organisations. Common norms of, inter alia, the respect for national sovereignty, the rule of law and human rights help the Member States to administrate their interdependence and to establish a collective problem-solving capacity based on political cooperation. From this perspective, the EU is an extension of state governance built on norms that, today, are accepted as law.<sup>22</sup> It therefore follows that, in this global society, regular exercise of state power requires representation in international organisations and compliance with binding international legal norms. The de-bordering of economics has, further, created a global market that prevents a single nation-state to independently manage its economy. The contemporary political context can therefore be described as a post-national constellation, and the EU embodies this process through a unified common market with open borders for goods, services, capital and citizens.<sup>23</sup>

On another level, the integration project has replaced nationalist infused interstate violence with the rule of law and economic, legal and political interdependence. War among the Member States is no longer a political option and collective policy-making as well as cross-border political action is based on a mode of arguing and bargaining. The EU is thus built on constitutional tolerance and the inclusion of the other. It follows that the transition from sovereign nation-states to Member States does not come without legal obligations, as the governments are accountable for the external effects of their actions. The EU therefore not merely extends governance through economic liberalisation, but also extends legitimacy beyond the borders.<sup>24</sup>

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<sup>20</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity*, p. 3 with reference to Avbelj and Komárek (2012).

<sup>21</sup> Augenstein, *A Homeless Ghost? European Legal Integration in Search of a Polity*, p. 2.

<sup>22</sup> Neyer (2012), 10.

<sup>23</sup> Neyer (2012), p. 11.

<sup>24</sup> Neyer (2012), p. 5.



## 2.2 Article 2 TEU and the centrality of the rule of law

The European Union is founded on values laid down in Article 2 of the Treaty on the European Union (TEU). Incorporated through the Treaty of Lisbon, they replaced the less extensive principles contained in the previous Treaties. It establishes that:

*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.*

Nonetheless, it has always been clear that the European integration project would be based on common values that upholds and furthers a homogeneity among the Member States. While entrenching democratic values in the EU, they also promote the development of a European identity and facilitates the integration towards a political, and not just ‘market’, Union.<sup>25</sup> As the values consist of principles that stem from Member States common constitutional traditions, it follows that the EU is founded on the shared constitutional values of the Member States.<sup>26</sup> A strict separation of those is therefore not possible. Instead, they create a common, European constitutional identity. While creating an inextricable link between the EU and the Member State orders, the foundational values are particularly central to the former as they constitute the prerequisites for EU membership. This means that a threat to the fundamental values in Article 2 at the national level would, consequently, also constitute a substantial threat to the values at the EU level.<sup>27</sup> However, this has wider implications than isolated instances of mere violations of those values. As has been noted by the Commission, a shared confidence in the different legal systems of the Member States is vital for the functioning of the EU. To maintain its legitimacy and credibility, the EU must therefore be able to uphold and protect the fundamental values in Article 2 TEU.<sup>28</sup>

The open-ended nature of the values in Article 2 TEU means, however, that it lacks justiciability. Consequently, legal proceedings cannot be brought against a Member State on the sole legal basis of a fundamental value. Nonetheless, Article 2 TEU is more than a mere political declaration. For example, the Treaties state that the Member States as well as the EU institutions should respect and promote them. It is also wrong to conclude that they would not be legal principles or that they lack legal effect. The rule of law, for example,

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<sup>25</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 2.

<sup>26</sup> Radjenovic, *At a Glance: EU mechanisms on democracy, the rule of law and human rights*.

<sup>27</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*.

<sup>28</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 521.

is a fundamental principle that underlies the EU legal order and from which the ECJ has derived directly actionable legal principles. It also guides the interpretation of other norms.<sup>29</sup>

Furthermore, the protection afforded to these values are two-folded. Compliance with Article 2 TEU forms part of the accession criteria needed for EU membership, and its values must be observed and promoted following accession. Article 7 TEU provides the possibility to sanction a Member State that breaches those values through suspending certain rights. However, it is important to also reflect on the position of the national constitutional identities in relation to the fundamental values. Article 4(2) TEU establishes that the EU must respect the national identities of the Member States and sets out a vision of an EU that, founded on the fundamental values, preserves the constitutional diversity of the Member States. Even if the common values represent a limit to the diversity of the Member State constitutional identities, it is a limit the Member States have agreed to. In turn, it enables them to have mutual trust in their respective legal systems for which compliance with the rule of law is essential.<sup>30</sup>

Consequently, the rule of law is particularly important in the EU. Pech has identified a series of shared traits in relation to the role of the rule of law as a fundamental EU value as reflected in the constitutional systems of the Member States. For example, the rule of law has never been precisely and exhaustively defined. However, in the most influential legal traditions in Europe has construed it to include the independent and effective judiciary with a power of judicial review, as well as subjecting public power to formal and substantive constraints to guarantee protection of the individual against arbitrary or unlawful use of public power. Further, all the national systems apply a dynamic understanding of the rule of law. This means that there are practical differences between Member States as to how compliance with the rule of law is established.<sup>31</sup> However, Pech rejects the view that the EU rule of law must be defined and applied in strict conformity with the national understandings of the principle, but that it merely models itself on the national concepts.<sup>32</sup>

To conclude, it follows that compliance with the rule of law is not merely a prerequisite for the protection of all fundamental values listed in Article 2 TEU, but vital for the well-functioning of the entire EU system.<sup>33</sup> The EU is, therefore, dependent on the implementation and observance of the rule of law at national level in all Member States.<sup>34</sup>

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<sup>29</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 519-520.

<sup>30</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 2-3.

<sup>31</sup> Pech, *The Rule of Law as a Constitutional Principle of the European Union*, p. 70.

<sup>32</sup> Pech, *The Rule of Law as a Constitutional Principle of the European Union*, p. 71.

<sup>33</sup> European Commission, *A new EU Framework to strengthen the Rule of Law*, p. 4-5.

<sup>34</sup> European Commission, *A new EU Framework to strengthen the Rule of Law*, p. 2.

## 2.3 Between Intergovernmentalism and Supranationalism

The question of what type of entity the EU is has commonly been discussed in terms of an intergovernmentalism and supranationalism. Whilst intergovernmental governance entails a structure where all critical decisions must be agreed on by all members, the supranational form represents more of an independent and central governance that stand above the national governments. Rather than belonging to one or the other, however, the EU contains a mix of intergovernmental and supranational features.<sup>35</sup>

Member States, however, seem to be dissatisfied with both intergovernmentalism and supranationalism. This is, generally, based on a belief that an increased intergovernmental cooperation limits effectiveness as it lacks mechanisms to ensure compliance, whereas a federal solution would threaten their constitutional character national sovereignty.<sup>36</sup> In relation to this, Weiler has described the EU as being led by two competing visions that both address the inherent problems of the interaction between the modern nation-state and the traditional state based on full sovereignty, autonomy, independence, and protectionism. The unity vision represents close integration of economic policies and ultimately a full political union in the place of the former nation-states. Conversely, the community vision strives for a political union where the Member States and the EU can continue to cooperate and co-exist through an ever-increasing integration. It does not mean a negation of the state but, instead, a shared sovereignty in certain fields and the interdependence of nation-states with overlapping constitutional values and ambitions.<sup>37</sup>

### 2.3.1 The EU political order

A better understanding of the framework the EU functions within will allow a more informed discussion on its current role, where it is heading and what legal tools it can avail itself of in achieving this. Like any government or intergovernmental organisation, the EU polity is comprised of several institutions. An examination of their operation and structures and whether they are largely supranational or intergovernmental is therefore important.<sup>38</sup>

#### 2.3.1.1 The EU as an Intergovernmental Organisation

Proponents of an intergovernmental EU want the Member States to collaborate on a voluntary level to achieve common goals without forsaking their

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<sup>35</sup> Sieberson, *Inching towards supranationalism*, p. 923.

<sup>36</sup> Miles, *Domestic influences on Nordic security and defence policy: from the perspective of fusion*, p. 86.

<sup>37</sup> Kukovec, Damjan: *Brexit – a Tragic Continuity of Europe’s Daily Operation*, *VerfBlog*, 2016/10/07, with reference to Weiler, *Federalism and Constitutionalism: Europe’s Sonderweg* (1991), p. 13.

<sup>38</sup> Goebel, *Supranational? Federal? Intergovernmental? The Government Structure of the European Union after the Treaty of Lisbon*, p. 81.

sovereign and autonomous powers to legislate, set policies and make decisions.<sup>39</sup>

The EU was founded on treaties and continues to exist by virtue of succeeding treaties, like all international organisations (IGOs). Similar to an IGO, the EU can add new Member States, suspend the voting rights of those in breach of its core principles, and provides Member State with the possibility of withdrawal. Member States also have the ability to opt out of certain key programs, as has been shown in the areas of the common currency and the Schengen arrangements.<sup>40</sup>

The European Council and the Council (of Ministers) represent the intergovernmental position among the EU institutions. Accordingly, they pursue a loose form of international cooperation towards EU integration.<sup>41</sup> Whereas they remain intergovernmental in structure, both have become increasingly supranational in their operations.<sup>42</sup>

Directly representing Member State governments, the Council had a clear intergovernmental nature in EU's early history. A requirement of unanimity or general consensus-seeking for action was, however, progressively shifted towards a system of qualified majority voting that enables the stronger Member States to increase their influence at the expense of the weaker Member States.<sup>43</sup> Although it is true that the Council ministers and the President of the Council reflect the views and interests of their respective government, the Council as a whole will strive for market integration and the enactment of common EU rules. It is therefore more accurate to describe the Council as intergovernmental in structure but both intergovernmental and supranational in its mode of operation.<sup>44</sup>

The European Council is composed by the Prime Ministers of the Member States and it has illustrated the core of the EU's intergovernmental nature since 1969. The requirement of unanimous voting, the need for consensus in decision-making and the fact that all Member States must accept a treaty amendment all demonstrates an intergovernmental structure.<sup>45</sup> However, the office of President of the European Council created by the Lisbon Treaty challenges this perception. The President is elected by a qualified majority vote and has the potential to hold office for up to five years. The responsibilities that comes with chairing the European Council include promoting the development of policies and signals a gradual shift towards a supranational approach in its operations.<sup>46</sup>

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<sup>39</sup> Ibid, p. 82.

<sup>40</sup> Sieberson, *Inching towards supranationalism?* p. 924.

<sup>41</sup> Goebel, *Supranational? Federal? Intergovernmental? The Government Structure of the European Union after the Treaty of Lisbon*, p. 98.

<sup>42</sup> Ibid, p. 141.

<sup>43</sup> Ibid, p. 79.

<sup>44</sup> Ibid, p. 109.

<sup>45</sup> Sieberson, *Inching towards supranationalism?* p. 924.

<sup>46</sup> Goebel, *Supranational? Federal? Intergovernmental? The Government Structure of the European Union after the Treaty of Lisbon* p. 141.

More than describing the creation of the EU as intergovernmental, it is claimed by some that the EU should also continue in the form of an IGO to protect Member State sovereignty. There are, however, clear signs of the fact that the EU has moved beyond its origins as an intergovernmental organisation.<sup>47</sup>

### **2.3.1.2 The EU as a Supranational Federal Entity**

A supranational system combines a unified legal order with a pluralistic political order. States retain their monopoly of coercion whilst yielding to the supremacy of supranational law. It has been described as a model that respects the legitimacy of the state at the same time as it ‘clarifies and sanctions the commitments arising from its interdependence with equally democratically legitimized states and with the supranational prerogatives that an institutionalization of this interdependence requires’. This allows the states to keep their political sovereignty while applying common legal norms as voluntary members rather than subordinates to a superior power.<sup>48</sup>

Legal norms in a supranational system apply directly to individuals and their application is not dependent on domestic implementation. In addition, they have general precedence over domestic norms in a case of conflict and transfer rights and obligations independently from domestic legislation. They are, moreover, enforced on supranational level and not by domestic authority.<sup>49</sup>

Proponents of a supranational EU see it as representing a centralised and institutional structure with numerous characteristics that resemble a national government, despite its intergovernmental roots. These include its permanent nature, legal personality and capacity, privileges and immunities. Its legislative, executive and judicial institutions are similar to those found in national governments and it has its own budgetary resources. In addition, many of its legislative decisions are taken by a majority vote. As these features exist independently from their corresponding versions in the Member State governments, they can be described as constituting supranational elements in a federal system. This is further strengthened by the fact that the EU law has primacy over Member State law.<sup>50</sup>

Article 17(1) in the Lisbon Treaty sets out the role of the Commission within the EU. It establishes that the Commission ‘shall promote the general interest of the Union’, thereby emphasising the fact that the Commission serves the EU and not the specific interests of the Member States. It is composed of one Commissioner designated from every Member State and, additionally, supported by a large body of officials. Even though this could have created an intergovernmental structure where each Commissioner would represent his or her government, Article 17(3) refutes this by declaring that the members of the Commission must be completely independent in the performance of their

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<sup>47</sup> Sieberson, *Inching towards supranationalism?* p. 925.

<sup>48</sup> Neyer (2012), p. 39.

<sup>49</sup> Neyer (2012), p. 40.

<sup>50</sup> Sieberson, *Inching towards supranationalism?* p. 926.

duties.<sup>51</sup> As it is the central administration for the EU and has more executive power than any other institution, it follows that the Commission is predominantly supranational in both structure and role. Through its continuous strive for political and economic integration, the Commission is commonly described as the leading actor in promoting the goal of an ‘ever closer union among the peoples of Europe’.<sup>52</sup>

Even though the Commission established its supranational nature pursuing unification and integration of policy from the start of the EEC, the lack of a democratic component was evident. Instead of a popularly elected Parliament, there was only an advisory Assembly composed of delegations from Member State parliaments. The name was soon changed to the European Parliament, however, and in 1974 it was decided that voters in each Member State would elect the Members of Parliament (MEP) directly.<sup>53</sup> Article 10 TEU stresses the importance of this democratic representation of the citizens of the EU. However, the MEPs are not allocated in strict accordance with Member State population. Contrary to proportionate democratic representation, therefore, smaller States often have more MEPs than warranted whereas those with bigger populations are underrepresented. This is further endorsed by Article 14(2) TEU which sets Member State representation to a maximum of 96 MEPs and a minimum of 6. Former Court of Justice Judge Manfred Zuleeg justifies this deviation from strict equality through underlining the fact that such a derogation might be necessary in order to grant a certain level of independence and protection to the smaller Member States.<sup>54</sup> Three aspects of this structure enhances the Parliament’s supranational character. The first is the fact that the elected MEPs form EU-wide political groups. Professor Desmond Dinan<sup>55</sup> notes that, rather than representing the opinion of their respective government the MEPs position on policy issues regularly follow the position taken by the affiliated political groups on EU level.<sup>56</sup> The second is the capacity and role of its President, elected by the Parliament, to exert considerable influence over the operations as well as act as the formal representative. The third is the functional role of the Parliament committees and their responsibility over an important EU field. More than review draft legislations, they also supervise the operations of other EU bodies and investigate allegations of serious violations.<sup>57</sup>

The Parliament can also be defined as supranational or federal in relation to its operational roles and constitutional powers. For example, it shares the power to adopt legislation with the Council, influences the appointment of Commissioners and the Commission President, supervises the Commission and is entrusted with the power to veto an accession of new Member States

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<sup>51</sup> Goebel, *Supranational? Federal? Intergovernmental? The Government Structure of the European Union after the Treaty of Lisbon*, p. 87.

<sup>52</sup> *Ibid*, p. 98.

<sup>53</sup> *Ibid*, p. 110.

<sup>54</sup> *Ibid*, p. 111.

<sup>55</sup> Desmond, *Ever Closer Union: An Introduction to European Integration* p. 252.

<sup>56</sup> Goebel, *Supranational? Federal? Intergovernmental? The Government Structure of the European Union after the Treaty of Lisbon*, p. 113.

<sup>57</sup> *Ibid*, p. 113-114.

or Treaty amendments.<sup>58</sup> It should be emphasised that the democratic deficit in the adoption of legislation is significantly reduced by the fact that the Parliament share the legislative process with the Council. The increased influence of an institution directly representing the people in a process previously controlled by an institution representing the governments manifestly strengthens the supranational and federal features of the EU.<sup>59</sup>

This supranational understanding of the EU does, however, not mean that a central government should possess unlimited powers and replace the identities of the former nation-states. Such a development would ignore realities in Europe and a successful integration must, instead, be based on a division of sovereignty between the EU and the Member States.<sup>60</sup>

### 2.3.2 The EU legal order

As explained above, the primary goal of the EU was to enable peace among the European states in the form of an antidote to the negative implications of nationalism and nation-states. Instead of creating a governance based on power and strength, the EU based its governance on self-limitation and have been described as constituting a *sui generis* legal order that takes account of the interests of others.<sup>61</sup>

This new EU legal order is divided into primary and secondary law, as well as judge made law from the CJEU. The treaties are the core of the primary legislation and the basis for all EU action. Secondary legislation is derived from the principles and objectives set out in the treaties and include regulations, directives, decisions, recommendations and opinion. Some of these legislative acts are binding, others are not. They all, however, aim to achieve the goal set out in the EU treaties.<sup>62</sup> As the EU is based on the rule of law, every action is founded on the treaties which, in turn, have been accepted by all EU member states voluntary and democratically. EU law confers rights and obligations on the authorities, individuals and businesses in each member state. The authorities are responsible for implementing and enforcing EU legislation correctly in national law, whilst ensuring citizens' rights under these laws.<sup>63</sup>

The three most prominent features of EU law are the principles on primacy, subsidiarity and direct effect. They are created in decisions from the CJEU and significantly affect the nature of the EU legal order as well as the EU as such.

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<sup>58</sup> Ibid, p. 123.

<sup>59</sup> Ibid, p. 117.

<sup>60</sup> Sieberson, *Inching towards supranationalism?*, p. 929 with reference to Fischer, *From Confederacy to Federation – Thoughts on the Finality of European Integration*, Speech at the Humboldt University in Berlin (May 12, 2000).

<sup>61</sup> Kukovec, *Brexit – a Tragic Continuity of Europe's Daily Operation*.

<sup>62</sup> European Union, *Regulation, Directives and other acts*.

<sup>63</sup> European Union, *EU Treaties*.

The principle of primacy of EU law over Member State law was established by the ECJ in the case *Costa*<sup>64</sup>. Following a line of previous teleological interpretations of EU Treaty law, the Court decided that that EU law must have primacy over Member State law if it is to be effective. Subsequent decisions clarified its nature and extended it to a duty to set aside provisions in national law that are incompatible with EU law, as well as to interpret and apply national law in a way that avoids conflict with EU law as far as possible.<sup>65</sup> Today, the supremacy of EU law over the law of the Member States is further entrenched through a declaration in the Lisbon Treaty.<sup>66</sup>

Primacy of EU law does, however, not mean unconditional supremacy. This is shown firstly through the fact that EU law only has primacy when it complies with the principles of subsidiarity, proportionality and respect for the Member States constitutional identities.<sup>67</sup> Secondly, primacy of EU law means that it will prevail over national law only in cases of conflict. In a situation of colliding rules, the primacy of EU law does not invalidate the national law but merely requires its disapplication. Rather than establishing a clear hierarchy between the legal orders of the EU and the Member States, therefore, the primacy of EU law regulates their interaction. The fact that the supremacy of EU law is not unconditional thus means that the EU legal order is based on consent which requires a cooperation between the EU and the Member States. For this to be possible, they must mutually recognise their respective legal autonomy whilst upholding the principle of mutual loyalty.<sup>68</sup>

In the *Van Gend en Loos*<sup>69</sup> case, the ECJ established the principle of direct effect. This principle gives individuals the right to invoke EU law before their national courts. The preliminary ruling procedure provides Member State courts with the possibility to ask the CJEU questions about the interpretation of certain EU norms. An EU norm invoked by an individual before a national court can therefore be adjudicated by the CJEU, which connects the two legal orders on a level far beyond any international organisation.<sup>70</sup>

Another important aspect of the EU legal order is the independent process of law application. In international law, states prefer to resolve conflicts through negotiations rather than settling disputes in courts. This can be traced back to a fear of retaliation and, consequently, structurally hampers its effectiveness. Legal systems in nation-states have overcome this problem through the use of a public prosecutor that allows the state to act as a neutral third party, thereby freeing the directly involved parties from the onus of initiating pro-

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<sup>64</sup> Judgment of 15 July 1964, *Costa v ENEL*, C-6/64

<sup>65</sup> Neyer (2012), p. 40.

<sup>66</sup> Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, declaration no 17 concerning primacy.

<sup>67</sup> *Ibid*, p. 42.

<sup>68</sup> *Ibid*, p. 43.

<sup>69</sup> Judgment of 5 February 1963, *Van Gend en Loos*, C-26/62

<sup>70</sup> *Ibid*, p. 43-44.



ceedings. The Commission has been given a similar role in the EU as Guardian of the Treaty, which includes the duty of initiating infringement proceedings against a Member State in breach of EU law.<sup>71</sup>

The infringement process shows that the (unified) EU legal order can only exist (with the pluralistic EU political order) if the Member States interact in good faith and with respect for each other's concerns. When compliance with EU law cannot be ensured through coercion, political authority can only be expanded as long as the Member States are willing to comply. If they are not, non-compliance would become the norm and the political authority would be questioned. A supranationality system can, therefore, never exclude the need for discussions and compromise as its authority does not come with an inherent right to use force. Instead, it is reliant on its validity among the Member States to function.<sup>72</sup>

As demonstrated, the EU is integrated by both law and politics. Weiler uses the term European dualism to describe this. The concept of a dualistic institutional order *sui generis* enables the understanding of the EU as not less than a state or more than an international organisation, but simply different. The dual nature of this political and legal integration allows for the understanding of the EU legal order as existing among the Member States rather than over and above.<sup>73</sup> In this sense, the fact that the legal order lacks a central authority with coercive powers and that compliance with EU law, instead, constitutes a voluntary act supports the idea of Member State primacy. Commitment to the integration process should, therefore, not be taken for granted and the EU itself must be understood in more than legal terms. If legal norms are interpreted without account of political realities in the Member States, compliance with EU law might suffer along with the legitimacy of the EU.<sup>74</sup> Consequently, the EU legal order must aim to balance what is practically useful and what is politically compatible with the constitutions of the Member States.<sup>75</sup>

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<sup>71</sup> *Ibid*, p. 45-46.

<sup>72</sup> *Ibid*, p.55.

<sup>73</sup> *Ibid*, p. 39.

<sup>74</sup> *Ibid*, p. 46-47.

<sup>75</sup> *Ibid*, p. 36-37.

# 3 Article 7 TEU and the integration project

## 3.1 Background

Article 7 TEU aims to ensure that all Member States respect the fundamental values of the EU. Consisting of a preventive mechanism and a sanctioning mechanism, it allows the EU to give the concerned Member State an early warning in case of a ‘clear risk of a serious breach’ and, provided the ‘serious breach’ has persisted, allows for the suspension of certain rights under the Treaties.<sup>76</sup> In full, Article 7 TEU states:

*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.*

Article 7 TEU was introduced at the prospect of Central and Eastern enlargement of the EU, due to a fear that these new countries would not adhere to the

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<sup>76</sup> Summaries of EU Legislation, *Promoting and safeguarding the EU's values.*

principles of human rights, democracy, and the rule of law. It was also intended to create a tool that could intervene when democratic values were threatened by one of its existing Member States. When the provision subsequently was incorporated into EU law by the Amsterdam Treaty, it contained only a sanctioning mechanism. However, the need for intervention before the actual occurrence of the breach allowed for an extension of the provision by the Nice Treaty, which introduced the preventive mechanism. Finally, Article 7 TEU was introduced in its current form after certain amendments to its procedure by the Lisbon Treaty.<sup>77</sup> It is commonly referred to as the ‘nuclear option’ which main purpose is to deter and is, therefore, only to be applied in extreme situations.<sup>78</sup>

As previously noted, the EU is founded on values laid down in Article 2 TEU common to all Member States. These include democracy, respect for fundamental rights and the rule of law, and are preconditions for the functioning of an EU based on mutual trust. Recently, however, some Member States have revealed signs of systemic threats to the rule of law. These developments exposed the lack of Article 7 TEU in effectively protecting the fundamental values and have, consequently, revealed a demand for new mechanisms. In relation to this, the European Commission adopted a ‘Rule of Law Framework’ aiming to address and resolve situations of systemic threats to the rule of law before Article 7 TEU is activated. As a reaction to this, the Council chose to hold an annual dialogue on the issue of Member States’ rule of law compliance instead.<sup>79</sup>

The difficulty lies in the fact that some regard political choices as legitimate results of a democratic debate, whereas others view them as violations of the EU values. In this regard, some hold the criticism from other Member State or EU institutions of certain domestic political developments as ideologically motivated rather than as efforts to ensure that national constitutional identities respect the values in Article 2 TEU. This understanding challenges the idea that there is one single model of liberal democracy that decides when a Member State has fallen below a common standard. Instead, greater respect must be paid to the plurality of political values through building the Article 7 TEU procedure on a legal decision subject to review by the CJEU. This would reduce the risk of discretionary and opportunistic decision as well as the cases where Member States refuse to act against each other. Nonetheless, it is also argued that legal criteria alone cannot determine a breach of EU values. An intervention based on Article 7 TEU must, therefore, be legitimised through political decision.<sup>80</sup> Subsequently, the political approach was chosen for Article 7 TEU and the proposal to involve the CJEU was rejected. The Council is central to the procedure and the role of the CJEU is limited to review the

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<sup>77</sup> Budó, *EU Common Values at Stake: is Article 7 TEU an Effective Protection Mechanism?* p. 2.

<sup>78</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 520.

<sup>79</sup> Radjenovic, *At a Glance: EU mechanisms on democracy, the rule of law and human rights*.

<sup>80</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 3.

procedural requirements under Article 7 TEU in accordance with Article 269 TFEU, if it is requested by the concerned Member State.<sup>81</sup>

## 3.2 Article 7 TEU

### 3.2.1 The scope

The constitutional orders of the EU and the Member States are inextricably linked as they consist of values that are foundational for both and, together, create a common constitutional identity established in Article 2 TEU. However, from the perspective of the EU these values are a prerequisite for membership and therefore should be foundational as well. It thus follows that it is the compliance with the values in Article 2 TEU that Article 7 TEU protects. As the values in Article 2 TEU are not restricted to the EU's specific competences or to the operation of EU law, Article 7 TEU must, therefore, confer power to the EU over Member State activity that falls outside the scope of EU law. This is also why alleged breaches of the values of Article 2 TEU are not restricted to ordinary infringement proceedings under Article 258 TFEU, which merely covers Member State acts and omissions within the scope of EU law. Limiting Article 7 TEU to that narrow scope would risk creating the absurd and undesirable situation where Member States respect the fundamental values only when it acts within the area of EU law, whereas they would be free to breach them in all other areas.<sup>82</sup>

The fact that the scope of Article 7 TEU goes beyond the areas regulated by EU law must, consequently, be underlined. This means that the EU can intervene also where Member States have acted in their exclusive areas of competence.<sup>83</sup>

### 3.2.2 The sanctions mechanism

As established by Article 7(2) TEU, the violation must be serious and persistent for the Council to determine an existing breach of the values in Article 2 TEU. The sanctions mechanism in Article 7 TEU does, therefore, not apply to individual violations of the EU values but only to those that are systemic. The vulnerability of the social groups affected by the national measure, as well as the number of involved EU values, must be considered in determining

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<sup>81</sup> Ibid, p. 4.

<sup>82</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 33-35.

<sup>83</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 520.

the seriousness of the breach.<sup>84</sup> Further, Member State failure to act on violations can also be targeted by the provision.<sup>85</sup>

The sanctions mechanism is independent, which means that a previous decision under the preventive mechanism in Article 7(1) TEU is not necessary for the imposition of a sanction under Article 7(3) TEU. It is activated by one third of the Member States or the Commission. The procedure itself has two steps. Firstly, Article 7(2) TEU allows the European Council to unanimously determine the existence of a serious and persistent breach of the fundamental values in Article 2 TEU by a Member State, after obtaining the Parliament's consent which is reached by a two-thirds majority of the votes and an absolute majority of members. Prior to this, the concerned Member State can submit observation to the Council. Secondly, the Council can suspend certain rights under the Treaties in respect of the Member State concerned, including voting rights in the Council. Under Article 7(3) TEU, the Council determines by a qualified majority whether, and what, sanctions should be imposed after hearing the Member State. This gives the Council a two-fold discretion, as it decides both the existence of the breach and the imposition of sanctions.<sup>86</sup>

The procedure in Article 7 TEU is of a highly political nature and there is, consequently, a dominance of political actors. The Commission's initiating right is not mandatory and the Court of Justice has not been given an explicit role in the procedure.<sup>87</sup> It should be noted that consent of the Parliament is only required for the determination of the existence of a breach in Article 7(2) TEU and not for the decision to impose sanctions in Article 7(3) TEU. Furthermore, Article 354(1) TFEU establishes that the concerned Member State does not participate in the vote in the Council and the European Council, and does not count towards the majorities needed to trigger the determinations or the adoption of other decisions.<sup>88</sup>

Article 7(3) TEU establishes that the Council can 'suspend certain of the rights deriving from the application of the Treaties'. However, the substance of this sanction is unclear except from the mentioned voting rights in the Council. Rights capable of being suspended other than voting rights are, therefore, a matter of speculation. The use of the expression 'certain' implies that the suspended rights will be specified in the decision imposing the sanctions, but also that not all rights can be suspended.<sup>89</sup> Nonetheless, the fact that

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<sup>84</sup> European Commission, *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* p. 7-8.

<sup>85</sup> European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, point 3.

<sup>86</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 4.

<sup>87</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 13.

<sup>88</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 4.

<sup>89</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 6.

sanctions could concern any ‘right deriving from the application of the Treaties’ implies that rights under secondary law could be suspended. This would cover rights under regional development programs as well as subsidies.<sup>90</sup> Consequently, it is possible that EU funding to the Member State concerned could be suspended.<sup>91</sup>

There is, however, one express limitation to sanctions. This is, namely, that Article 7(3) TEU entails a principle of proportionality which requires that the Council must consider ‘the possible consequences of such a suspension on the rights and obligations of natural and legal persons’.<sup>92</sup>

### 3.2.3 The preventive mechanism

As noted above, the original provision only provided for the imposition of sanctions. However, due to a high demand for earlier and lesser interventions the Nice Treaty introduced a ‘preventive mechanism’ in Article 7(1) TEU. Although there is an obvious relation between the two procedures, the preventative mechanism is separate from the sanctioning mechanism.<sup>93</sup> This new mechanism creates powers for the EU to prevent the occurrence of actual serious and persistent breaches by Member States through allowing the Council to give the Member State a warning before such a breach has materialised.<sup>94</sup>

Under Article 7(1) TEU, following a reasoned proposal by one third of the Member States, the European Parliament or the Commission, the Council can determine that there is a ‘clear risk’ of a serious breach of the fundamental values in Article 2 TEU by a Member State. To adopt the decision, the Council must have a majority of four fifths of its members and the consent<sup>95</sup> of the European Parliament. However, the Council must hear the concerned Member State prior to this and may also issue recommendations. The Council is, furthermore, obliged to regularly verify that the grounds of the determination continue to apply.<sup>96</sup>

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<sup>90</sup> Schmahl, *Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett - Eine europa- und völkerrechtliche Analyse* p. 826; Poptcheva, *Understanding the EU Rule of Law mechanisms* p. 4 and Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 8: This is made explicit in preamble 10 to the European Arrest Warrant Framework Decision.

<sup>91</sup> This is suggested in a letter to the Commission regarding the protection of the rule of law in the EU by the foreign ministers of Germany, the Netherlands, Denmark and Finland: “As a last resort, the suspension of EU funding should be possible.” The letter was sent on March 6<sup>th</sup>, 2013 and is available here: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf> (Accessed: 04-01-2017).

<sup>92</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 5.

<sup>93</sup> *Ibid*, p. 14-15.

<sup>94</sup> European Commission, *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*, p. 7.

<sup>95</sup> Parliament’s consent requires a two-thirds majority of the votes cast and an absolute majority of all Members (Article 354(4) TFEU)

<sup>96</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 5.

There is controversy about whether Article 7(1) TEU confers the power to monitor the situation in a Member State prior to the determination, or whether monitoring is only allowed after such a determination. The fact that recommendations can be made before the determination of a ‘clear risk of serious breach’ could help to shed light on the question of EU competence prior to the risk determination. A logical assumption would be that monitoring powers are inherent in the powers of the Council and the right of initiative of the Parliament, the Commission, and Member States, as the Council requires a solid and factual basis for its decision-making in the determination process. It can, therefore, be argued that Article 7(1) TEU warrants practical and operational measures to ensure an effective monitoring of Member State compliance with the fundamental values.<sup>97</sup>

### **3.3 Pre-Article 7 procedures**

#### **3.3.1 The Commission’s Rule of Law Framework**

Although the preventative mechanism in Article 7(1) TEU was devised as a more practicable and user-friendly procedure, the actual use of Article 7 was still considered impossible. The head of the Commission called it ‘the nuclear option’ and it received extensive criticism by NGOs and others who feared that it resulted in a misplaced complacency. The fact that all Member States share certain common constitutional values does not mean that they automatically observe them in practice and the non-usage of the Article 7 procedure does, therefore, not ensure compliance with the values in Article 2 TEU. As a response to this, the Commission developed a Rule of Law Framework that aimed to create a broader set of instruments to fill the void between mere political persuasion and the Article 7 mechanisms.<sup>98</sup> It was presented as a residual instrument only to be activated in cases of ‘systemic threats’ to the rule of law in the Member States and does not substitute any of the existing procedures. Instead, it is meant to complement both the Article 7 TEU and the infringement procedures under Article 258 TEU.<sup>99</sup>

The purpose of the Framework is to prevent the emergence of a systemic threat to the rule of law in the concerned Member State which could trigger the preventive mechanism in Article 7(1) TEU. To ensure equality, the Framework applies in the same way to all Member States.<sup>100</sup>

The Framework is triggered where the authorities of a Member State takes measures or tolerates situations that will likely ‘systematically and adversely

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<sup>97</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 16-17.

<sup>98</sup> *Ibid*, p. 17-19.

<sup>99</sup> Closa, *The EU needs a better and fairer scrutiny procedure over Rule of Law compliance*, p. 4.

<sup>100</sup> European Commission, *A new EU Framework to strengthen the Rule of Law*, p. 6.

affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law'. The Framework will not be triggered by a miscarriage of justice or individual breaches of fundamental rights, but the threat must be of a systemic nature. This means that the constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists must be threatened. Nonetheless, it does not prevent the mechanisms in Article 7 TEU from being activated directly if the situation in a Member State would require it.<sup>101</sup>

It consists of a structured dialogue between the Commission and the Member State concerned with a focus at resolving the issue. This is done in a three-stage process consisting of an initial assessment, a recommendation, and a follow-up to the recommendation.<sup>102</sup>

As a first step, the Commission collects and examines relevant information as a preliminary assessment. If there are clear indications of a systemic threat to the rule of law, it will initiate a dialogue with the concerned Member States by sending it a 'rule of law opinion' that substantiates its concerns, to which the Member State can respond. The content of the exchange will be kept confidential to facilitate a quick solution. If the matter has not been satisfactorily resolved, the Commission will issue a 'rule of law recommendation' to the Member State concerned. This second step is only taken if it finds that there is objective evidence of a systemic threat and that the authorities of the Member State are not taking appropriate action to redress it. This recommendation would clearly indicate the reasons for its concerns and recommend that they should be solved within a fixed time limit. If appropriate, they could also include specific ways and measures on how to resolve the situation and its main content will be made public. Lastly, as a third step the Commission monitors the follow-up given by the Member State regarding the recommendations. If there is no satisfactory follow-up within the time limit set, the Commission will consider activating one of the mechanisms in Article 7 TEU.<sup>103</sup>

### **3.3.2 The European Council's 'Rule of Law dialogue'**

After a negative opinion concerning the Commission's Rule of Law Framework by its Legal Service, the Council launched its own initiative focusing on promoting respect for the rule of law among the Member States.<sup>104</sup> The procedure adopted by the Council provides for an annual dialogue among all Member States to encourage the respect for the rule of law within the framework of the Treaties. The dialogue is based on the principles of objectivity, non-discrimination, and equal treatment of all Member States, and is to be conducted on a non-partisan and evidence based approach without prejudice

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<sup>101</sup> Ibid, p. 6-7.

<sup>102</sup> Ibid, p. 7.

<sup>103</sup> Ibid, p. 7-8.

<sup>104</sup> Council of the European Union, *Ensuring Respect for the Rule of Law* p. 1, paragraph 3.



to the principles of conferred competences, as well as the respect for the national identities of the Member States. It is, furthermore, meant to be complementary to other EU institutions and international organisations.<sup>105</sup>

### 3.3.3 Monitoring powers

As the legal possibilities under Article 7 TEU have not been fully explored, the focus has shifted backwards from sanctions, to prevention, to prior monitoring powers and even, with regards to the Council's dialogue, a step away from monitoring. This is due to different interpretations of the monitoring powers inferred by the preventive mechanism in Article 7(1) TEU. The Commission believes that the possibility to send the concerned Member State a warning before a 'clear risk' materialises implies powers to monitor situations in a known political, economic, and social environment which risk evolving after the first critical policies. The Council, however, believes that no such powers are implied.<sup>106</sup>

An argument in support of this latter view is the assumption that the Council is given explicit power to issue recommendations under the preventive mechanism in Article 7(1) TEU, inferring from this that the Commission has no such power under Article 7 TEU. However, the Council's power to issue recommendations exists already prior to the determination of a 'clear risk' under Article 7(1) TEU. This seems to necessarily imply a power to monitor Member State behaviour. If such power did not exist the Council would risk issuing recommendations that are not based on established facts, which would be entirely contrary to the principles of EU law. Given that the recommendation is supposed to prevent the subsequent use of the sanctioning mechanism, it is imperative that it is based on objective facts and not merely an exchange of views in the Council. It would also run counter to the institutional architecture if the Council would not be able to involve the Commission in an assessment of compliance with the rule of law and the other values of Article 2 TEU. It thus follows that here must be implied monitoring powers allowing the Council to invoke the assistance of the Commission. The same is true for those who have the power of initiative, the European Parliament, the Commission and a Council minority of a third of the Member States, as they must base such initiative on a reasoned proposal.<sup>107</sup>

The monitoring consists of the gathering of information. This can either be provided by the Member States directly, or collected from other sources capable of providing relevant information.<sup>108</sup> The information should then be processed in engagement with the respective Member States.<sup>109</sup>

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<sup>105</sup> Ibid, p. 5, paragraph 16.

<sup>106</sup> European Commission, *A new EU Framework to strengthen the Rule of Law*, p. 6-7.

<sup>107</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 26-28.

<sup>108</sup> Fundamental Rights Agency, Venice Commission, the Human Rights Commissioner, The Parliamentary Assembly, the Committee of Ministers, European Court of Human Rights, OCSE, ILO and UN.

<sup>109</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 30.

### 3.4 The situation in Poland

On July 27, the Commission issued a recommendation to Poland declaring that it believes there is a ‘systemic threat to the rule of law in Poland’. The Polish Government has three months to take appropriate action to address the issues and inform the Commission of the steps taken. If this is not done satisfactorily within the time limit it is possible that the ‘Article 7 procedure’ will be initiated.<sup>110</sup>

The recommendation is based on the events in Poland regarding changes to the Constitutional Court. On January 23, the Commission opened a dialogue with the government to ensure that the Polish Constitutional Tribunal is able to carry out its responsibilities under the Constitution, especially with regards to the effective constitutional review of legislative acts. Following the adoption of an opinion by the Commission on the situation in Poland on June 1, a new law on the Constitutional Tribunal was adopted in Poland on July 22. However, after assessing the whole situation the Commission concluded that important rule of law issues was still present in Poland and, therefore, issued concrete recommendations on how to address those.<sup>111</sup>

The reason for the Commission’s belief that there is a systemic threat to the rule of law in Poland is, therefore, that the Constitutional Tribunal is prevented from delivering effective constitutional review, consequently impeding its integrity as well as proper functioning. This is essential as the effectiveness of the constitutional justice system is a fundamental component of the rule of law.<sup>112</sup>

With regards to this, the Commission has identified four main areas of recommendations for Poland. Firstly, that it respects and implements the judgements of the Constitutional Tribunal which require that the three judges nominated by the previous legislature take up function in the Constitutional Tribunal, whilst the three judges nominated without valid legal basis by the new legislature refrain from doing so. Secondly, that it publishes and implements judgements of the Constitutional Tribunal and ensures that future publishing is automatic and independent of executive or legislative powers. Thirdly, that it ensures that reforms of the Constitutional Tribunal respect the judgements of the Tribunal and takes fully into account the Opinion by the Venice Commission, as well as ensures that new requirements do not undermine the effectiveness of the Constitutional Tribunal in its protection of the Constitution. Fourthly, that it ensures that the Constitutional Tribunal is able to review the compatibility of the new law on the Constitutional Tribunal before its entry into force and publish and implement the resulting judgment.<sup>113</sup>

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<sup>110</sup> European Commission Press Release, *Rule of Law: Commission issues recommendation to Poland*.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

In response to the recommendation by the Commission, Poland's Prime Minister Beata Szydło stated that the government will not introduce any recommendations into their legal system that are incompatible with the interests of Polish citizens and the Polish state. This position can be understood in the light of a previous statement from Poland's Foreign Affairs Ministry commenting on the dialogue with the Commission, where it is claimed that the interferences into Poland's internal affairs lacked adherence to the principles of objectivism, subsidiarity and respect for sovereignty or national identity.<sup>114</sup>

Poland has, as of the writing of this thesis, not responded to the recommendation although the time limit has passed. At the same time, the Polish authorities are about to enact a law that would encroach on the freedom of assembly.<sup>115</sup> It is also important to note that, next to the changes to the Constitutional Tribunal, the government has enacted laws through which the top management in public radio and TV have been switched for supporters of the governing party.<sup>116</sup>

Considering the uncooperativeness of the Polish authorities and the extensive evidence of a deliberate strategy to systematically undermine all checks and balances, it has been argued that the Commission has no option but to trigger the use of Article 7 TEU. This would oblige the national governments to live up to their responsibilities even if it is unlikely that the Council would adopt any sanctions against Poland.<sup>117</sup> Despite this, however, the Commission has not yet announced its intention to activate the Article 7 procedure.<sup>118</sup> The difficulty lies in the fact that a decision for sanctions requires unanimity in Council, and Hungarian Prime Minister Viktor Orbán has expressed his intention to block any such decisions against Poland.<sup>119</sup>

### **3.5 Legal reflection: safeguarding integration?**

The rationale for the Commission's Rule of Law Framework was the inadequacy of Article 7 TEU to address the increasing number of internal, systematic threats to the fundamental values laid down in Article 2 TEU. Essentially, there are two reasons why the provision never has been used even though many have called for its activation. These are, firstly, its high thresholds for activation and, secondly, that it would be counterproductive to do so in the current political context.<sup>120</sup>

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<sup>114</sup> Goulard, Politico, *Poland rejects Commission's rule of law request*.

<sup>115</sup> Steinbeis, *Freedom of Assembly in Poland: Next in Line?*

<sup>116</sup> Gostyńska-Jakubowska, *Poland: Europe's new enfant terrible?*

<sup>117</sup> Pech, *Systemic Threat to the Rule of Law in Poland: What should the Commission do next?*

<sup>118</sup> De La Baume, Politico, *Commission meets on Poland after court takeover*.

<sup>119</sup> euobserver, *Orban: Hungary would veto sanctions on Poland*.

<sup>120</sup> Kochenov and Pech, *Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction*, p. 2.

As explained above, the Article 7 procedure consists of two separate scenarios governed by different, although equally demanding, procedural requirements. In addition to the fact that these requirements are virtually impossible to satisfy because of the large majorities needed, the Member States are generally reluctant to take such action due to a fear of repercussions.<sup>121</sup> Even if the unanimity required in Council for the determination of a serious and persistent breach would be achieved, with the exception of the Member State under scrutiny, there is no subsequent obligation to adopt any sanctions. This is a clear sign of the political nature of Article 7 TEU.<sup>122</sup> Should the provision be activated, nonetheless, there is a risk that internal support for the government of the Member State in question would increase and generate euroscepticism among its citizens, as such measures often are understood as punishing the population rather than the governing power.<sup>123</sup>

The new Rule of Law Framework launched by the Commission is, however, also criticised. For example, the Council's Legal Service argued that the absence of solid competence by the Commission breached the principle of conferral and that the Framework therefore lacked sufficient legal basis. This opinion was based on the understanding that 'there is no legal basis' to 'amend, modify or supplement' the procedure laid down in Article 7 TEU.<sup>124</sup> The Legal Service also changes 'monitoring' to 'supervision' and thereby suggest the submission of the Member States to the Commission. This reflects an alleged inequality between the supervisory Commission and the Member States subjected to the supervision, which results in the Member States not being treated equally among themselves. The Council has repeatedly stated that any mechanism connected to Article 7 TEU and the rule of law should be non-discriminatory and treated in the same way. It is, however, incorrect to conclude that monitoring and dialogue can only be conducted by the Council and thus the Member States themselves. As noted above, Article 7 TEU is not merely intergovernmental, as the Commission and Parliament are given significant powers through their right to initiative and right of consent. This does not turn their monitoring activity into a hierarchal means of subjecting certain Member States to 'supervision'. On the contrary, the principles of non-discrimination and equality can be upheld by a general monitoring of all Member States based on transparent and uniform criteria.<sup>125</sup> It can further be argued that, in this regard, that Article 7(1) TEU implicitly empowers the Commission to investigate any risk of a serious breach of the values in Article 2 TEU. This is because the EU institutions and the Member States must be able to assess the situation before they use their respective power to trigger Article 7 TEU.<sup>126</sup> Similarly, the Council must be able to rely on solid factual

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<sup>121</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 5.

<sup>122</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 516.

<sup>123</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 5.

<sup>124</sup> Closa, *The EU needs a better and fairer scrutiny procedure over Rule of Law compliance*, p. 4.

<sup>125</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 29.

<sup>126</sup> Kochenov and Pech, *Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a timid step in the right direction*, p. 11.

evidence before determines the existence of such a potential or actual breach. Rather than breaching the principle of conferral, therefore, the Commission merely establishes clear guidelines on how the procedure should be triggered in practice.<sup>127</sup>

Furthermore, the British government criticised the Framework for duplicating already existing procedures, thereby enhancing the role of the Commission at the expense of Member States in the Council. Concerns were also raised with regards to the uncertainty of what situations would activate the Framework. Rather than duplicating, however, the Framework merely adds a preparatory stage to the Commission's role under Article 7 TEU. Nonetheless, the criticism regarding the uncertain nature of the Framework is not entirely unfounded as the values in Article 2 are highly unspecified.<sup>128</sup>

The Framework has also been criticised for lacking any legal implications and, therefore, only being effective where Member States would be willing to cooperate.<sup>129</sup> In situations where the governing power has made a conscious decision to violate EU values, however, a diplomatic dialogue within the Framework is unlikely to bring about an end to such systematic breaches.<sup>130</sup> Nonetheless, this 'light touch' mechanism established by the Commission can be defended and explained by the fact that it does not require an extremely time consuming Treaty amendment<sup>131</sup>, but rather complements an already existing procedure. Its careful nature also suggests that the Commission is aware of the area's sensitivity, as the EU system might not be ready to enforce open-ended values against reluctant Member States.<sup>132</sup> Despite this, the lack of certain procedural requirements are nonetheless likely to prevent effective outcomes. For example, the confidential nature of the dialogue and the non-legally binding nature of the recommendation, as well as the non-automatic recourse to the Article 7 procedure, further increase the risk of forming an inadequate mechanism.<sup>133</sup>

As described above, as a response to the Commission's Framework the European Council adopted a different mechanism aimed at promoting and protecting the rule of law. This mechanism can be criticised in several aspects. For example, the meaning of a 'dialogue among all Member States' is vague and undefined and its principles, limitations and procedural conditions are both unspecified and unclear in terms of legal implications. It also disregards

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<sup>127</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 529-530.

<sup>128</sup> Closa, *The EU needs a better and fairer scrutiny procedure over Rule of Law compliance*, p. 5.

<sup>129</sup> Poptcheva, *Understanding the EU Rule of Law mechanisms*, p. 6.

<sup>130</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 531.

<sup>131</sup> Which, according to the authors, 'avoided a situation akin to asking turkeys to vote for Christmas'. Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 529.

<sup>132</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 529.

<sup>133</sup> *Ibid*, p. 533.

some of the soft-law instruments on the area and is, thus, based on the lowest level of formalisation. It further entirely abstains from targeting breaches and the only obligation the Member States have with regards to its implementation is a commitment to establish it. In addition, the dialogue is deprived of any coercive power and seem to lack potential consequences whatsoever. In fact, the mechanism does not contain any form of peer review and there is no obligation to publish the dialogue, thereby excluding the possibility of public scrutiny or a ‘naming and shaming’ of the Member State in question.<sup>134</sup>

The Council’s dialogue reflects the view that the Commission’s Framework lacks legal basis as it violates both the principle of conferred powers and the respect for national constitutional identities. However, it is incorrect to hold that compliance with the rule of law is confined to areas where the EU has competence.<sup>135</sup> Conversely, Article 7 TEU confers power to the EU over a Member State activity that falls outside the scope of EU law. This situation is, nonetheless, sensitive because of the constitutional nature of the Member State activity and because it allows the EU to act on Member State activity that is completely outside the scope of EU law. This two-folded sensitivity explains why the Council is so reluctant to rule of law monitoring of Member States action.<sup>136</sup> An illustration of this is how the Council changed the opinion of its Legal Service. Whereas the opinion by the Legal Service can be interpreted as saying that the EU is able to invoke a violation of the values of Article 2 TEU because it has been granted competence to do so in Article 7 TEU, the Council interpreted the opinion as saying that the rule of law applies as a value of the EU only in areas where the EU has competence and that monitoring is possible only to that extent. Although the Legal Service held that Article 7 TEU provided the EU with the competence to monitor Member State compliance with the rule ‘as a value of the Union, in a context that is not related to a specific material competence’<sup>137</sup>, the Council constructed the opinion to mean that rule of law monitoring is possible only when Member States act within the scope of EU law.<sup>138</sup> This interpretation goes against standard opinions expressed in both literature and case law.<sup>139</sup>

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<sup>134</sup> Closa, *The EU needs a better and fairer scrutiny procedure over Rule of Law compliance*, p. 6.

<sup>135</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 534-535.

<sup>136</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 33-34.

<sup>137</sup> Opinion by the Legal Service of the Council, *Commission’s Communication on a new EU Framework to strengthen the Rule of Law* paragraph 17.

<sup>138</sup> Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives*, p. 33-34.

<sup>139</sup> See for example Advocate General Maduro in Judgement of 31 January 2008, *Centro Europa, 7 Srl*, C- 380-05, p. 17-23 and Von Bogdandy and Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done* p. 65 and 67; examples as suggested in footnote 49 in Besselink, *The Bite, the Bark and the Howl - Article 7 TEU and the Rule of Law Initiatives* p. 34.

Given that several national governments expressed reluctance towards the idea that the Commission or any supranational body would have the power to monitor rule of law compliance outside the scope of EU law, it is not surprising that the Council attempts to pre-empt such a mechanism.<sup>140</sup> The dialogue introduced entails no external control on governments, and neither the European Parliament nor the Commission are involved in its procedure. This new mechanism, therefore, represents a clear intergovernmental approach in resolving issues.<sup>141</sup>

As explained above, the limited scope of infringement actions has proven to be insufficient in providing effective remedies to national violations of EU values. Hence, breaches of fundamental values in areas of national autonomy or in the absence of concrete EU legislative competence would render infringement procedures either inefficient or unusable. Although the scope of Article 7 TEU is extended to cover areas of national exclusive competences, it cannot be ignored that its purpose is to deter rather than to be applied.<sup>142</sup> It follows that the EU is left with a limited set of legal tools to combat national systemic breaches of the fundamental values. This is problematic, as the effects of violations of the national constitutional system is not confined to the relevant Member State and its citizens and residing EU citizens. On the contrary, a Member State that ceases to be governed by the rule of law would still participate in the adoption of binding norms and thus threaten the exercise of the rights granted to all EU citizens. This would, consequently, also threaten the very existence of the entire regulatory and judicial system built on the principle of mutual trust and mutual recognition of judicial decisions. To conclude, both the legitimacy and the credibility of the EU is therefore dependent on its ability to guarantee internal compliance with the fundamental values in Article 2 TEU.<sup>143</sup>

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<sup>140</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 534-535.

<sup>141</sup> Closa, *The EU needs a better and fairer scrutiny procedure over Rule of Law compliance*, p. 6.

<sup>142</sup> Kochenov and Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, p. 520.

<sup>143</sup> *Ibid.*, p. 521.

# 4 Article 50 TEU and the integration project

## 4.1 Background

Article 50 TEU forms the legal basis for a Member State's right to withdraw from the EU and was introduced for the first time in the Treaty on European Union by the Lisbon Treaty. It provides as follows:

*1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*

*2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*

*3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*

*4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.*

*A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.*

*5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

Before the introduction of Article 50 TEU, the question of withdrawal from the EU was highly controversial. It was argued by some that unilateral withdrawal was possible through the application of customary international law within the EU framework.<sup>144</sup> Others, however, rejected the possibility of withdrawal, as the supranational character of EU and its autonomous legal order prevents the application of international law. Lastly, some argued that a Member State would only be able to terminate its membership if decided in agreement with the remaining Member States. Nonetheless, many understood the creation of the EU as a permanent organisation excluding the possibility

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<sup>144</sup> Article 62 of the Vienna Convention on the Law of the Treaties allows for the unilateral withdrawal from Treaties



of withdrawal.<sup>145</sup> The supranational federal nature of the EU and the constitutional content of the Treaties further supported such a belief.<sup>146</sup>

It thus follows that, in theory, there are three kinds of withdrawal mechanisms. The first is state primacy, which gives the nation-state an absolute and unilateral right of withdrawal. The second is federal primacy, which holds withdrawals as legally impossible. The third, however, is federal control, which provides a middle path through allowing withdrawal after approval from both the withdrawing nation-state and those that remain.<sup>147</sup> Subsequently, when the right to withdraw from the EU was included in the Draft Constitutional Treaty it was based on the premise that such right already existed in the general principles of international law, and it was deemed appropriate that the procedure would be adjusted to the specific reality and needs of the EU and its Member States. It was, furthermore, expressed in the comments to the draft provision that its inclusion was necessary to reach compromise on the Draft Constitutional Treaty, through signalling that the EU was not a rigid entity from which it was impossible to withdraw.<sup>148</sup> The provision was later included in the Lisbon Treaty without changes.<sup>149</sup>

As the right of withdrawal undeniably disintegrates the EU if used, it can be questioned how the introduction of Article 50 TEU aligns with the integration process of the EU. Firstly, and obviously, it presents an exit for any Member State that does not accept closer European integration. Secondly, it prevents the majority from abruptly excluding a non-cooperative Member State. Yet, in contrast to Article 7 TEU, the Article 50 TEU was never expected to be used and must be interpreted accordingly.<sup>150</sup>

## 4.2 Article 50 TEU

Article 50 TEU consists of five paragraphs that together make up a complex set of rules, procedures, and limitations which must be presented with care to fully understand its various effects.<sup>151</sup> In short, however, the provision consists of the unilateral right of a Member State to withdraw from the EU provided it is in accordance with its constitutional requirements. The procedure is triggered after a notification by the concerned Member State to the European Council, following which the EU and the Member State will begin negotiating a withdrawal agreement. The Treaties will, however, cease to apply to the Member State after two years regardless of whether an agreement is reached. During this time, members representing the withdrawing Member

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<sup>145</sup> Introduced with the Maastricht Treaty. Articles 53 TEU and 356 TFEU

<sup>146</sup> Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU* p. 2.

<sup>147</sup> Tatham, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, p. 147.

<sup>148</sup> Articles 1-59

<sup>149</sup> Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU*, p. 3.

<sup>150</sup> Duff, *Everything you need to know about Article 50 (but were afraid to ask)*.

<sup>151</sup> Phillipson, *A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament*, p. 1066.

State are prevented from participating in discussions or decisions in the European Council or Council concerning its withdrawal. Lastly, a Member State that has withdrawn from the EU will be subject to the accession procedure in Article 49 TEU if it wants to rejoin.

The introduction of the withdrawal procedure in Article 50 TEU means that relevant international law provisions cannot be applied in parallel. Moreover, Article 50 TEU lowers the conditions for withdrawal as compared to international law, where the right of withdrawal requires a fundamental change in circumstances.<sup>152</sup> Instead of establishing any substantive conditions, Article 50 TEU is confined to setting up procedural requirements for the right of Member States to withdraw from the EU.<sup>153</sup>

#### **4.2.1 The decision to withdraw**

As noted above, Article 50(1) TEU only mentions that the decision to withdraw must be in accordance with the Member State's constitutional requirements.

#### **4.2.2 The notification, negotiations and withdrawal agreement**

Article 50(2) TEU establishes that a notification to the European Council from the concerned Member State, declaring its intention to withdraw, initiates the procedure. It is entirely up to the Member State to decide when it wants to issue the notification, and *informal discussions with* other Member states or the EU institutions could take place prior to this. Upon notification, the European council will provide guidelines for the negotiations between the EU and the notifying Member State, with the aim of concluding an agreement of withdrawal. The Member State's future relationship with the EU should also be covered.

Article 50 TEU provides a process for determining the terms of separation, rather than setting out the details of any UK future trading relationship with the EU, which would be determined in a further agreement.<sup>154</sup> This agreement will set out the arrangements for the Member State's withdrawal, while taking the framework for its future relationship with the EU into account. It is assumed that the future relationship itself, however, will be set out in a separate instrument rather than in the withdrawal agreement to avoid the need for a Treaty change.<sup>155</sup>

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<sup>152</sup> Article 62 of the Vienna Convention

<sup>153</sup> Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU*, p. 3.

<sup>154</sup> Douglas-Scott, *Brexit, Article 50 and the Contested British Constitution*, p. 1025.

<sup>155</sup> de Witte, *Near-membership, partial membership and the EU constitution* p. 1.

The Treaties are unclear as to what role the European Commission has in the withdrawal procedure. According to Article 218(3) TFEU<sup>156</sup>, the Commission would make a recommendation to the Council to open negotiations with the notifying Member State. Normally, the Commission negotiates agreements with third countries on behalf of the EU. Article 218(3) TFEU, however, allows for the Council to nominate a different negotiator.<sup>157</sup>

Further, Article 50(2) TEU states that the Council must obtain the European Parliament's consent to conclude the agreement. Whilst Article 50(4) TEU prevents the member of the European Council or of the Council representing the concerned Member State to participate in discussions or decisions concerning its withdrawal, no similar provision exists in relation to Members of the European Parliament (MEP's). This has led some to believe that the Treaties do not prevent the MEPs elected in the withdrawing Member State from participating in the debates or from voting on the motion to consent the withdrawal agreement, as the MEPs represent all EU citizens and not only those belonging to the Member State that elected them.<sup>158</sup> The second paragraph in Article 50(4) TEU states that the qualified majority needed in Council to conclude the agreement will be defined in accordance with Article 238(3)(b) TEU. This means that at least 72% of the members of the Council representing Member States comprising at least 65% of the population of the Member States are required the conclusion of the withdrawal agreement.

It is important to note that the withdrawal agreement is not primary EU law, since it is concluded between the withdrawing Member State and the EU, and not the rest of the Member States. However, as an international agreement it is subject to judicial review by the Court of Justice of the EU (CJEU). The Council decision to conclude the agreement could therefore be challenged through an action of annulment. Further, some argue that the draft withdrawal agreement's compatibility with EU law could be subject to review under Article 218(1) TFEU, whereas others claim that would not be possible as Article 50 only refers to Article 218(3) TFEU<sup>159</sup>. The courts of the remaining Member States would also be able to refer questions for preliminary rulings regarding the withdrawal agreements. The courts of the withdrawing Member State, however, would not have this power unless it is expressly included in the withdrawal agreement.<sup>160</sup>

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<sup>156</sup> Article 218(1) TFEU: Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

<sup>157</sup> Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU*, p. 4.

<sup>158</sup> *Ibid.*

<sup>159</sup> Article 218(3) TFEU: The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

<sup>160</sup> Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU*, p. 4.

### 4.2.3 Consequences of withdrawal

Article 50(3) TEU states that the legal consequence of withdrawal from the EU is the disapplication of the Treaties in the Member State concerned. However, although EU law ceases to apply, any national acts implementing or transposing EU law remains valid in the Member States until amended or repealed. A withdrawal agreement must, therefore, include the phasing-out of EU financial programmes and other EU norms. Experts agree that the withdrawing Member State would need to enact substantial new legislation to replace EU law. However, if there were to be a future relationship between the EU and the former Member State a complete isolation of the effects of the EU *acquis* would be impossible.<sup>161</sup>

The paragraph further states that this disapplication of the Treaties in relation to the Member State in question will occur on the date of entry into force of the withdrawal agreement or, if that fails, two years after the notification was received. However, the European Council can unanimously extend the period if the concerned Member State agrees to it. Here it should be noted that this two-year limit only applies to cases where the negotiations fail, and does not prevent that a date is set for the entry into force of a withdrawal agreement which exceeds this period.<sup>162</sup> Further, the imposition of the time limit can be said to have two purposes. Firstly, it prevents the withdrawing Member State from procrastinating endlessly and thereby protects the EU from any harm that unnecessary delay could cause. At the same time, and secondly, it gives the concerned Member State enough time to develop a thought-out plan for its withdrawal.<sup>163</sup>

Unlike the accession of a new Member State, the actual withdrawal of a Member State does not require ratification by the other Member States. Any Treaty changes or international agreements concluded as a consequence of the withdrawal, however, would require ratification by the remaining Member States in accordance with Article 48 TEU. Furthermore, Article 52 TEU would need to be amended to reflect the correct list of Member State, and thus the territorial scope of the Treaties, as well as the revision of Protocols concerning the Member State in question.<sup>164</sup>

## 4.3 The situation in the UK

On June 24, it was confirmed the UK had voted to leave the European Union in a referendum. As described above, this marks the start of a long process that most likely will result in the future withdrawal of the UK in accordance with the procedure laid down in Article 50 TEU. Nonetheless, the road is not without its hurdles.

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<sup>161</sup> *Ibid*, p. 5.

<sup>162</sup> de Witte, *Near-membership, partial membership and the EU constitution*, p. 1.

<sup>163</sup> Duff, *Everything you need to know about Article 50 (but were afraid to ask)*.

<sup>164</sup> Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU*, p. 4.

Firstly, the reason for this unprecedented vote must be examined closer. The message of the ‘leave’ campaign was that it was time for the national institutions to take back sovereignty from the EU, and the referendum was portrayed as being capable to have that effect. It was also promised that Britain would be able to maintain its trading privileges with the EU whilst taking control over the free movement of citizens to end the influx of migrants, as well as take back large sums of money to spend on national health care instead. In reality, however, the notions in the former claim risk being mutually exclusive whereas the latter is completely false.<sup>165</sup>

Secondly, what are the ‘constitutional requirements’ for notifying the Council of its intention to withdraw from the EU? As it concerns national constitutional matters, the British constitutional law must be examined. However, in the absence of a codified constitution it is unclear what exactly is required.<sup>166</sup> The initial belief that the British government can trigger Article 50 TEU without putting it to a vote in the House of Commons has been challenged for violating parliamentary sovereignty. It is argued that it would be unlawful of the Government to trigger Article 50 TEU without explicit parliamentary authorisation, as it would inevitably result in the removal of rights enjoyed under EU law.<sup>167</sup> In a landmark judgment<sup>168</sup> from 3<sup>rd</sup> of November this year, the High Court upheld the challenge and ruled that the process of withdrawal requires prior approval from Parliament.<sup>169</sup> However, the question of whether it is a constitutional requirement that a legally binding parliamentary vote must precede the notification will not be settled until the Supreme Court gives a final judgment on the matter.<sup>170</sup>

Thirdly, what kind of future relationship will Britain seek? As explained, the negotiations about the conditions for withdrawal will start when the Council has been notified of its intention to trigger Article 50 TEU. The alternatives have been broadly described as soft, hard or gray strategies and express the nature of the future relationship between Britain and the EU. Generally, those who voted remain opt for a soft Brexit whereas those who voted leave opt for a hard Brexit, which holds control over immigration higher than access to the single market.<sup>171</sup> However, although previously indicating a hard Brexit strategy, the British government currently seem to lean towards the gray alternative.<sup>172</sup> This would increase the chances of obtaining access to the single market without bending too much on the question of national sovereignty.

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<sup>165</sup> The Economist, *Negotiating Brexit – the way forward*.

<sup>166</sup> Douglas-Scott, *Brexit, Article 50 and the Contested British Constitution*, p. 1025.

<sup>167</sup> Phillipson, *A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament*, p. 1064.

<sup>168</sup> R Miller v Secretary of State for Exiting the European Union [2016] EWHC 2768

<sup>169</sup> Spence, Politico, *UK government must consult MPs on Brexit*.

<sup>170</sup> Cooper, Politico, *British MPs back Theresa Mays Brexit timetable*.

<sup>171</sup> Walker, The Guardian, *Brexit: Theresa May prioritises immigration curbs over single market*.

<sup>172</sup> Surk, Politico, *Theresa May could opt for ‘gray Brexit’*.

## 4.4 Legal reflection: safeguarding integration?

Tatham describes the introduction of the legal possibility of withdrawal as underlining the recognition of Member State sovereignty, as well as confirming their role as ‘Masters of the Treaty’. This is supported by the fact that the only requirement Article 50 TEU sets out is that the Member State’s decision of withdrawal is in accordance with its own constitutional arrangements.<sup>173</sup> This interpretation will, however, be scrutinised below.

Firstly, the criteria that a withdrawal must be in accordance with the constitutional arrangements of the concerned Member State should be examined. In relation to this, Garner argues that a dialogue regarding the constitutional requirements for initiating Article 50 TEU would provide a constitutional statement as to why Member States engage in the EU integration project and, subsequently, clarify the limits of this integration. Although such a dialogue would risk being abused by Eurosceptics using it to drive Member States towards a withdrawal, it would also enable individuals and collective bodies to consider their relation to the EU, thereby illuminating the reasons and benefits for European integration. A determination of the substantive conditions for withdrawal would also challenge the Eurosceptic allegations that the Member States’ independence and sovereignty ‘has been sacrificed at the altar of a European super-state.’<sup>174</sup>

Secondly, the actual procedure of Article 50 TEU must be examined. Several aspects point towards the fact that the withdrawing Member State is put in a worse position than the EU and its institutions from the outset of the negotiations. Indeed, the EU sets out the timetable for the withdrawal negotiations and the Member State concerned is not allowed to participate when the remaining Member States define their negotiating position. In addition, members representing the withdrawing Member State in the European Council and the Council of the European Union will be excluded from taking part in discussions and decisions concerning its withdrawal.<sup>175</sup>

It is currently uncertain whether a Member State, once it has notified the European Council of its intention to withdraw, is able to unilaterally revoke its notification and suspend the Article 50 procedure. Most argue that this is impossible from a legal perspective, as Article 50 TEU does not expressly provide for that. It must be noted that it is the unilateral notification that triggers the procedure, not the withdrawal agreement. The reason for its merely declaratory nature is that the Member State will withdraw from the EU even if an agreement is not reached. This does, however, not exclude the possibility

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<sup>173</sup> Tatham, *Don’t Mention Divorce at the Wedding, Darling: EU Accession and Withdrawal after Lisbon*, p. 148.

<sup>174</sup> Garner, *Why all Member States should clarify their Constitutional Requirements for Withdrawing from the EU*.

<sup>175</sup> Kulpa, *EU Law Analysis, Is Article 50 valid?*

of suspending the withdrawal process upon agreement between the withdrawing Member State, the remaining Member States, and the EU institutions. Nonetheless, the fact that it is unsure whether the notification can be revoked risk that Member States use the notification in Article 50 TEU to force renegotiations of their membership.<sup>176</sup> Article 50 TEU also risks being abused by Member States attempting to force renegotiations of their membership under threats of a future notification. However, it is argued that such abuses could amount to a breach of the fundamental values in Article 2 TEU and, consequently, fall within the scope of the Article 7 procedures.<sup>177</sup>

In relation to this, it must be noted that the opportunity for withdrawal in Article 50 TEU presents the Member States with an emergency exit from the EU in case it fails to protect the fundamental values in Article 2 TEU. Article 50 TEU could therefore function as a safety valve that enables the withdrawing Member State to preserve their constitutional foundation.<sup>178</sup>

For whatever reason Article 50 TEU is initiated, there are many views on the effects of a future Member State withdrawal on the integration of the EU. While some hope that a swift and unfavourable exclusion would discourage any Member States contemplating to follow suit, others believe that it could serve as a springboard towards a more integrated Europe through overcoming the resistance that would have otherwise hindered such a development. Nevertheless, few focus on finding ways to convince doubtful Europeans of the benefits of the integration process.<sup>179</sup>

It could, however, be argued that the mere existence of Article 50 TEU legitimises and strengthens the integration process. This is explained through the positive psychological impact on the political discourse of the Member States in respect of the EU, as it could calm their concerns about an increasing transmission of sovereignty.<sup>180</sup> At the same time, it could be argued the Article 50 TEU risks undermining Member State loyalty towards the integration process. With the political reality of an exit that is both legally available and possible, eurosceptic forces could succeed in achieving a withdrawal instead of striving for change within the EU.<sup>181</sup>

In terms of governance, control over law-making and cross-border movements are fundamental. Consequently, the question of participation in a system which controls that becomes central. A withdrawal from that system with the ambition to regain sovereign powers might, therefore, prove to be futile. This is because the idea of independent nation-states can be said to be an

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<sup>176</sup> Poptcheva, *Article 50 TEU: Withdrawal of a Member State from the EU*, p. 4.

<sup>177</sup> Hillion, *Leaving the European Union, the Union way A legal analysis of Article 50 TEU* p. 3.

<sup>178</sup> Garner, *Why all Member States should clarify their Constitutional Requirements for Withdrawing from the EU*.

<sup>179</sup> Nettesheim, Martin, *Brexit: Time for a Reflection Period about the Finalité of European Integration*, p. 88.

<sup>180</sup> Tatham, *Don't Mention Divorce at the Wedding, Darling!: EU Accession and Withdrawal after Lisbon*, p. 154.

<sup>181</sup> Kulpa, EU Law Analysis, *Is Article 50 valid?*

illusion in today's interconnected world.<sup>182</sup> In line with this, it is argued that nation-states can only be preserved within the framework of a strong and united EU. The belief that independence and sovereignty would be regained following a withdrawal from the same is, therefore, necessarily a misconception. Instead, sovereignty only exists to the extent a state can execute its sovereign competences in international relations.<sup>183</sup> Member State withdrawal from the EU will therefore have the paradoxical consequence of a decline in the concerned nation-state's sovereignty, as its capacity to impact the global order will decrease significantly.<sup>184</sup> Lastly, it can be argued that an exit from the EU is bound to be selective rather than total. As the regulatory power of the EU extends beyond its borders, a nation-state might find itself under the influence of EU regulations even after its withdrawal.<sup>185</sup> It can thus be held that a British withdrawal from the EU risks undermining the very self-determination and national sovereignty that its proponents believe it will create.<sup>186</sup>

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<sup>182</sup> Kukovec, *Brexit – a Tragic Continuity of Europe's Daily Operation*

<sup>183</sup> Wimbledon Case PCIJ 1923

<sup>184</sup> Avbelj, *Brexit: An End to the End of History* p. 4.

<sup>185</sup> Kukovec, *Brexit – a Tragic Continuity of Europe's Daily Operation*.

<sup>186</sup> Douglas-Scott, *Brexit, Article 50 and the Contested British Constitution*, p. 1040.



# **5 Conclusion: Articles 7 and 50 TEU as safeguards?**

## **5.1 The European integration project**

The legal and political development of the EU shows that the integration project has expanded into covering not only its initial goal of economic integration through the internal market, but broader policy areas. For example, human rights are now entrenched in EU law through the enactment of the Charter and Article 2 TEU establishes the fundamental values in the EU. In relation to this, the centrality of the rule of law to the functioning of the EU, and thereby the integration project, must be underlined. More than on a substantive level, the way in which the EU integration project is carried out structurally has also developed. Although primarily intergovernmental in the beginning, it has evolved into a *sui generis* legal and political order with several supranational and federal aspects. However, discontentment among some Member States towards closer integration has resulted in a shift towards intergovernmental influences in its governance.

## **5.2 Implications of Articles 7 and 50 TEU on the integration project**

The analysis of the procedures under Article 7 TEU and Article 50 TEU shows that both consist of a mix between supranational and intergovernmental approaches.

Article 7 TEU, which provides the EU with the power to sanction a Member State in breach of the fundamental values in Article 2 TEU, show two major weaknesses. The first is its high thresholds for determining a potential or actual breach of the fundamental values in Article 2 TEU. The second is the constitutional nature of the act allegedly in breach as well as the fact that its scope is extended to cover situations where the Member State has acted within its exclusive competence. The complementary procedures adopted as pre-Article 7 mechanism are different due to opposing understandings of monitoring powers over Member States. This backwards development shows an increased focus on intergovernmental governance in the EU, which should be criticised for losing sight of the importance of compliance with the values, and especially the rule of law, that form the basis of the EU. The fact that Article 7 TEU has the ability to sanction the acts of a Member State outside the scope of EU law is, therefore, both its strength and weakness. Whilst providing for a holistic protection of the fundamental values in theory, this extensive scope makes Article 7 TEU unusable in practice due to its largely political nature.

Article 50 TEU, which allows for the unilateral withdrawal of a Member State from the EU, further underlines the mix of intergovernmental and supranational features. Whilst representing a shift towards increased intergovernmental governance on the outset, an examination of its terms in respect of the negotiations and subsequent withdrawal agreement reveal that it is shaped to the EU's advantage. It can therefore be concluded that Article 50 TEU incorporates supranational and federal aspects in both its structure and operations. Further, although focus should necessarily be on reaching a stable and unified EU, the exclusion of a Member State that is unwilling to cooperate could benefit the integration project through avoiding the increasing opt-outs which hinder the project from being carried forward.

Lastly, it should be mentioned that Article 7 TEU and Article 50 TEU could be said to both rest on a notion of deterrence. However, whereas the deterrence in Article 7 TEU will become inflated if proven unusable, Article 50 TEU might risk having the same result if (too successfully) used.

### **5.3 Mutual impact on Articles 7 and 50 TEU on the integration project**

Article 50 TEU risks having the effect that it alters the content, or the interpretation of, the common fundamental values as laid down in Article 2 TEU. As has been noted, these should remain the same regardless of Member State withdrawals. However, although the actual values in Article 2 TEU remain, their application in the Member States can affect their interpretation at the EU level. Hence, the withdrawal of an influential Member State might risk altering the application of a specific value. This, in turn, would be a hinder to the application of Article 7 TEU as it would make it increasingly difficult to determine whether a Member State has in fact breached, or risk breaching, a fundamental value in Article 2 TEU.

It can also be argued that the increased focus Article 50 TEU gives to Member State sovereignty could risk undermining the supranational approach in Article 7 TEU. This power is founded on the belief that the EU has a right to limit the constitutional identities of the Member State within the realm of the fundamental values. However, those that criticise this based on the understanding that EU lacks the right to intervene in national political measures could become more convinced in that belief.

The effects Article 7 TEU could have on Article 50 TEU are somewhat complex. Hindering the application of Article 50 TEU through activating Article 7 TEU against a Member State that abuses the withdrawal procedure would risk harming the EU, as it would prolong the procedure and create an unstable situation among the remaining Member States. However, despite this it is important that Article 7 TEU can protect against real abuses of Article 50 TEU. This is central to the integration project as it is vital to create an environment in the EU where Member States can work for change within the sys-

tem on equal terms. Here it should be added that the reality of the global context means that this is also the better option, since national sovereignty outside the EU lacks the power to have any real influence.

Furthermore, Article 50 TEU could validate the use of Article 7 TEU by legitimising its cause and powers. The existence of Article 50 TEU means that participation in the EU is a voluntary act that can be withdrawn. Although membership means a limitation on the constitutional identity of the nation-states, it is necessary in order to ensure the well-functioning of the EU as a whole. It must be clear to all Member States that voluntary cooperation cannot, and should not, mean that it is possible to only comply with (and benefit from) certain parts of the system.

## 5.4 Concluding remarks

The development of Article 7 TEU reflects the inherent tensions in the integration process. Providing the EU with the possibility to sanction a Member State in breach of the fundamental values in Article 2 TEU, Article 7 TEU must be seen as fundamentally supranational. However, its political character and the fact that a decision under Article 7 TEU requires unanimity in the Council makes it, de facto, intergovernmental in its operations. This is problematic given the utmost importance of compliance with the values for the functioning of the EU.

While the incorporation of Article 50 TEU into the EU system reflects the shift towards a more intergovernmental model, it also counteracts it. Although providing the Member States with the tool to exit the EU, the fact that it is structured to the EU's advantage means that it does not provide the Member States with sufficient means of achieving a *successful* withdrawal. Therefore, although theoretically symbolising the disintegration of the EU, it could function more as a supranational federal tool in practice through its structure and operations.

Furthermore, it is interesting to explore and expand on the ways in which Article 7 TEU and Article 50 TEU are interlinked. This is mainly because they are both so closely connected to contemporary ideas and notions regarding the power relation between the Member States and the EU in terms of national sovereignty and the conferral of competences. It follows that, as they stand on the verge of being activated, their potential mutual and correlative impacts and applications should be carefully considered (especially since it is the first time either of them will be applied).

It can therefore be concluded that Article 7, although theoretically equipped with tools to safeguard compliance with the fundamental values in Article 2 TEU, cannot be effectively utilised because of the intergovernmental and political aspects of its structure. This is problematic, as compliance with the fundamental values in Article 2 TEU are essential to the functioning of the EU. However, it is equally important that the Member States remain in the EU. Although providing for the unilateral withdrawal from the EU, Article

50 TEU has proven to be more than a purely intergovernmental tool for disintegration. Firstly, it is supranational in its operations. Secondly, it can further integration through allowing a let-out for Member States that do not want to cooperate. Combined, these aspects show the inefficiency of increased intergovernmental governance and the importance of an open discussion of the constitutional basis on which the European integration should be carried forward.

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