UPHOLDING DEMOCRATIC VALUES
WITHIN THE EUROPEAN UNION:
PRE- AND POST-ACCESSION

LLM-paper
'LLM in European Union Law'

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Upholding Democratic Values within the European Union: pre- and post-accession

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Abstract: The European Union is founded on the Democratic Values enshrined in Art. 2 TEU. Through the pre-accession procedure, potential Member States have to respect and satisfy these Democratic Values before joining the European Union, and uphold these Democratic Values once they become Member States. Nevertheless, recent development within certain Member States, such as Austria, France, Hungary, Romania, etc. showed that the Member States are not able to keep up with the high standards of the European Union once they accede. Moreover, some Member States are even allowed to join the European Union without satisfying the Democratic Values. Although the European Union has several tools at its disposal to act against non-compliant Member States from the nuclear option of Art. 7 TEU, over the infringement procedure under Art. 258 TFEU and following, to the monitoring mechanism established by the Acts of Accessions, these tools fail to produce the desired outcome since Member States are still violating the Democratic Values. Therefore, several proposals have been made by legal scholars from the 'reverse Solange' doctrine, the 'Systemic Infringement Procedure', a 'Copenhagen Commission' to proposals from the Commission and the Council. All these proposals will be analysed in this paper to come up with a comprehensive mechanism to deal with Member States which are non-complying with the Democratic Values.
Driven by the passion with which the Professors of European Union Law of the University of Ghent provide the students with knowledge during the Bachelor and Master's years, my interest in European Union law increased significantly. Following a LLM in European Union Law is a good reflection of this interest. This paper is therefore the result of my studies and the extensive interest in European Union Law developed at this University. This LLM-paper is submitted as a completion of the requirements for the LLM in European Union Law at the University of Ghent.

I express my deep gratitude to my promoter, Prof. dr. Inge Govaere, for providing the essential educational background, for your continued and valuable support, for lots of great inspiration, ideas, constructive feedback and professional guidance. Further, I have to thank Helen Mort and Bernadette Willemot for expertly proofreading, much thanks for your care and attention. Lastly, lots of thank for my relatives and friend, who have been great sources of encouragement and support.

Femke Gremmelprez
Ghent, June 2015
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INTRODUCTION

Article 2 TEU:
"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the right 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."

1. Foregoing provision quotes the foundational stones and shared values on which the European Union (hereinafter 'EU') is rooted. This has a two-folded protection purpose, namely, being a requirement that must be fulfilled before acceding to the EU and after the accession being promoted and respected by the Member States.\(^2\) The EU and its institutions are committed to promote these Democratic Values.\(^3\) In the earlier years of the European Economic Community such a catalogue of Democratic Values did not exist due to the fact that the Community initially just targeted economic integration. It was when the Community evolved both politically and constitutionally that Democratic Values eventually appeared in the EU’s agenda.\(^4\) The EU has progressively expanded its perspective of Democratic Values, examples being the development of the 'Copenhagen criteria', the inclusion of Art. 2 and 7 TEU in the Treaties, the establishment and entry into force of the Charter of Fundamental rights, the obligation to accede to the European Convention of Human Rights – although the accession is further away than ever due to Opinion 2/13 of the CJEU, and the recognition that fundamental rights constitute as general principles of EU-law.\(^5\) This paper will use the Democratic Values as they are established and enshrined in Art. 2 TEU up till today without assessing whether this is a complete list of values or whether other values should be added.

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1. Art. 2 TEU.
2. E. MUSTAFIC, "European values as criteria for accession to the European Union: the effectiveness of sanction mechanisms on Member States and non-Member States", Central European University, March 2014, 7.
3. The fundamental values of the EU pursuant Art. 2 TEU will be referred to as 'Democratic Values' for the purpose of this LLM-paper.
Therefore, it will not be the purpose of the paper to analyse the specificity and various elements of those Democratic Values.6

2. During the procedure which States have to follow in order to accede, the EU attaches great importance to conditionality, or in other terms to the fact that potential Member States have to fulfil a set of requirements before becoming a Member State. Various instruments have been created over the years, especially after the dissolution of the Soviet Union, which had as prospect the 'big bang' enlargement taking the EU with 15 Member States to a EU with 25 Member States, which ultimately took place in May 2004. Due to the open and vague nature of the accession procedure, the legal basis of which is described in Art. 49 TEU, the European Council had the opportunity to establish a new set of pre-accession conditionality to ensure new Member States comply with the Democratic Values at the moment of accession. Nevertheless, once the candidate States become Member States, this future membership incentive disappears. The European Court of Human Rights shows us that not only certain specific confrontations, but also systematic and persistent violations by Member States of certain Democratic Values still exist.7 The recent developments in Hungary speak for themselves, for instance the idea has emerged to reintroduce death penalty, to legalise the segregation of Roma in public education, etc.8

3. The European Council nonetheless declared that the EU is highly committed to its Democratic Values in its external relations: "trading preferences, cooperation and association agreements, aid, diplomatic recognition, and eventual membership have been made conditional on respect for Democratic Values by the EU’s partners".9 In order to be credible in this respect, full compliance with the Democratic Values should be ensured, in particular, within the Member States of the EU as such.10 In other words, "if fundamental rights are not

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7 European Court of Human Rights, "Overview 1959-2011", February 2012.


taken seriously in one's own backyard, one's credibility in the wider neighbourhood is bound to diminish as well."\textsuperscript{11}

4. However, what can the EU do when Member States no longer comply with the Democratic Values to which they committed themselves by joining the EU? This brings along the focus of this LLM-paper. To answer this question, the issue of disparity between on the one hand the democratic model promoted by the EU in its external relations and thereby imposed on candidate members and on the other hand its modest capacity to intervene whenever Democratic Values are at risk being violated within one of its Member States has to be critically analysed. Analysing the pre-accession conditionality is therefore a necessary first phase. Subsequently, it is indispensable to extensively review and assess currently existing and possible new or revised mechanisms against breaches of Democratic Values by Member States.

5. Following this general introduction, the first chapter will start with establishing the 'pre-accession conditionality' as this exists in particular in relation to Democratic Values. Therefore, the concept of 'good neighbourliness' as developed by the Essen European Council in 1994 will not be addressed.\textsuperscript{12} The different aspects of the 'pre-accession conditionality' on the basis of the various components of Art. 49 TEU will be scrutinised. This is first of all the requirement of respecting the Democratic Values which are realised by Accession Strategies, Accession Partnerships and pre-accession funding. Further requirements to ensure the respect of the Democratic Values are formulated vaguely giving the opportunity to the European Council to establish new conditions. The Copenhagen criteria are realised in the context of such a European Council. Acknowledging all the different aspects of 'pre-accession conditionality', the question of necessity for post-accession conditionality emerges. Therefore, in the second chapter, the currently existing post-accession mechanisms will be critically evaluated. The chapter firstly analyses – subsequent to a short introduction (Section 1) – the only explicit legal basis for EU action when a Member State fails to comply with the Democratic Values, namely Art. 7 TEU (Section 2). Determining four problems leading to the ineffectiveness of Art. 7 TEU, a second implicit legal basis will be assessed, namely the


\textsuperscript{12} For an extensive assessment, see for instance: P. VAN ELSUWEGE, "Good neighbourliness as a condition for accession to the European Union: Searching the balance between law and politics", forthcoming in D. KOCHENOV and E. BESHESKA (eds.), Good Neighbourly Relations in the European legal context, Leiden, Brill Nijhoff, 2015.
original infringement procedure pursuant Art. 258 TFEU (Section 3). Due to difficulties with the upcoming acceding States, the Acts of Accession of Bulgaria, Romania and Croatia foresee besides the mechanisms existing in the EU-Treaties in an additional monitoring system (Section 4). At the end of this chapter, a comprehensive review of all those mechanisms will be provided (Section 5). Then, in the third and last chapter, a proposal to reform the existing mechanisms and/or to establish new mechanisms (Section 1) will be established in order to create an ultimate sound mechanism for the prevention and/or sanction of non-compliant Member States (Section 2). The LLM-paper will draw to a close with an overall conclusion.
CHAPTER 1:
PRE-ACCESSION:
FROM THIRD COUNTRY TO MEMBER STATE

6. One of the current mechanisms of action to ensure that all Member States of the EU respect the Democratic Values is to filter their compliance before they accede to the EU. This is also called 'pre-accession conditionality', meaning that the applicant States have to fulfil a set of requirements before these States can join the EU.\(^{13}\) And therefore, it presupposes the agreement of applicant States with the EU's scrutiny of all their legal, political and economic reforms.\(^{14}\) The current accession procedure under Art. 49 TEU still contains a lot of features, as they were in force in the first enlargement with Ireland, United Kingdom and Denmark.\(^{15}\) Nevertheless, the prospect of the 'big bang' enlargement with Central and East European post-communist countries (hereinafter 'CEECs') gave rise to further procedural and administrative innovations and consequently more safeguards were introduced. The European Council saw the prospect of membership as a unique incentive to the applicant Member States to speed up the implementation of the EU acquis. The incorporation of the EU acquis into legislation is necessary, but is not in itself sufficient, it will also be necessary to ensure that it is actually applied.\(^{16}\) Hence, a comprehensive assessment of the compliance of the candidate countries through pre-accession conditionality is inevitable. As a result, a pre-accession process of unprecedented length and complexity was designed, involving a sophisticated set of pre-accession instruments, strategies and policies.\(^{17}\) In other terms, this pre-accession

\(^{13}\) W. SADURSKI, "EU enlargement and democracy in New Member States" in W. SADURSKI, A. CZARNOTA and M. KRYGIER (eds.), *Spreading democracy and the rule of law? The impact of EU enlargement in the rule of law, democracy and constitutionalism in post-communist legal orders*, Dordrecht, Springer, 2006, (27) 47.


\(^{16}\) Presidency conclusions Luxembourg European Council, 12-13 December 1997.

conditionality is aimed at reducing the differentiation between Member States once they join an enlarging EU.\(^{18}\)

7. The pre-accession conditionality comprises different requirements that have to be fulfilled. Those conditions can clearly be derived from Art. 49 TEU. The first condition is respect for the Democratic Values. Art. 49 TEU reads very clearly: only States that "respect the principles set out in Art. 2 TEU may apply to become a member of the Union". This encouraged a practice of the EU to apply conditionality clauses in its relations with third countries. It started as 'essential elements clauses' and 'suspension clauses' which allowed the suspension of an agreement or treaty if one of the parties acts against democracy or other essential principles guiding the EU's external relations. The first essential element clause was introduced into the fourth Lomé Convention with the ACP-countries.\(^{19}\)

8. With the prospect of the 'big bang' enlargement with ten post-communist CEECs joining the EU in mind, the essential element clause became an instrument of positive conditionality, rewarding compliance with the Democratic Values by opening accession negotiations and ultimately offering membership.\(^{20}\) When the EU decided to offer these CEECs a membership perspective in the 1990's, the CEECs were submitted to an extensive scrutiny of their compliance with the Democratic Values. The EU first used trade and cooperation agreements to encourage political reforms. Although the EU decided to conclude association agreements, so called Europe Agreements, with the countries of CEECs if those countries met the conditions related to the rule of law, human rights, a multi-party system, free and fair elections and a market economy, the first three Europe Agreements did not refer to the conditionality.\(^{21}\) On 11 May 1992, the Council decided that all cooperation and association agreements should contain a clause permitting the suspension of the agreements if human rights, democratic principles, and the principles of the market economy are not respected.\(^{22}\)

9. Those suspension clauses are combined in the Accession Partnerships with the suspension of pre-accession financial assistance. This allowed the EU to postpone the opening


\(^{20}\) Ibid., 11.


\(^{22}\) Ibid., (253) 261.
of accession negotiations or delay the opening of new chapters and the closure of opened chapters if candidate countries refused to comply.\textsuperscript{23} The Accession Partnerships were created by the Luxembourg European Council of 1997 and had to be established for all applicant CEECs.\textsuperscript{24} It addressed the most important steps for a candidate state in order to improve its compliance with the Copenhagen criteria as explained below and set forth the financial means available to implement these priorities and conditions.\textsuperscript{25} The candidate States that were not complying with the outlined conditions would suffer the consequences of their behaviour and therefore lost the pre-accession funding. Art. 4 Reg. 622/98 States literally that "when the commitments contained in the Europe Agreement are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, (…), may take appropriate steps with regard to any pre-accession assistance granted to an applicant State".\textsuperscript{26}

10. On the merit of the Thessaloniki European Council of 2003, the Stabilisation and Association Agreements (hereinafter 'SAAs') concluded with the Western Balkan countries were reinforced and served as the primary contractual agreements guiding the membership process.\textsuperscript{27} The SAAs are adapted to the specific situation of each country and serves as the basis for implementation of the accession process. These SAAs are part of the Stabilisation and Association Process (hereinafter 'SAP') towards the Western Balkan, creating extra requirements for accession vis-à-vis candidate countries for the Western Balkan based on the principle of conditionality under which the EU reserves the right to unilaterally impose sanctions.\textsuperscript{28} Under Art. 2 of the SAA with Albania, "respect for democratic principles and human rights (…), respect for international law principles and the rule of law (…), shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement".\textsuperscript{29} Only when both the requirement of the SAP and the conditions as set forth below are fulfilled, the candidate state can proceed with the accession negotiations to

\textsuperscript{24} Council Regulation No 622/98 of 16 March on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, \textit{OJ} L 85, 20 March 1998, 1.
\textsuperscript{26} Council Regulation No 622/98 of 16 March on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, \textit{OJ} L 85, 20 March 1998, 2.
\textsuperscript{27} Presidency Conclusions Thessaloniki European Council, 19-20 June 2003, recital 40-43.
\textsuperscript{28} G. STAFAJ, "From rags to riches: Croatia and Albania's EU accession process through the Copenhagen criteria and conditionality", \textit{Fordham International Law Journal} 2014, vol. 37, (1683) 1696.
\textsuperscript{29} Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, \textit{OJ} L 107, 28 April 2009, 166-502.
end with the accession. Croatia was the first state of the Western Balkan that joined the EU in accordance with the SAA.

11. Furthermore, Art. 49 TEU spills out other conditions before a candidate state can accede to the EU, namely the "conditions of eligibility agreed upon by the European Council". Therefore, before becoming a member of the EU, the candidate States have to fulfil the conditions set out by the highest political authority of the EU. The 'Copenhagen criteria', developed by the Copenhagen European Council in 1993, are the first quasi-legal or at least legally enforceable requirements that all subsequent applications for membership have been made subject to.\(^{30}\) Compliance with the Copenhagen criteria is a prerequisite for the opening of any accession negotiations and it is the basis for accession to the EU. The Copenhagen European Council therefore stated: "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union".\(^{31}\) Especially, the political criteria developed by the European Council reflect the Democratic Values. Subsequently, the Madrid European Council in 1995 added the condition of the adjustment of their administrative structures in order to strengthen the ability to take on the obligations of membership.\(^{32}\) Notwithstanding the currently existing conditions of eligibility as they are developed by the Copenhagen European Council and the Madrid European Council, Art. 49 TEU appears to leave a door open to the introduction of new pre-accession conditions by the European Council.

12. Lastly, there are instruments through which compliance of the requirements is monitored. Since 1997, the European Commission (hereinafter 'Commission') issued Regular Reports, after the 'big bang' accession called Progress Reports, to monitor the progress of individual countries.\(^{33}\) In those annual reports, the Commission evaluated progress for sections such as "Democracy and the rule of law" focussing on the parliament, the executive, the judicial


\(^{32}\) Presidency conclusions Madrid European Council, 15-16 December 1995, III-A.

system and anti-corruption measures, and "Human rights and the protection of minorities" with the focus on civil and political rights, economic, social and cultural rights.\textsuperscript{34} The progress includes a summary of the progress made by the state concerned and provides conclusions and recommendations for the state concerned to act upon. For instance, in 2009 Albania has applied for membership. Since this moment, the Commission has monitored yearly the progress Albania made and evaluated the main remaining challenges.\textsuperscript{35}

13. Concluding this chapter, it is clear that the EU has a wide range of pre-accession mechanisms thanks to the open and vague nature of Art. 49 TEU.\textsuperscript{36} It verifies whether the candidate States comply with the Democratic Values before they become Member States. This is efficiently and effectively working, at least at the moment of accession. It is clear from the above mentioned that the EU is able to rely on an outstanding pre-accession conditionality and monitoring system to follow the situation in each acceding state separately. Furthermore, the EU may provide for sanctions against a candidate state if the state concerned is not acting in compliance with, among other things, the Democratic Values as they are represented in the Copenhagen criteria. Also the sanctions are effective as they are related to financial assistance and the accession process as such. One has to keep in mind that the EU in exercising the pre-accession conditionality towards candidate countries are not limited by the principle of conferral of power enshrined in Art. 5 TEU, whereby the candidate States essentially offer a carte blanche to interfere with their internal affairs.\textsuperscript{37}

14. Another ultimate reason why pre-accession conditionality is working is the willingness of the candidate States to join the EU. These States are willing to fulfil all the criteria and conditions set by the EU, taking into account their specificity and other parameters surrounding its application.\textsuperscript{38} Nevertheless, one could argue that this brings along an

\textsuperscript{35} http://eeas.europa.eu/delegations/albania/eu_albania/progress_reports/index_en.htm (consultation 10 March 2015)
asymmetrical relationship between the potential or candidate state and the EU. The candidate countries are left a weak margin of manoeuvre guaranteeing a sufficient degree of pressure towards those candidate countries to meet the demands of the EU. In any case, the strong position of the EU may not force candidate countries into accepting obligations and conditions, though will it significantly affect the progress of accession. Take for example the accession process of Albania. Already at the early stage of the SAA negotiations, the negotiations were immediately ceased because the Commission expressed serious concerns about Albania's political system and its efforts in fighting corruption and organised crime.

Hence, differentiation between the various candidate States and a strong position of the EU can be justified on the one hand to ensure that candidate States only accede to the EU when they are able to fulfil the obligations of membership, and comply with the Democratic Values. On the other hand, differentiation ultimately potentially reduced the necessity of sanctioning mechanisms for the non-compliance with the Democratic Values once those States become Member States. Conditionality rather works when it reflects the domestic preferences and political aims of the candidate country concerned and where there existed in the concerned candidate States certain domestic factors that favoured the importation, adoption and maintenance of these pre-conditionality mechanisms.

15. Hence, pre-accession conditionality is supposed to have a double positive effect according to Kochenov. On the one hand, it assist internal democratic transformation of the candidate countries, and on the other hand, it protects the EU by blocking States that are not yet ready to accede to the EU and/or represent a risk on the process of European integration. Nevertheless, the effectiveness of the pre-accession conditionality cannot be overestimated.

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42 Ibid., (1683) 1715.
45 Ibid., (541) 548.
and is criticised for various reasons. As stated correctly by KOCHENOV: "Although conditionality is now firmly rooted in the core design of EU law, overestimating it can be very dangerous indeed. Especially, it can lead to underestimating the correction mechanism, like Article 7 TEU, which potentially play a crucial role in preserving democratic achievements which conditionality cannot guarantee. Prevention should now, besides being revamped as such, be combined with therapy." Romania and Bulgaria – thus, since the last two waves of accession – for instance, are made subject to a monitoring mechanism precisely because those States were not able to follow the pre-accession conditionality. Further, the pre-accession conditionality used to work effective on a short-term notice. Concerns related to the breaches of Democratic Values in various Member States, old and new, show that imposing Democratic Values on candidate state does not mean that those States will uphold the high standards during their membership. Therefore, the question emerges what will happen with the compliance of Democratic Values when those candidate States become new Member States when the incentive of membership disappears? The pre-accession conditionality does not exist anymore. In other terms, there are no more annual Progress Reports, there is no more scrutiny of the accession eligibility conditions, etc. Hence, the next chapter will therefore deal with an examination of the existing mechanisms to prevent and/or to sanction non-compliance with Democratic Values by Member States, either founding Member States or new Member States, namely it will examine whether or not one could speak about 'post-accession conditionality'.

48 See Subsection 1: Cooperation and Verification Mechanism for a detailed analysis.
CHAPTER 2: POST-ACCESSION:

KEEPING UP THE HIGH STANDARDS OF DEMOCRATIC VALUES DURING EU MEMBERSHIP

SECTION 1: Introduction

16. The incentives available to EU institutions are much weaker than the threat of withholding membership during the pre-accession phase. The scope of Democratic Values' monitoring with regard to the candidate countries possesses indeed no equivalence within the EU's relations with its Member States. The existing mechanisms for monitoring candidate States are not available vis-à-vis Member States. Once a candidate State becomes a Member State, there is a general perception that the EU is currently not properly equipped to monitor Member States on their compliance with Democratic Values and to deal with non-compliance. In other terms, one could say that the 'Copenhagen dilemma' appears. The Commission defines this as "the fact that while candidate countries are required to adhere to democratic principles, rule of law and fundamental rights before joining the EU, after their entry there is no appropriate instrument to address and redress violations, including in founding Member States or in Member States that joined the EU before the Copenhagen criteria were developed". In fact, there is a multi-level and multi-actor European framework of existing legal and policy instruments dealing with the assessment of Member States' compliance with Democratic Values, but do those instruments work (adequately)? This problem is due to the principle of conferred powers as enshrined in Art. 5 TEU, meaning that the EU only can act within the competences conferred upon it by the Member States; all other


competences remain within the sovereign powers of the Member States. Regarding Democratic Values, the EU has limited powers. This principle does not apply with respect to the accession of candidate States, because the Member State rather than the EU concludes the Accession Treaties.

17. Important problems concerning the compliance with Democratic Values emerge not only in 'new', but also in 'founding' and 'older' Member States. In the early 2000’s, Austria was the centre of attention as the populist right-wing Freedom of Jörg Heider was included in the Austrian government. It was the first time a radical political party, known for racist and xenophobic statements and positions, was taking positions in the government of a Member State since the end of World War II. Therefore, the case of Austria was the first that gave rise to reasoning for the application of the sanction mechanism of Art. 7 TEU, although this mechanism could not apply due to the fact that the inclusion of a party in the government as such did not constitute a ‘serious and persistent’ breach of the EU Democratic Values. Eventually, the situation was solved by diplomatic sanctions. A decade later, Hungary became widely spoken as it adopted a new Constitution that was deeply nationalist and undermined checks and balances. Although various Commissioners and the European Parliament have called for triggering Art. 7 TEU against Hungary, there appeared to be little appetite for such a move in the Commission as a whole and was 'solved' under several individual infringement procedures related to the independence of the central bank, the lowering of the mandatory retirement age of judges and the independence of the data protection authority. At the same time as the Hungarian Constitutional reforms, another problem arose in France. During the summer of 2010 France expelled almost 1000 Romanian and Bulgarian nationals of Roma origin living in France. In 2007, Romania and Bulgaria joined the EU whereupon their nationals became EU-citizens and benefited from the same citizenship rights as other EU-citizens. The infringement procedure under Art. 258 TFEU was started in relation to the Directive 2004/38/EC, but eventually a final ultimatum allowed France to avoid further infringement procedures.

51 Infra, see Section 2: The 'theoretical' Nuclear Option (§19 and following).
52 Infra, see Section 3: Infringement Procedure (§28 and following).
54 G. BUDO, "EU Common values at stake: is article 7 TEU an effective protection mechanism?", CIDOB documents May 2014, 6.
18. In the Treaties, different instruments can be found. The main instrument, but at the same time the most far going, is Art. 7 TEU. The current Treaties leave some other options open addressing the non-compliance with the Democratic Values, such as Art. 258 TFEU. Besides the Treaties, also the Acts of Accession foresee in instruments to monitor compliance. In the following sections, the various 'post-accession conditionality' mechanisms, starting with Art. 7 TEU (Section 2), proceeding with the original infringement procedure (Section 3) to conclude with some other existing safeguard measures (Section 4), will be analysed and discussed.

SECTION 2: The 'theoretical' Nuclear Option

19. Art. 7 TEU is the only explicitly mentioned option in the current Treaties to guarantee the protection of Democratic Values, introduced by the Amsterdam Treaty and amended by the Nice Treaty. This means that the Democratic Value requirements "gradually evolved from a precondition for accession into an on-going and enforceable condition of European Union membership" keeping the membership prospect of ten post-communist CEECs into mind. Art. 7 TEU establishes the possibility to take measures in case of violations of the Democratic Values. It foresees in the establishment of an early warning system in case of a risk of breaches, and a sanction mechanism in the event of an actual breach by a Member State and therefore contains a mechanism to protect the EU against serious breaches of the Democratic Values by any of the Member States. Thus the Member States choose to use a differentiated approach, namely a two-steps procedure consisting of a preventive mechanism and a sanction mechanism allowing for a "step-by-step escalation". In theory, this nuclear option gives the possibility to act in case of a serious and persistent breach by a Member State of the Democratic Values, meaning that it is not a method for resolving individual violations of Democratic Values suffered by citizens.

56 Communication from the Commission to the Council and the European Parliament on article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM (2003) 606, 15 October 2003, 3.
58 Art. 7(1) TEU.
59 Art. 7(2) TEU.
20. The intention of Art. 7 TEU to penalise and remedy a serious and persistent breach, but first of all to prevent such a situation is good. This mechanism has its advantages and can be seen as a unique instrument of EU integration.61 In particular, it does not make a distinction between 'old' and 'new' Member States. Furthermore, the scope of Art. 7 TEU is not restricted to the areas covered by EU-law, but it also allows the EU to act in the event of a breach in which Member States act autonomously within their exclusive competence.62 A breach can be seen as the undermining of the very 'foundations' of the EU and therefore, Art. 7 TEU ignores the traditional limitation of competences based on the principle of conferral of powers pursuant Art. 5 TEU.63 Hence, Art. 7 TEU has a 'general and horizontal' nature.64 Nonetheless, it is a long way from theory to practise. This Treaty-based mechanism has never been used in practise up till today and is nothing more than what a British scholar has called an "empty gesture".65 Moreover, it can be considered that the threat to invoke Art. 7 TEU is not able to create an incentive for the Member States to comply with the Democratic Values.

21. The first major problem relating the smooth working of Art. 7 TEU is the political dependence. Art. 7 TEU confers the related powers exclusively to political institutions, namely to the European Council and the Council of Ministers (hereinafter 'Council'). According to Art. 7(2) TEU, the European Council unanimously has to determine whether a serious and persistent breach of the Democratic Values exists. This means that the European Council has a wide margin of discretion in determining whether or not there is a serious and persisting breach, notwithstanding the consensus that has to be reached. All Member States have to agree,66 but it seems that the Member States are too concerned that the 'nuclear option' will be used against them one day. Those high majority thresholds increase the difficulty of triggering sanctions pursuant this mechanism. Only when the European Council determines that such a breach exists, the Council may decide to adopt measures suspending some rights

66 Obviously apart from the Member State concerned. Art. 354 TFEU establishes that the member of the Council or the member of the European Council representing the Member State concerned shall not take part in the vote and calculation of the majorities mentioned in Art. 7 TEU.
of the Member States. The Commission recognises the political nature of this mechanism, but sees this as space left open "for a diplomatic solution to the situation". Thus, instead of using the 'nuclear option', a solution will be found through diplomatic channels.

22. A second problem emerging, related to the political nature of the mechanism, is the lack of the CJEU's participation in this mechanism. The Art. 7 TEU mechanism confers powers exclusively on political institutions. The Treaties don't provide for competences for the CJEU to review the decision determining that there is serious and persistent breach of Democratic Values or a clear risk of such a breach. Pursuant Art. 269 TFEU, "the Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 TEU solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article". The CJEU, therefore, has only jurisdiction to review compliance with the procedural requirements of Art. 7 TEU.

23. The Court of First Instance (hereinafter 'CFI') confirmed this issue in the case Luis Bertelli Galvez v. Commission. The case concerns a complaint of a Spanish lawyer criticising the improper conduct of the Spanish courts over a period of 20 years and thereby failing to respect the fundamental principles of democracy and the rule of law mentioned in Art. 6 EU (current Art. 2 TEU). The ultimate aim of the complaint was to request the Commission to propose to the Council, pursuant to Art. 7(1) EU (current Art. 7(3) TEU), to suspend the voting rights of Spain in the Council until Spain had developed and implemented appropriate mechanism for exercising effective control over its judiciary. The Commission, on the contrary, referred to the limitation of powers concerning fundamental right whereby the Commission has no general power, but where it falls within the exclusive competences of the Member States. Hence, the Spanish lawyer brought the case before the CFI stating that the Commission failed to act by not investigating on the one hand, and in not proposing to the Council the suspension of the voting rights within the Council because of the serious breach by Spain of the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. "The EU Treaty (...) gives no jurisdiction to the Community
judicature to determine whether Community institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under Article 6(1) EU (current Art. 2 TEU) or to adjudicate on the lawfulness of acts adopted on the basis of Article 7 EU (current Art. 7 TEU), save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned. (emphasis added)\(^70\) Hence, the CFI has the jurisdiction to adjudicate on an application brought by a natural or legal person for a review of the lawfulness of measures adopted pursuant to Art. 7 TEU.

24. It, nevertheless, has to be emphasised that this limited jurisdiction of the CJEU, limited to purely procedural stipulations in Art. 7 TEU, does not mean that the CJEU is completely excluded to rule in case of breaches of the Democratic Values. The CJEU has competence to intervene in accordance with the infringement procedure under Art. 258 TFEU, which will be examined in the following section.\(^71\)

25. At first sight, Art. 7 TEU has a wide scope of application, namely the scope of commitment made in Art. 2 TEU such as the EU's founding principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Nevertheless, related to this, a third issue can be considered. The first stage of the sanction mechanism requires the existence of a 'clear' risk of a serious breach. This represents a warning signal to a non-compliant Member State before the breach occurs. Further, the second stage requires a 'serious' and 'persistent' breach. This wording makes clear that the threshold for activating Art. 7 will be hard to satisfy. The interpretation of the words 'a clear risk of a serious breach' and 'a serious and persistent breach' used in Art. 7 TEU can namely make the process of identification of such clear risk and later on serious and persistent breach in relation to the discretionary power of the Council and the European Council excessively difficult. It leaves space for all kind of political interpretations, an example of which can be found in the interpretation of 'persistent'. This means according to the Commission that the violation should not be of usual type, but acquires a systematic character. The characterisation of a breach as persistent is not connected to the violation itself, but this violation should have obtained extensive dimensions being transformed to a systemic problem. The Commission even recognises that a persistent breach can appear in a variety of manners. This does not

\(^{71}\) Infra, see Section 3: Infringement procedure (§28 and following).
make it easier. Furthermore, the provided emergence of a risk or a breach to trigger the mechanism encompasses the lack of systematic monitoring mechanism. When there is any body engaged in continuously monitoring the Member States' compliance with the Democratic Values, it will be hard to determine whether a risk or a breach has occurred.

26. And last but not least, another problem should be considered, namely the sanction that the Council can impose. Art. 7 TEU also provides for a wide margin of discretion for the Council in imposing sanctions. Art. 7 TEU gives the Council the right and not the obligation to impose sanctions. The sanction mechanism of Art. 7(3) TEU provides for the suspension of certain rights that can be derived from the Treaties, including the voting rights of the Member State in the Council, taking due account of the possible consequences of such a suspension on the rights and obligations of natural and legal persons. So, Art. 7 TEU doesn't specify which sanctioning measures the Council may take, apart from the voting rights of the Member State in the Council, making sure that the Member State concerned is not able to influence the decision-making process. Also the Commission doesn't address this issue in its Communication on Art. 7 TEU.

27. Hence, it has to be concluded that the early warning system and/or sanctioning mechanism of Art. 7 TEU is only a theoretical mechanism. The advantages of being consolidated in the Treaty, of having a general and horizontal scope are being reduced to nothing due to several reasons. The political discretion and the lack of judicial protection and review are besides the high thresholds to invoke the mechanism the main reasons. Nevertheless, the ineffectiveness of Art. 7 TEU puts forward some important features that have to be taken into account to create an effective mechanism addressing non-compliance with the Democratic Values. Firstly, the general and horizontal scope of application has to be part of the mechanism. This encompasses that it will be applicable to all Member States and that it applies with regard to all Democratic Values. Secondly, a mere political mechanism should be avoided, as non-compliance with Democratic Values not only constitutes political issues, but also legal ones. And thirdly, the mechanism should consist of a monitoring and sanctioning mechanism. Bringing Member States under continuous scrutiny makes it possible for the EU to act as soon as possible and to address the issue with the appropriate sanction.
SECTION 3: Infringement Procedure

28. As it is clear from the foregoing, it is indispensable to have a sound alternative to Art. 7 TEU in a way to achieve a high level of compliance with the Democratic Values among the Member States. From the EU-Treaties, one could derive implicitly another existing mechanism, particularly the original infringement procedure of Art. 258 TFEU and following. The case law of the CJEU is in a great extent related to "deficient, incomplete or incorrect transposition of Directives". Therefore, with regard to cases of non-compliant Member States related to Democratic Values, the Commission can also bring the concerned Member States before the CJEU for singled-out issues breaching specific EU-legislation. Infringement actions pursuant Art. 258 TFEU are namely to challenge a specific and concrete violation of EU-law by a Member State, of which Hungary would be the preeminent Member State.

29. This case concerns the constitutional changes in Hungary as a consequence of the concentration of political power in the hands of a right-wing party, including the reduction of the Constitutional Court's power and the radically lowered retirement age for judges, prosecutors, and notaries from 70 to 62 years of age. Instead of initiating the mechanism under Art. 7 TEU for a breach of the independency of the judiciary as an element of the Democratic Values, the Commission decided to start individual infringement procedures under Art. 258 TFEU. In the case of the lowering of the retirement age, the infringement procedure was found successful. The CJEU declared the lowering of the retirement age as an unjustified discrimination based on age contrary to the Equality Directive 2000/78 and ordered that the judges be returned. Nevertheless, Hungary waited to comply with the judgement till the National Judicial Office appointed new judges to the empty positions, and then allowed the senior judges to return back to work, but not to their original positions if those positions had already been filled with the new appointees. Furthermore, the Hungarian government offered compensation to the retired judges if they would not go back to work, as a result, very few judges actually returned to judging and none returned to their leadership.

74 CJEU, C-286/12, 6 November 2012, Commission v. Hungary, ECR; and CJEU, C-288/12, 8 April 2014, Commission v. Hungary, nyp.
75 E. MUSTAFIC, "European values as criteria for accession to the European Union: the effectiveness of sanction mechanisms on Member States and non-Member States", Central European University, March 2014, 39.
posts. This led according to Commission Reding to compliance with the judgement of the CJEU: "Hungary has respected – as the rule of law requires – the judgement of the Court of Justice of November (…). President Barroso and I were intensively involved in bringing all these matters to a satisfying conclusion from a legal perspective."

30. The Commission, by lodging an individual infringement procedure in the specific situation of Hungary, forgot to look at the broader picture, namely the problem of judicial independence as identified by Venice Commission. It is clear that the Commission only focused on a fragment of the structural problem, instead of providing the CJEU with the broader picture addressing the greater concern. Nevertheless, original infringement procedures are important, but if a Member State is threatening the foundational stones of the EU, this procedure will only address a specific and concrete violation of EU-law by a Member State. Therefore, this procedure will be too small bore to challenge the structural problem the Member State is faced with. Considering this procedure, another disadvantage can be discovered. Even when the Commission launches various infringement procedures concerning one Member State, the CJEU would still not be able to trigger the broader picture. The CJEU is namely institutionally not able to generate the patterns at issue if the cases are filed one by one. Each concrete infringement action stands on its own ground alone. Hence, analysing the original infringement procedure of Art. 258 TFEU, this mechanism certainly will not be accurate. Noncompliance with Art. 2 TEU clearly needs a more general approach whereby not only specific infringements are tackled, but whereby the issue as such in its widest possible scope should be dealt with, emphasising the importance of a general scope of application in a new mechanism.

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80 Ibid., 3.
81 Ibid., 3.
SECTION 4: Other Safeguards?

31. Keeping in mind the abolition of the membership perspective once a state has joined the EU and the lack of effective and accurate mechanism to deal with non-compliance by Member States, the Commission added additional safeguard measures in the Accession Treaties since the 'big bang' enlargement. This means that each enlargement wave produces a new set of 'post-accession conditionality'. With the accession of Bulgaria and Romania in 2007, the Commission for the first time made the newly acceded Member States subject to post-accession monitoring based on a Cooperation and Verification Mechanism (hereinafter 'CVM'). Learning from the past, the EU did not develop a CVM in the Act of Accession (hereinafter 'AA') of Croatia, but introduced for the first time a more general monitoring mechanism.

SUBSECTION I: COOPERATION AND VERIFICATION MECHANISM FOR ROMANIA AND BULGARIA

32. Romania and Bulgaria joined the EU in 2007, although they still had to make progress in certain areas of the EU acquis. There were some shortcomings in the compliance with important Democratic Values such as judicial reform, the fight against corruption, etc. This shows that the pre-accession conditionality with a strong leverage on the side of the EU is being sacrificed, as Romania and Bulgaria were not completely implementing the EU acquis and the Democratic Values at the time of accession. Therefore, the Commission set up a CVM in accordance to the Protocol82 concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the EU to assess the progress made by those Member States and to help focus the efforts of the concerned Member State through specific recommendations. This assessment is performed on the basis of certain benchmarks83 set out in Commission Decisions.84 In other terms, the CVM, regularly assessing progresses, is in line with the pre-accession progress reports of the Commission.

83 It is preferable to refer to these benchmarks as targets or tasks. See for instance: D. MARKOV, "The Cooperation and Verification Mechanism Three Years Later: What has been done and what is yet to come", Bulgaria Reports Friedrich Ebert Stiftung 2010, no. 1, 2:“In general, a benchmark represents a standard or best practise against which something can be measured or judged. The Commission benchmarks resemble more targets or tasks that should be completed rather than a standard against which a progress can be measured.”
84 Commission Decision establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, COM (2006) 6569
33. The CVM can be described as a "preliminary stage to the one-stage procedure for invoking the safeguard clauses, without however precluding an immediate application of the latter".\textsuperscript{85} If Bulgaria or Romania fails to address the benchmarks as they are set out in the Commission Decisions, the Commission may apply safeguard measures based on the 'Internal Market' safeguard clause of Art. 37 and the 'Justice and Home Affairs' safeguard clause of Art. 38 of the AA.\textsuperscript{86,87} According to the Commission, the CVM reports have "played an important role in the consolidation of the rule of law in Romania (respectively Bulgaria) as a key facet of European integration. Monitoring and cooperating with the work of the Romanian (respectively Bulgarian) authorities to promote reform has had a concrete impact on the pace and scale of reform (emphasis added)".\textsuperscript{88}

34. This certainly can be seen as an improvement and as an essential mechanism to verify whether a candidate State remains complying with the Democratic Values once it becomes a Member State. Though, some caveats in this monitoring mechanism persist. This mechanism sets out certain benchmarks and is geared towards a specific purpose and therefore depending on certain specific Democratic Values, such as independent judiciary – as a part of the rule of law – set forth in the Commission Decisions. This means that the CVM has only a limited scope of application, unless the Annex to the Commission Decision is adapted. Furthermore, the scope is not only limited with respect to the Democratic Values, but also limited with respect to its scope \textit{ratione personae}. Only Romania and Bulgaria are subject to a CVM, giving the impression that Romania and Bulgaria are 'second class' Member States in comparison with the other – older – Member States. This will not foster the equality of Member States pursuant Art. 4(2) TEU.

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\textsuperscript{86} Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, OJ L 157, 21 June 2005, 203-220.

\textsuperscript{87} Recitals 6 and 7 of the Commission Decision establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption, COM (2006) 6569 final, 13 December 2006 and Commission Decision establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, COM (2006) 6569 final, 13 December 2006.

35. Furthermore, even up till today – more than seven years after the accession –, those shortcomings have still not been solved. Moreover, more deficiencies occurred over the years. Romania serves as a good example to analyse the CVM. It is a tool for naming and shaming, working too slow lacking prevention-orientation. The Commission acknowledges that 2012 – five years after the accession – was a time when important questions were raised with regard to respect for the rule of law and the independence of the judiciary in Romania and when recent steps by the Romanian Government raise serious concerns about the respect of these Democratic Values.\textsuperscript{89} The Commission names following concerns: political challenges to judicial decisions, the undermining of the constitutional court, the overturning of established procedures, the removal of key checks and balances and the indications of manipulations and pressure which affect institutions, members of the judiciary, and eventually have a serious impact on society as a whole.\textsuperscript{90} This means that even five years after the accession of Romania, Romania still not satisfies the benchmarks, which they actually already had to fulfil at the time of accession. Moreover, it was necessary for the Commission to introduce a supplementary benchmark.

36. The latter showed on the other hand, so notwithstanding the deficiencies in the CVM, that the CVM is characterised by a certain degree of flexibility. Due to the exceptional nature of the developments in Romania in 2012, the Commission justifies the inclusion of specific urgent recommendations addressing the situation with regard to respect for the rule of law and the independence of the judiciary. The Commission States: "Overall progress has to be assessed in the context of a wider social recognition of key principles such as the rule of law, and the independence of the judicial process as part of the checks and balances of a well-functioning democracy. A well functioning, independent judicial system, and respect for democratic institutions are indispensable for mutual trust within the European Union, and for gaining the confidence of citizens and investors. (…) This report therefore includes specific recommendations to address the current situation and to help restore respect for principles which are cornerstones of European Democracy"\textsuperscript{91} The Commission is thus not afraid to extend the scope of the CVM to other Democratic Values when one of those 'foundational stones' of the EU is in danger. Since July 2012, the Commission also reviews the progress made for the independency of the judiciary as long as the recommendations are not fulfilled.

\textsuperscript{90} Ibid., 2.
\textsuperscript{91} Ibid., 2-3 and 19-21.
37. The importance of the flexibility cannot be exaggerated. Adding new benchmarks brings along the opportunity for the Commission to adopt their monitoring policy at any time when it can be justified by exceptional circumstances. Therefore, it will result in a legal basis for the monitoring proposal, at least with respect to Romania and Bulgaria, that will be discussed in the following chapter. However, the impact of the flexibility will be limited. It does not result in sanctions. Consequently, naming and shaming is the only leverage of the CVM Reports. Due to a lack of pressure, progress is made too slowly by the Member States concerned and in the meantime those Member State remain violating the Democratic Values during several years. Considering the forgoing, the CVM will not be of any help to deal with non-compliance of Member States with the Democratic Values, not mentioning its lack of prevention-orientation.

**SUBSECTION 2: MONITORING MECHANISM FOR CROATIA**

38. The EU was not willing to develop a CVM in relation to Croatia, drawing lessons from the pre-accession experience in the context of Bulgaria and Romania.\(^{92}\) As an alternative to the CVM, the EU has introduced for the first time a more general monitoring clause in the AA of Croatia.\(^{93}\) The AA of Croatia foresees in the possibility to monitor the commitments undertaken in the context of the accession negotiations, especially on commitments undertaken by Croatia in the area of the judiciary and fundamental rights.\(^{94}\) The text is unclear in a manner that the AA does not contain any formal time frame.\(^{95}\) Moreover, it is completely silent in this regard and therefore, contrary to the more specific 'Internal Market' and the 'Justice and Home Affair' safeguard clauses that are limited in time.\(^{96}\) Analysing this, one could argue that the Commission's monitoring of commitments could continue even after

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\(^{92}\) M. VACHUDOVA, "EU leverage and national interests in the Balkans: The puzzles of enlargement ten years on", *Journal of Common Market Studies* 2013, 12.


\(^{94}\) Art. 36(1) AA of Croatia: "The Commission shall closely monitor all commitments undertaken by Croatia in the accession negotiations (...). The Commission's monitoring shall focus in particular on commitments undertaken by Croatia in the area of the judiciary and fundamental rights (Annex VIII), including the continued development of track records on judicial reform and efficiency, impartial handling of war crimes cases, and the fight against corruption."

\(^{95}\) A. LAZOWSKI, "European Union do not worry, Croatia is behind you: a commentary on the seventh accession treaty, *Croatian Yearbook on European Law and Policy* 2012, no. 8, 34.

\(^{96}\) Art. 38 and Art. 39 AA of Croatia.
accession. However, Lazowski questions the relevance of such an additional monitoring mechanism, as the Commission has already at its disposal the infringement procedure pursuant Art. 258 TFEU and following. By referring to the previous section related to the original Infringement Procedures, it is clear that the efficiency of Art. 258 TFEU can be diminished due to its individual character and thus not sufficient to solve non-compliance with the Democratic Values. Although Art. 36 AA of Croatia could be considered as the legal basis for establishing a monitoring mechanism, it remains a theoretical discussion because up till today Art. 36 AA of Croatia has not been invoked yet.

**SUBSECTION 3: REVIEW OF INDIVIDUAL SAFEGUARD CLAUSES**

39. The individual safeguard clauses introduced by the AAs of Romania and Bulgaria and Croatia respectively clarify that there is an increased focus on post-accession conditionality by setting out monitoring systems. There is within the EU a tendency towards open-ended monitoring on the part of the Commission using the system of specific benchmarking, especially in the case of Romania and Bulgaria. However, the introduction of such monitoring system highlights in particular the existence of deficient pre-accession conditionality. This can be considered as a dangerous practise in the light of compliance with the Democratic Values. During the accession procedure, the EU has a huge leverage to force States willing to join the EU to implement the democratic values as a part of the EU acquis. Further, the leverage is disappearing increasingly once those States become Member States and as forgoing section have showed, the EU does not have efficient and effective mechanisms at its disposal to deal with non-compliance with the Democratic Values. So, when the EU is already sacrificing its high leverage and permits States to join the EU without complying with the whole EU acquis and therefore also without complying with the foundational stones of the EU, it will be hard to redress the issue once they become Member State considering the lack of mechanism to do so. Those monitoring mechanisms have not enough leverage to oblige the new Member States to address the issue, where already the membership incentive in the pre-accession phase did not work.

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98 A. Lazowski, "European Union do not worry, Croatia is behind you: a commentary on the seventh accession treaty, Croatian Yearbook on European Law and Policy 2012, no. 8, 35.
40. Furthermore, the monitoring mechanism created by the Acts of Accession bring along increased differentiation among Member States. Although differentiation to a certain degree might be constructive as already mentioned in relation to the pre-accession conditionality,\(^99\) in relation to the post-accession conditionality nothing could be further from truth. It has to be considered that all Member States are equal. Due to this mechanism, some Member States are 'more equal than others'. The new Member States, such as Romania, Bulgaria and Croatia, are subject to an additional monitoring mechanism, where the 'older' Member States are not, notwithstanding the fact that also some of those Member States fail to comply with the Democratic Values.

41. Therefore, notwithstanding the importance of a monitoring system, this system demonstrates various shortcomings, especially in the case of Romania and Bulgaria. The general monitoring system can be considered as an improvement as regards Romania and Bulgaria, when this general monitoring system will be used after the accession.

**SECTION 5: Conclusion**

42. Member States do not always comply with Democratic Values. France, Austria and Hungary among others can be considered to be prominent examples. Further, Bulgaria, Romania, and Croatia demonstrate that the pre-accession conditionality is being diluted increasingly with the enlargement wave of 2007 by introducing the CVM. Analysing the sanctioning mechanisms currently existing in the EU-Treaties and the monitoring mechanisms established by the AAs, it becomes clear that all those mechanisms one by one, for one or another reason, lack of effectiveness. Hence, unfortunately, it has to be concluded that the EU is powerless in the case of violations of and non-compliance with the Democratic Values.

43. The analysis started with the sanctioning mechanism of Art. 7 TEU, also known as the 'theoretical nuclear option'. Although this is the only mechanism enshrined in the TEU explicitly relating to infringements of the Democratic Values and thus providing for a legal basis for EU-action against Member States, several issues could be raised. The most important issue is the political dependency due to the wide margin of discretion in the hands of the European Council and the Council, and further the high threshold that have to be

\(^{99}\) Supra §13.
obtained in order to invoke the mechanism. Besides this explicit sanctioning mechanism, Art. 258 TFEU and following provides for the legal basis of an implicit sanctioning mechanism, namely the original infringement procedure. Neither does this mechanism create a solid and sound solution. It became clear that in case of breaches of Art. 2 TEU this infringement procedure in unsatisfactory. This procedure is only dealing with individual and specific infringements of EU-law. Consequently, a broader and more structural problem arising in the light of Art. 2 TEU will not be tackled. The last element of the analysis concerned the additional safeguard clauses related to the Democratic Values by the AA since the 'big bang' enlargement. Neither of the additional monitoring mechanism for Romania and Bulgaria, and Croatia respectively could achieve the desired objective. Where the improvements made by Romania and Bulgaria monitored through the CVM are realised too slow as they are seven years after the accession still not resolved, it is uncertain whether the monitoring mechanism for Croatia as set forth in Art. 36 AA of Croatia will and can be used as a legal basis to adopt a monitoring system after the accession. They have at least in common that both monitoring systems increase the degree of differentiation among the Member States, giving the impression that the older Member States are superior over the new acceding Member States.
CHAPTER 3: 
PROPOSALS FOR REFORMS AND NEW MECHANISMS

44. In consideration of the previous chapter, it became clear that the current mechanisms are missing efficiency. A definite discrepancy between the various instruments of the pre-accession conditionality and the more or less ineffective post-accession conditionality appeared, mainly due to the reason that States, which have acceded to the EU, are member of the EU and thus the membership incentive dissolves. One should also keep in mind the principle of conferral pursuant Art. 5 TEU and therefore should not expect too much from the EU in this respect. This provision foresees that the EU only has the power to act insofar these powers are conferred by the Member States upon the EU. This involves an important limitation for the scope of EU action against Member States that are breaching the Democratic Values. Therefore, it is necessary to emphasise that the 'ultimate' mechanism is one that should be consolidated in the Treaties. This has the advantage of being enshrined by the Member States in EU primary law, containing a legal basis for action against non-compliant Member States. However, it is doubtful whether the Member States will be ready to create a new preventive and sanctioning mechanism and consolidate this within the Treaties. Consequently, this chapter aims to provide for a proposal to reform existing mechanisms and/or to create new mechanisms whereby Treaty reforms should be avoided. Of course, besides the system explained in the following sections, the current mechanisms remain at the disposal, meaning that Art. 7 TEU could be invoked – what should be considered as non-existent –, or that the Commission can start infringement proceedings before the CJEU, etc.

45. To come to a solid and sound non-compliance mechanism, various proposals stated by different scholars and the EU institutions themselves have to be analysed (Section 1). Moreover, four different mechanism have to be examined, namely the Commission's proposal to develop a pre-Art. 7 TEU mechanism and the reaction thereon of the Council (Subsection 1), the 'Systemic Infringement Procedure' proposed by SCHEPPELE (Subsection 2), the 'reverse Solange' doctrine suggested by among others VON BOGDANDY (Subsection 3), and the
construction of the 'Copenhagen Commission' by MÜLLER (Subsection 4). In the second section, workable elements of the various proposals taking due account of the shortcomings of the existing mechanisms will be combined in one comprehensive mechanism, examining the advantages and disadvantages (Section 2).

SECTION 1: Various proposals

46. Different authors proposed various mechanisms. Also the Commission and the Council made some proposals. These proposals go from extending the existing mechanism of Art. 258 TFEU to creating a new EU-body. Analysing these proposals one by one, it becomes clear that neither of them are 'perfect' and proves the degree of difficulty which the EU is confronted with to find and/or create a sound and solid mechanism to deal accurately with non-compliance of the Democratic Values.

SUBSECTION 1: COMMISSION'S PROPOSAL AND COUNCIL'S REACTION

47. A first proposal can be found among the EU institutions themselves to address non-compliance with respect to the rule of law part of the Democratic Values. The Commission itself has set out a new framework to ensure an effective and coherent protection of the rule of law in all Member States, a framework to address and resolve a situation where there is a systemic threat to the rule of law. The purpose of this new framework is to find a solution in order to prevent the emerging of a systemic threat. So, basically not all individual breaches of Democratic Values will trigger this procedure, only those that are of a systemic nature. The previous President of the Commission José Manuel Barroso stated: "We need a better developed set of instruments, not just an alternative between the 'soft power' of political

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persuasion and the 'nuclear power' of Art. 7 TEU." However, the Commission emphasises that it is meant to fill a gap, namely to precede and to complement the nuclear option of Art. 7 TEU rather than to alternate the existing mechanism, disclosing immediately a weakness.102 Supposing the proposed mechanism would be applied and the mechanism will not have the desired result, Art. 7 TEU could be triggered. As this is a never used mechanism, there is little chance it will be invoked in the near future. It will be almost impossible to reach the unanimity threshold within the European Council.

48. Notwithstanding the affiliation with Art. 7 TEU, the procedure as such has to be examined. Namely, it is possible that the procedure leads to a positive outcome before Art. 7 TEU has to be invoked. Hence, the three-stage procedure framed by the Commission has to be analysed. The focus will be on dialogue, objectivity and thorough assessment, equal treatment and swift and concrete actions taking into account the shortcomings of among other things the CVM, such as differentiation between the various Member States.103 The first stage is based on Commission's assessment. This includes gathering information taking due account of information received from available sources such as the Council of Europe and European Union Agency for Fundamental Rights (hereinafter 'FRA') and assessing whether there are clear indications of a systematic threat to Democratic Values.104 The FRA is an agency, formally established in 2007, that consists of experts in collecting and analysing data in the field of fundamental rights.105 Nowadays, the FRA is nothing more than a special body with advisory power, the objective of which is "to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of actions within their respective spheres of competences to fully respect fundamental rights."106 The FRA could alert the Commission of any suspected breaches of fundamental rights as part of the Democratic Values, although it is only recognised that EU-institutions seek the assistance of the FRA to obtain a report on the

103 Ibid., 7.
104 Ibid., 7.
situation in a Member State. The authority of the FRA is limited considering the Council Decision establishing the FRA does not refer to the Art. 7 TEU mechanism. Hence, issues related to fundamental rights arising within Member States that go beyond the implementation of EU-law will not be incorporated within the mandate of the FRA.

49. It suggests that the Commission took into account the limitations the FRA is confronted with and will not only consult EU-bodies, but also other international organisation related to Democratic Values. However, allowing external bodies such as the Council of Europe to have a stronger role in monitoring Member States in the light of their compliance with Art. 2 TEU can also be criticised. Art. 2 TEU contains 'EU's' Democratic Values. 'Outsourcing' will be most likely insufficient in dealing with specific areas of EU-law, as this requires a EU autonomous interpretation.

50. If it follows from the assessment that there is a situation of systemic threat to the rule of law, the Commission will initiate a dialogue with the Member State concerned, by sending a 'rule of law opinion' giving the Member State concerned the possibility to respond. In line with the duty of sincere cooperation pursuant Art. 4(3) TEU, the Commission expects that the Member State concerned cooperate throughout the process and refrains from adopting any irreversible measure in relation to the concern raised by the Commission. It can be suggested that the Commission would be able to launch an infringement procedure pursuant Art. 258 TFEU based on a breach of the duty of sincere cooperation against a non-compliant Member State when the Member State concerned does not cooperate during the procedure. However, the Commission foresees in a second stage where the Commission will issue a 'rule of law recommendation' if there are objective evidence of a systemic threat and that the Member State concerned is not taking appropriate action to redress it. The third and final stage will be a follow-up. The Commission will monitor the action of the Member State and

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110 Ibid., 18.
112 Ibid., 8.
113 Ibid., 8.
verify whether the Member State is in compliance with the recommendation. These following stages in the framework set up by the Commission are less relevant for this analysis. Moreover, they will not ameliorate the situation nor serve as an added value on the current existing mechanisms. The mechanism depends too much on dialogue and therefore, resembles extensively at the CVM, lacking of any sanction. Thus, the incentives are too low; dialogue and recommendations will not be able to force non-complying Member States to redress the situation. So, there is little chance Member States will obey.

51. The Council's Legal Service raised the objection of the principle of conferral enshrined in Art. 5 TEU in relation to this 'rule of law mechanism'. The Council swiftly answered in a crystal clear manner: "There is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU". Nevertheless, they recognise the fact that the EU has a key role to play in the development of a new mechanism by referring to their role as "anchor for reforms in the areas of the rule of law and fundamental rights for several third countries". But, instead of giving the Commission as a guardian of the Treaties the primary role, the Council is of the opinion that the Council itself should be centre stage. "The Council will closely accompany the future developments of a new EU framework to strengthen the rule of law which seeks to resolve future systemic threats to the rule of law in Member States before the conditions for activating the mechanism foreseen in Article 7 TEU would be met." It is clear from the press release of 16 December 2014 that the Council will take 'its responsibilities'. The Member States "commit themselves to establishing a dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties".

52. However, the delimitation of competences should not be a problem for establishing a monitoring mechanism containing only the first stage. The proposal is anything but innovative. The Commission might play an important role in the monitoring procedure, following the framework as it was set out in the Communication. It seems that the 'rule of law mechanism' of the Commission is a detailed prescription on the working of Art. 7(1) TFEU.

114 Ibid., 8.
116 Ibid., 5.
Moreover, the Commission itself emphasised that the framework is a mechanism rather to precede and to complement Art. 7 TEU than additional to Art. 7 TEU. According to Art. 7(1) TEU, "the European Commission, (...), may determine that there is a clear risk of a serious breach by a Member State (of the Democratic Values) (emphasis deleted and added)". This implies, by determining whether there is a clear risk, the Commission had to investigate any potential risk.\footnote{D. KOCHENOV and L. PECH, "From bad to worse? On the Commission and the Council's rule of law initiatives", \url{http://eulawanalysis.blogspot.be/2015/01/from-bad-to-worse-on-commission-and.htm}, 19 January 2015 (consultation 9 March 2015).} Taking independent and external expertise to determine a risk of non-compliance will ensure the non-partisan character of the Commission. Furthermore, the emphasis has to be put again on the general way Art. 2 TEU is construed, contrary to the Charter for Fundamental Rights, especially because this framework is linked to the working of Art. 7 TEU. This "constitutes legal standard that applies to any exercise of public authority in the European legal space, be it by the Union or the Member States".\footnote{K.L. SCHEPPELE, "What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions", \url{http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversitieschepplesystemicinfringementactionbrusselsversion_en.pdf}, November 2013 (consultation 9 March 2015).}

53. Although the conferral of power principle will not be an issue due to its link with Art. 7 TEU, this link will be the main problem why this proposal is everything but effective. Except for an infringement procedure eventually launched before the CJEU on the basis of an infringement of the duty of sincere cooperation, dialogue, recommendation and the incentive of invoking the 'nuclear option' are the only leverage created by the EU. Therefore, these mechanisms, neither from the Commission nor from the Council, will contribute to a solid new mechanism to address non-compliance of the Democratic Values within the Member States.

**SUBSECTION 2: SYSTEMIC INFRINGEMENT PROEDURE**

54. Where the proposal of the Commission is based on the creation of a pre-phase to Art. 7 TEU, SCHEPPELE suggests a new approach by extending the existing infringement mechanism of Art. 258 TFEU.\footnote{Supra §30.} The original infringement procedure pursuant Art. 258 TFEU is inefficient to tackle structural problems, as Hungary's assault on the judiciary's independence as situated above has shown.\footnote{Supra §30.} The procedure is focused on tackling individual cases when a specific EU rule is infringed. Therefore, one could argue that it would be better to address the
structural problem as such under the banner of Art. 2 TEU. A proposal is brought forward to seek a finding of non-compliance of a Member State with Democratic Values not only related to specific identified situations, such as the case of Hungary, but also to a general practise.\textsuperscript{121} On account of the case Commission v. Hungary\textsuperscript{122}, this new approach of the infringement procedure was brought into focus. She proposes a 'Systemic Infringement Action' whereby the Commission could signal systemic complaints against a Member State by bundling a group of individual infringement actions together under the banner of Art. 2 TEU. This guarantees the protection of Democratic Values under the motto "that the whole is more than the sum of the parts and that the set of alleged infringements rises to the level of a systemic breach of basic values".\textsuperscript{123} By presenting the context in which such infringements took place, each individual allegation is strengthened.\textsuperscript{124}

55. In this context, doubt emerged regarding the legal authority of the Commission. The question has been raised as to whether this 'Systemic Infringement Procedure' could be accomplished under the existing legal competence of the Commission.\textsuperscript{125} MANGIAMELI is of the opinion that "the violations referred to in Art. 258 TFEU relate to the law of the Treaties, whereas the violation of the values of Art. 2 TEU might not be linked to the Treaty law and, therefore, may concern the domestic behaviour of the Member States".\textsuperscript{126} Following the procedure pursuant Art. 258 TFEU, the Commission can bring a Member State before the CJEU, if that Member State has "failed to fulfil an obligation under the Treaties". Technically reading Art. 2 TEU, it is questionable whether this provision imposes an obligation on

\begin{itemize}
\item \textsuperscript{121} C. PINELLI, "Protecting the fundamentals: Article 7 of the Treaty on the European Union and beyond", \textit{FEPS Juristis Netzwerk} 25 September 2012, 10.
\item \textsuperscript{122} CJEU, C-286/12, 6 November 2012, Commission v. Hungary, \textit{ECR}.
\end{itemize}
Member States and therefore can fall within the scope of the infringement procedure of Art. 258 TFEU.

56. However, this reasoning cannot be followed. Various arguments can be found in favour of EU-action. First, the Democratic Values are inherent to the EU through the EU-treaties and the Charter of Fundamental Rights. These Democratic Values are on the one hand pre-existing commitments by all Member States. They all accepted these values by acceding to the EU pursuant Art. 49 TEU. On the other hand, they are used as a benchmark for the performance of the Member States which can be appraised according to Art. 7 TEU, which has a general and horizontal scope. Further, the EU is also using its Democratic Values in relations to third countries trying to shape international law. Secondly, all EU-citizens are affected by developments and decisions of a particular Member State, as the Member State concerned will take decisions in the European Council and the Council. Lastly, Art. 2 TEU is construed in a general manner, contrary to the Charter for Fundamental Rights, and this "constitutes legal standard that applies to any exercise of public authority in the European legal space, be it by the Union or the Member States". For all these above-mentioned reasons, it can be considered that the EU has the right to act in case of breaches of the Democratic Values.

57. However, even if Art. 2 TEU is not accepted to be the sole legal basis of an infringement action, CLOSA and KOCHENOV consider that Art. 2 TEU cannot be separated from other provisions in the EU-Treaties. Therefore, one could argue that the Member States are obliged to comply with the Democratic Values pursuant to Art. 2 TEU, for instance reading it in combination with other provisions, such as Art. 3(1), 4(3) and 13(1) TEU. Firstly, there is Art. 2 TEU explaining the foundational stones of the Union and thereby the Democratic Values. Further, Art. 3(1) and 13(1) TEU obliges the EU and its institutions to promote its

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Democratic Values, thereby giving the EU a basis for EU-action in relation to Art. 2 TEU. And finally, there is the duty of sincere cooperation of Art. 4(3) TEU whereby the Member States are obliged to "facilitate the achievements of the Union's tasks and (to) refrain from any measure which could jeopardise the attainment of the Union's objective". Therefore, one could conclude that Art. 2 TEU, read together with those provisions, appears to produce an obligation on the Member States which can objectively be seen as sufficiently strong to justify forcible EU measures to adhere to Democratic Values.\(^{132}\)

58. Regardless of the bundling of breaches of the Democratic Values under a 'Systemic Infringement Procedure', \textit{Schepple} emphasises that a set of specific alleged infringement should be listed in the systemic infringement complaint.\(^{133}\) This 'listing' approach has been criticised on the base that it would invite the Commission and the CJEU to rise "ever more adventurous challenges to different national rules, where the link to EU law would be rather weak".\(^{134}\) The Democratic Values on their own are abstract and vague. However, a set of specific infringements will ensure that the CJEU has an overall perspective of the individual infringements, but at the same time the explicit legislation and practises to examine.\(^{135}\) So, instead of referring only to a breach under the banner of Art. 2 TEU, this 'Systemic Infringement Procedure' combines each individual breach of specific EU-law into one procedure which gives an overall overview of a systemic breach of the Democratic Values.

59. Hence, it brings Art. 2 TEU infringements under the scrutiny of the CJEU, whereby the political dependency of Art. 7 TEU is diminished. This brings along some criticisms. Where Art. 7 TEU is not working due to its mere political character, the 'Systemic Infringement


Procedure’ is criticised, as it is a purely legal remedy to an essential political issue. However, the legal question arising is whether a Member State has systematically infringed its commitments under EU-law through its own laws or practises. This constitutes pre-eminently a legal question. By combining all the different violations into a systemic infringement, the CJEU can determine the deeper problem leading to a systemic compliance judgement. The CJEU acknowledges that "the fact that the deficiencies pointed out in one or other case have been remedied does not necessarily mean that the general and continuous approach of those authorities, to which such specific deficiencies would testify where appropriate, has come to an end." Therefore, the systemic problem will be solved in a permanent manner, and not lead to temporary compliance to Democratic Values as BLOKKER conveys, when it is triggered in a general way. It can be considered the Commission's task to bring a non-compliant Member State before the CJEU showing the pattern in various violations and, eventually, bundling them together. Also Advocate-General GEELHOED recognises the principle of bundling individual infringements and States: "It would appear to me that it certainly cannot be ruled out that, under certain conditions, a pattern of complaints may provide the basis for a finding that a Member State has structurally infringed its Community law obligations.

60. Moreover, this 'Systemic Infringement Procedure' does not need the proof of a 'serious and persistent breach' of the Democratic Values, contrary to Art. 7 TEU. But, determining the various separate breaches in one procedure as such consists in a systemic infringement of Art. 2 TEU. Related to the scrutiny of the CJEU, the CJEU will be able to develop case law concerning Art. 2 and the enshrined Democratic Values, improving the legal certainty and

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clarity about the exact meaning of the Democratic Values.\textsuperscript{143} And lastly, the CJEU could apply the sanctions prescribed in Art. 260 TFEU if it decides that Art. 2 TEU is violated and the Member State persists in breaching the Democratic Values and moreover the judgement of the CJEU. The CJEU can impose financial sanctions such as a lump sum and penalty payment once the Member State concerned does not comply with the judgement of the CJEU.\textsuperscript{144} In addition, the CJEU will take due account of the ability of the Member State to pay the fines.\textsuperscript{145} Nevertheless, this mechanism will not always be a sound mechanism due to the wide margin of discretion in the hands of the Commission. The Commission might not start proceedings at all or when started, may stop proceedings for political reasons, etc. The original infringement procedure for instance related to the expulsion by France of EU citizens with Roma origin, although initially started, was avoided by setting an ultimatum for France.

61. Notwithstanding the criticisms, the 'Systemic Infringement Procedure' proposed by SCHEPPELE can be considered as a workable mechanism to fight the non-compliance with the Democratic Values by one or another Member States, in particular when the procedure is not only based on Art. 2 TEU, but read together with the duty of sincere cooperation enshrined in Art. 4(3) TEU. Because this 'Systemic Infringement Procedure' has to be seen as an extension of the currently existing original infringement procedure, it is not a radical and evolutionary mechanism. This avoids problems related to Treaty reforms, to political dependency or national judicial dependency, and it does not require the creation of new bodies. Therefore, it takes due account of many shortcomings highlighted in the previous chapter.

\textit{SUBSECTION 3: THE 'REVERSE SOLANGE' DOCTRINE}

62. As regards to fundamental rights as part of the Democratic Values mentioned in Art. 2 TEU, \textit{Von Bogdandy} and others proposed a revolutionary 'reverse Solange' theory based on


\textsuperscript{144} Art. 260(2) TFEU.

the Solange reasoning, the substance of EU-citizenship and the Ruiz Zambrano reasoning.\textsuperscript{146} The Ruiz Zambrano reasoning constituted a seminal step of judicial law making by developing 'substance' of EU-citizenship which applies even to purely internal situation.\textsuperscript{147} The CJEU established the principle that "Article 20 TFEU preclude(d) national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".\textsuperscript{148} Following this reasoning, the 'reverse Solange' doctrine reads as follows: "Beyond the scope of Article 51(1) (Charter on the Fundamental Rights) Member States remain autonomous in fundamental rights enshrined in Article 2 TEU. However, should it come to the extreme constellation that a violation is to be seen as systemic, this presumption is rebutted. In such a case, individuals can rely on their status as Union citizens to seek redress before national courts."\textsuperscript{149} It seems that this doctrine is not very helpful in preventing and solving non-compliance with the Democratic Values due to its highly theoretical character.\textsuperscript{150} Further, this doctrine is moving in the direction of a general human rights jurisdiction for the CJEU that would be activated through the preliminary ruling procedure, bringing the question whether the presumption should be rebutted before the national courts. This brings along the doubts whether the required independency of national courts of Member States failing to comply with Democratic Values can be assured.\textsuperscript{151} Furthermore, this provides a theoretical judicial remedy for the individual EU-citizen against serious threats to his constitutional status instead of the EU.\textsuperscript{152} Hence, this doctrine is only indirectly related to the question on what the EU can

\textsuperscript{146} A. \textsc{Von Bogdandy}, M. \textsc{Kottmann}, C. \textsc{Antpöhlér}, J. \textsc{Dickschen}, S. \textsc{Hentrei} and M. \textsc{Smrkolj}, "Reverse Solange – Protecting the essence of fundamental rights against EU Member States", \textit{Common Market Law Review} 2012, no. 49, 489-520; and CJEU, C-34/09, 8 March 2011, Gerardo Ruiz Zambrano v. Rijksdienst voor Arbeidsvoorziening (RVA), \textit{ECR} I-01177.

\textsuperscript{147} A. \textsc{Von Bogdandy}, M. \textsc{Kottmann}, C. \textsc{Antpöhlér}, J. \textsc{Dickschen}, S. \textsc{Hentrei} and M. \textsc{Smrkolj}, "Reverse Solange – Protecting the essence of fundamental rights against EU Member States", \textit{Common Market Law Review} 2012, no. 49, (489) 504.

\textsuperscript{148} CJEU, C-34/09, 8 March 2011, Gerardo Ruiz Zambrano v. Rijksdienst voor Arbeidsvoorziening (RVA), 2011, I-01177, p. 42.

\textsuperscript{149} A. \textsc{Von Bogdandy}, M. \textsc{Kottmann}, C. \textsc{Antpöhlér}, J. \textsc{Dickschen}, S. \textsc{Hentrei} and M. \textsc{Smrkolj}, "Reverse Solange – Protecting the essence of fundamental rights against EU Member States", \textit{Common Market Law Review} 2012, no. 49, (489) 491.

\textsuperscript{150} D. \textsc{Kochenov}, "On policing Article 2 TEU compliance – reverse Solange and Systemic Infringements analysed", \textit{Polish Yearbook of International Law} 2013, (145) 154.

\textsuperscript{151} Ibid., (145) 160.

\textsuperscript{152} C. \textsc{Closa}, D. \textsc{Kochenov} and J.H.H. \textsc{Weiler}, "Reinforcing rule of law oversight in the European Union", \textit{EUI Working Paper RSCAS} 2014, 16; and A. \textsc{Von Bogdandy}, M. \textsc{Kottmann}, C. \textsc{Antpöhlér}, J. \textsc{Dickschen}, S. \textsc{Hentrei} and M. \textsc{Smrkolj}, "Reverse Solange – Protecting the essence of fundamental rights against EU Member States", \textit{Common Market Law Review} 2012, no. 49, (489) 502.
do in case a Member State is non-compliant with the Democratic Values analysed in this paper and therefore not necessary to be deployed in the most fullest sense.153

**SUBSECTION 4: INTRODUCING A NEW EU-BODY – THE 'COPENHAGEN COMMISSION'**

63. Besides building on existing mechanisms, institutions or case law, MÜLLER suggests to create a new EU-body, moreover a new agency called the 'Copenhagen Commission' referring to the Copenhagen criteria and extending the pre-accession phase beyond accession.154 This independent EU-body ought to monitor and investigate the situation related to the Democratic Values within all Member States and then trigger a mechanism that sends a clear signal, as it were an early warning mechanism.155 Hence, it would be an independent institution, non-partisan, and designed to be involved in the protection of the Democratic Values, thus going beyond simple monitoring.156 Related to this independency, the 'Copenhagen Commission' should be vested with a clear mandate to offer comprehensive and consistent political judgements on the situation in certain Member States, but at the same time, the body should have enough visibility and empowerment to address situations within non-compliant Member States effectively and accurately.157

64. Therefore, considering its proactive role, this 'Copenhagen Commission' ought to be considered as an appropriate mechanism, the creation of which nevertheless could experience some difficulties due to the clear mandate.158 The legal basis for the creation of a new EU body depends on whether the body has solely a monitoring role or whether the body has

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157 G. BUDO, "EU Common values at stake: is article 7 TEU an effective protection mechanism?", CIDOB documents May 2014, 8.

decision-making capacity. The former have been created in the past without a formal legal basis. DG Justice and Home Affairs for instance has established the EU Network of Independent Experts on Fundamental rights. More independent agencies have been established on the basis of the flexibility clause enshrined in Art. 352 TFEU, such as the FRA. According to CLOSA and KOCHENOV, the 'Copenhagen Commission' could also be based on this flexibility clause. However, this would not lead to the desired result, as this flexibility clause requires a unanimity decision of the Council. Hence, a new EU body will probably not be established in the near future as a result of finding the appropriate legal basis and its required procedure.

SECTION 2: A comprehensive mechanism

Analysing the various proposals, it is clear that those suggestions to tackle the issue related to the non-compliance with the Democratic Values are open to criticisms. Admittedly, the proposal of SCHEPPELE probably the most practical to use, as it has a general scope of application – namely the scope of the Democratic Values as they currently exist – and as it has the less counterarguments. With regard to the creation of the 'Copenhagen Commissssion' – notwithstanding its general scope – or the development of the 'reverse Solange' doctrine, the opposite is true. The first will experience a lot of resistance with respect to its creation, where the latter will be a too theoretical realisation the day of today. Those proposals can nevertheless be useful as a point of reference to develop a comprehensive mechanism taking due account of all criticisms delivered with respect to the existing mechanisms and the proposals.

159 Ibid., 20.
160 Ibid., 20.
164 Art. 352(1) TFEU.
SUBSECTION 1: NECESSITY OF EX ANTE MONITORING

66. A first necessary step will be a monitoring system to a certain extent in line with the CVM or the Progress Reports. A monitoring system will have a preventive advantage in a way that the Member States are under continuous and periodic scrutiny. A monitoring system *ex ante* will have the benefit that violations not have acquired yet and lead to action as soon as the risk of a serious breach of Democratic Values occurs. One of the necessary adaptations to the CVM is the differentiation currently existing. Instead of limiting the monitoring mechanism to the 'new' Member States exclusively, the revised mechanism ought to be extended uniformly to all Member States in accordance with the equality of Member States pursuant Art. 4(2) TEU. It simply sets the wrong signal to make only certain Member States subject to surveillance. It creates a feeling of 'second class Member States'.

67. The Commission as a guardian of the Treaties has the responsibility of ensuring the respect of Democratic Values on which the EU is founded and of protecting the general interest of the EU. In line with the CVM and the Progress Reports, the Commission could therefore be the institution to monitor the compliance of Member States with Democratic Values. Several Member States recognise that the Commission should have "*a stronger role here. It should be allowed to address deficits in a given country at an early stage and – if sufficiently supported by Member States – require the country in question to remedy the situation*".165

68. Nevertheless, to avoid a politicisation of the Commission and the possible erosion of its required independence relating to it, an independent organ would be necessary to provide information to the Commission. The consultation of independent external expertise of various bodies is necessary to ensure impartiality in the evaluation of politically sensitive issues and will lead to qualitative assessments of Member States.166 The FRA is an example of such organ which provide independent expertise for the EU-institutions, admittedly with limited scope. Moreover, an independent body established by the Commission could be of help to monitor and assess the situation, taking due account of the 'Copenhagen Commission'

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165 Letter from the Ministers of Foreign Affairs of Germany, Finland, Denmark and the Netherlands, 6 March 2013, available at https://www.google.be/?gws_rd=ssl&q=letter+safeguard+fundamental+values, 2.

proposed by Müller. A mere monitoring body does not have to refer to an explicit legal basis. A body such as the EU Network of Independent Experts on Fundamental rights could be established by the Commission, called the Network in Independent Experts on Democratic Values, not only limited to the fundamental rights, but with a monitoring capacity over all the Democratic Values. It can have the purpose of providing the Commission with reports on the situation of the Democratic Values within the Member States and the EU and with opinions on one or more critical situations detected in one or more Member States. Admittedly, it will all over again be an additional body created under the wings of the Commission bringing it within the Commission's margin of appreciation.

69. However, finding serious and persistent breaches through monitoring is the first step towards ensuring compliance with the Democratic Values. It is a preventive procedure and not subsequent to violations of Democratic Values. A monitoring system aims to avoid an infringement and reduce the need for a subsequent mechanism. Moreover, a monitoring mechanism will automatically accelerate action of the EU against non-compliance with the Democratic Values. Further, it can provide ideas for achieving an area free from breaches of the Democratic Values or alerting the Commission to divergent trends and/or patterns of non-compliance by the Member States which could jeopardise the mutual trust on which the EU is founded.

**SUBSECTION 2: A SECOND PHASE OF ENFORCEMENT**

70. Although monitoring and assessing the situation will be a good start, a second phase of *ex post* involvement will be indispensable, if and when a breach nonetheless occurs. The existence of a working enforcement mechanism will also have a preventive purpose enforcing the effectiveness of the monitoring phase. It has in particular its importance as a form of deterrence. Notwithstanding the importance of the forgoing monitoring mechanism, an adequate enforcement mechanism ought to exist, not only for the deterrent effect, but moreover as a last resort instrument if a Member State is perseverant in breaching Democratic Values. Both the CVM, and the proposals of the Commission and the Council lack of effective enforcement. To be precise, sanctions are simply missing. This accentuates immediately the ineffectiveness of the concerned mechanisms. They result in reports and dialogue, which will hardly affect or improve a situation when the government 'consciously'
choose not to comply with the Democratic Values.\textsuperscript{167} It is also applicable for the 'reverse Solange' doctrine. Relying on national courts will not bring about the desired result, as the Member State is facing severe problems with respect to certain Democratic Values, meaning that the national judiciary is not necessarily independent and trustworthy.\textsuperscript{168}

71. An enforcement mechanism will further only be successful when the possibility exists to impose sanctions and when the possible sanctions are deterrent enough. Given that breaches of Democratic Values are breaches of the 'foundational stones' of the EU, those sanctions should accumulate approximately as a function of the breach. Further, they should have a European dimension to highlight the impact of a breach with regard to the Democratic Values concerns the EU as a whole.\textsuperscript{169} Therefore, the "sanction should not give the impression that individual nation-States are lining up – or, put more drastically ganging up on – an EU Member State", as acknowledged by MÜLLER.\textsuperscript{170} As it is clear from above, the sanctions which the Council can impose in the Art. 7 TEU mechanism lack in efficiency. The Council can suspend amongst other things the voting rights of the Member State in the Council. Due to the optional nature of the sanction imposition and of the inaccuracy of various sanctions that can be imposed, this sanction mechanism will never be effective, even in absence of previous described shortcomings of the Art. 7 TEU mechanism.

1. \textit{Financial sanctions}

72. By analogy with the suspension of pre-accession funding when a potential/candidate State does not fulfil the Copenhagen criteria and the conditionality of the SAP, a system ought to be created whereby the funding of Member States will be suspended as long as they continue to breach the Democratic Values. The EU has for instance suspended IPA funds of Bosnia and Herzegovina as a result of its failure to implement a judgement of the European Court of Human Rights. The purpose of the IPA funds is to "help the beneficiaries make political and economic reforms, preparing them for the rights and obligations that come with

\begin{thebibliography}{9}
\item G. BUDO, "EU Common values at stake: is article 7 TEU an effective protection mechanism?", \textit{CIDOB documents} May 2014, 9.
\end{thebibliography}
The priorities for IPA support for Bosnia and Herzegovina concerned strengthening the rule of law, improving the capacity and efficiency of the public administration and supporting social and economic developments, meaning the IPA support is related to the Democratic Values.\textsuperscript{172} Due to the failure to implement the judgement a procedure was launched for reducing the amount of funding. The pre-accession financial assistance provides a strong incentive, using the 'carrot and stick method', for the reason that it is not only a form of positive conditionality, but also a form of negative conditionality. On the one hand, it promotes the compliance with the EU's Democratic Values by promising financial aid and on the other hand, the suspension of the financial assistance can be a big stick to keep the candidate States on the right track.\textsuperscript{173} This should be created by analogy for the Member States in relation to their funds, admittedly as a last resort. It will send a clear signal that infringing one of the Democratic values concerns the EU as a whole.\textsuperscript{174} And hence, the EU does not have to pay the Member State concerned to see infringements of its Democratic Values.\textsuperscript{175}

73. Even the Ministers of Foreign Affairs of Germany, Denmark, the Netherlands and Finland stressed in a Letter to the Commission the importance to safeguard the Democratic Values within the EU and eventually, as a last resort, to suspend or cut the EU funding as an option to foster compliance.\textsuperscript{176} The problem arising, recognised by Scheppele also in favour of funding suspension, is the legal basis for such suspension. As already stated, the most suitable legal basis ought to be enshrined in the EU-Treaties. Despite the willingness to establish such a sanction of some Member States, there is little chance that this will happen due to the heavy procedural rules. Scheppele recognises that secondary legislation could give

\begin{itemize}
\item \textsuperscript{171} \url{http://ec.europa.eu/enlargement/instruments/overview/index_en.htm} (consultation 8 April 2015).
\item \textsuperscript{172} Commission Staff Working Document Bosnia and Herzegovina 2013 Progress Report, SWD (2013) 415 final, 16 October 2013, 5.
\item \textsuperscript{173} E. Mustafic, "European values as criteria for accession to the European Union: the effectiveness of sanction mechanisms on Member States and non-Member States", Central European University, March 2014, 37.
\item \textsuperscript{174} J.-W. Muller, "Safeguarding democracy inside the EU – Brussels and the future of liberal order", Transatlantic Academy Paper Series 2012-2013, no. 3, 25.
\item \textsuperscript{176} Letter from the Ministers of Foreign Affairs of Germany, Finland, Denmark and the Netherlands, 6 March 2013, available at \url{https://www.google.be/?gws_rd=ssl&q=letter+safeguard+fundamental+values}, 2.
\end{itemize}
the Commission the power to suspend EU funds. Secondary legislation could be used to link the allocation of funds for one purpose to the compliance with the Democratic Values.\textsuperscript{177}

74. Another financial sanction can be derived from \textit{Schepele}'s proposal of a 'Systemic Infringement Procedure'. Following this mechanism, the CJEU has the possibility to impose fines. Art. 260 TFEU foresees in the imposition of lump sums and/or penalty payments as an additional leverage to end infringements of the Democratic Values as soon as possible and to redress the consequences of those infringements. Being explicitly enshrined in the Treaties will be an advantage compared with the cutting of funds.

75. An emerging issue related to cutting funds or imposing fines is the effect on the EU-citizens.\textsuperscript{178} However, with respect to suspending funds, the EU has always the possibility to release funds at the moment that the Member State breaching the Democratic Values puts forward a serious and realisable plan to reform and restore the non-compliance with the Democratic Values. Hence, the fact that suspended funds can be released will be an additional incentives for the Member States to redress the situation and comply with the Democratic Values.\textsuperscript{179} The manner Art. 260 TFEU currently is formulated do not foresee in the reimbursement of the fines to the Member States.\textsuperscript{180} The suspension of EU funds thus will have an advantage compared with the imposition of fines according to Art. 260 TFEU.

\textbf{2. Expulsion of a Member State from the EU}

76. For the sake of completeness, a sanction provided for in the Statute of the Council of Europe has to be mentioned. According to Art. 8 of the Statute of the Council of Europe of 1949, members of the Council of Europe who violate seriously the fundamental values of the Council of Europe can be ceased to be a member of the Council. The application of this


\textsuperscript{178} J.-W. \textsc{Müller}, "Safeguarding democracy inside the EU – Brussels and the future of liberal order", \textit{Transatlantic Academy Paper Series} 2012-2013, no. 3, 25.


\textsuperscript{180} C. \textsc{Closa}, D. \textsc{Kochenov} and J.H.H. \textsc{Weiler}, "Reinforcing rule of law oversight in the European Union", \textit{EUI Working Paper RSCAS} 2014, 20.
sanction would be too radical and have far-reaching repercussions in relation to the EU citizens. The current EU-Treaties do not provide for the possibility to expel a Member State. Only the Member States have the possibility to withdraw their membership pursuant Art. 50 TEU. A sanction consisting in the expulsion of a Member State from the EU due to non-compliance with Democratic Values is not the right solution, regardless whether this sanction is appropriate in relation to the Council of Europe.\textsuperscript{181} EU-law creates rights and obligations for EU-citizens of the Member States, every decision, although formally addressed to a Member States, will have repercussions on the EU-citizens.\textsuperscript{182} Expelling a Member State would, admittedly, delete the problem from the EU territory. However, it would entail disastrous consequences for the former EU-citizens and residents of the expelled Member State, raising huge ethical issues.\textsuperscript{183} Expelling a Member State would absolutely not solve the violations, not mentioning the possible effect of the situation's deterioration. Hence, introducing such a procedure in the EU-Treaties, notwithstanding the cumbersome procedure of Treaty reforms, will most likely be redundant and only have a symbolic theoretical value, at most it would have a deterrent effect.\textsuperscript{184}

\textbf{SECTION 3: Conclusion: What about the ultimate mechanism?}

77. Various indispensable features that have been derived from the shortcomings or strong points of the existing mechanisms had to be taken into account to come to a comprehensive mechanism dealing with the non-compliance with regard to the Democratic Values by the Member States. None of the various proposals made by the legal scholars and by the Commission and Council contain the different stages of the comprehensive mechanism. They all provides for elements and therefore, those various elements has to be combined to come to a comprehensive mechanism consisting of a monitoring phase and enforcement phase.

78. A first necessary process is a monitoring phase whereby the Member States are made subject to continuous scrutiny in order to tackle non-compliance at the earliest moment, taking into account the proposal of the Commission. This monitoring phase has to have a general and horizontal scope of application as the general formulation of Art. 2 TEU requires this. All Member States have to be subordinated to scrutiny with respect to the compliance of all Democratic Values, doing away with the established differentiation of the CVM for Romania and Bulgaria, and respectively of the monitoring mechanism for Croatia. The Commission as guardian of the Treaties would be in the right place to monitor and assess the situations in the Member States. However, to retain the independency of the Commission in highly political issues, the Commission should be assisted for the assessment by other bodies such as the FRA, the Council of Europe, or specially introduced new bodies.

79. Exclusively monitoring is not sufficient. In addition, a second phase is necessary to come to a comprehensive mechanism, namely an enforcement mechanism whereby appropriate sanctions can be adopted. For the enforcement, the Commission in conjunction with the CJEU would play a preferable role, compared to the national courts of the very Member States that suffer from breaches of Democratic Values and compared to the political institutions. Considering this, the 'Systemic Infringement Procedure' as introduced by SCHEPPELE derived from Art. 258 TFEU and following can be preferred over mechanisms who relate to a preliminary ruling procedure pursuant Art. 267 TFEU, such as the 'reverse Solange' doctrine. By persevered non-compliance, this enforcement mechanism should give rise to suspension of EU funding, reflecting the EU wide concern of non-compliance with the Democratic Values. As long as the Member States refrain from addressing the non-compliant situation, the funds will be suspended. As soon as they come up with plans to reform and restore the issues breaching the democratic values, the suspended funds are reimbursed to implement these plans.

80. Hence, it can be concluded that at this moment, no comprehensive mechanisms exist, nor the proposals come up with a solid and sound solution. The ultimate mechanism to protect the foundational stones of the EU and to address infringing situations within Member States does not exist yet. However, a combination of all the strong advantages taking due account of all the caveats of the various proposals and existing mechanisms as described in the previous paragraphs have to be considered as a workable mechanism, if every stage in the chain is working as it supposed to work.
CONCLUSION

81. Recent violations of the Democratic Values by – surprisingly not only the new – Member States have raised the question as to the possible legal action of the EU in case of non-compliance. In other terms, what can the EU do when Member States no longer comply with the Democratic Values to which they committed themselves by joining the EU? The Democratic Values are after all the foundational stones upon which the EU is constituted. Those foundational stones are accordingly reflected in the pre-accession phase. Through the Copenhagen criteria and pre-accession procedure enshrined in Art. 49 TEU, only Member States that respect the Democratic Values can join the EU. Having the handle on a decisive membership incentive, the EU acquires a strong position during the negotiations and the leverage necessary to impose the Democratic Values upon potential Member States.

82. Developing impressive pre-accession conditionality could nonetheless not avoid the backsliding of certain Member States with respect to the compliance with the Democratic Values. Moreover, the EU itself allowed States to join, notwithstanding the fact that they were clearly not ready due to the inability to implement to its fullest extent the Democratic Values and the EU acquis at the moment of accession. The EU thereby created an increased risk for infringements with respect to the Democratic Values and ultimately for the European integration process. Instead of 'upholding Democratic Values', Member States still had to 'satisfy the Democratic Values'. This would not cause – or at least cause fewer – problems if the EU had a safe and sound sanctioning mechanism at its disposal to deal with non-compliant Member States. Nevertheless, even when the States implement the Democratic Values to its fullest extent at the moment of accession, the strong position of the EU and the incentives at its disposal during the pre-accession procedure – giving a weak margin of manoeuvre for the States – diminishes enormously at the moment the States accede to the EU – leaving a weak margin of manoeuvre for the EU.

83. Analysing this issue, it can be considered that the scope for action, which the EU enjoys to deal with non-compliant Member States, was certainly not a foregone conclusion. Moreover, a disparity appeared between on the one hand the democratic model imposed on candidate States and on the other hand its modest capacity to intervene whenever Democratic
Values are at risk being violated within one of its Member States. Therefore, it has to be considered inevitable to provide for a mechanism ensuring the forceful protection of the Democratic Values avoiding infringements by Member States both in their internal action and in implementing EU-law. Up till now, the EU has not the appropriate mechanisms to deal with Member States that are violating the Democratic Values. The mechanisms are going from too political orientated such as the 'nuclear option' of Art. 7 TEU, to having a too limited scope of application such as the CVM for Romania and Bulgaria and the 'theoretical' monitoring mechanism for Croatia. In addition, none of these mechanisms, besides the original infringement procedure, can rely on effective sanctions.

84. Hence, lessons should be learned from the ineffectiveness of the existing mechanisms in order to create a new or reform the existing mechanisms to one comprehensive mechanism. Various proposals have been analysed in the context of this paper. One being more realistic than the other; one being more workable than the other. However, they are useful to derive the most important features of a comprehensive mechanism to deal with non-compliant Member States. A comprehensive mechanism should firstly apply in a general and horizontal manner without differentiating between the different Member States. Further, although the non-compliance with the Democratic Values is a highly political sensitive issue, it remains a legal question and therefore, politically independent institutions should be involved such as the Commission and the CJEU. Finally, to be comprehensive, it should be a two-stage procedure containing on the one hand a monitoring stage and on the other hand an enforcing and sanctioning stage. The monitoring stage is indispensable to assess whether the Member States are still complying with the Democratic Values bringing the Member States under continuous scrutiny and allowing the EU to act upon an alleged breach of the Democratic Values as soon as possible. Further, the enforcement and sanctioning phase will ensure that the Member States refrain from violating the Democratic Values and if not, they will be effectively sanctioned.

85. Thus, the Commission has to perform its task as guardian of the Treaties in order to decrease substantively the infringements against the Democratic Values, moreover prevent the development of new infringements. The Commission has implicitly the power under Art. 258 TFEU to monitor compliance with Art. 2 TEU – eventually in conjunction with the duty of sincere cooperation – assisted by a monitoring body especially created therefor. Given that infringements under Art. 2 TEU have been raised or going to rise in the near future, the
Commission is able to launch a Systemic Infringement Procedure by bringing the Member State concerned before the CJEU. The CJEU will then be able to rule a systemic compliance judgement to ensure that the structural problem will be tackled. As a last resort, non-compliance can be sanctioned by the CJEU by suspending EU funding until the non-compliance is addressed by the Member State concerned, when secondary legislation will provide this possibility.

86. Admittedly, up till now such a mechanism has not been established, nor been used. Only the current existing mechanisms are available and therefore, up till now, compliance with Democratic Values depends on the goodwill of the Member States, dialogue within the EU-institutions and recommendations made by the EU-institutions. Considering the foundational significance of the Democratic Values, it is nevertheless indispensable that such a mechanism is established as soon as possible – the sooner the better, as non-compliance with the Democratic Values is a EU wide concern. Some Member States already recognise the importance of such a mechanism. Hopefully, the other Member States and the EU-institutions fully understand the seriousness of the situation and act upon it by creating – this time – an effective mechanism.
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