

## Safeguarding Fundamental Values of the EU Through the Adoption of Sanctions

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## 1. Introduction

Fundamental values have played an important role within the European Union (EU) since its inception. However, it is only in the last 30 years that more prominent developments can be discerned in terms of the inclusion of fundamental values in the EU's primary law and the establishment of legal frameworks for their enforcement through the adoption of sanctions. While in the past, the EU's commitment to safeguarding its fundamental values through the adoption of sanctions was primarily focused on potential candidates and third states, it has become clear in recent years that members states' respect for the EU values cannot be taken for granted.

This paper provides an overview of existing mechanisms to sanction violations of fundamental values by the EU's existing or future member states: membership conditionality and Article 7 of the Treaty on European Union [TEU]<sup>1</sup> mechanism; as well as third states: conditionality in international agreements and restrictive measures. Drawing on the examples of Poland and Hungary, it discloses deficiencies of the Article 7 TEU mechanism and pinpoints to some of the shortcomings of the EU's well developed judicial enforcement mechanism that make it unable to prevent and mitigate the systematic undermining of fundamental values within its members. On the other hand, respect for fundamental values such as human rights, democracy, and the rule of law, lies at the very heart of the EU's external policies. Essential elements clauses and non-execution clauses are included in most of the EU's international agreements with third states and allow for the relatively swift adoption

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<sup>1</sup> Consolidated version of the Treaty on European Union, OJ C 326, 26 October 2012, pp. 13-390.

of sanctions e.g. in the form of the suspension of development aid to third states in cases of grave violations of human rights. What is even more prominent, however, is the EU's sanctioning practice with regard to third states under its Common Foreign and Security Policy (CFSP), under which the EU regularly sanctions violations of human rights, democracy, and the rule of law through the adoption of restrictive measures. An argument is therefore made, that the EU is better equipped and more willing to adopt sanctions in response to breaches of fundamental values against third states than against its members.

This introduction is followed by a brief clarification of basic concepts: sanctions and the fundamental values of the EU (Chapter 2). The paper then presents mechanisms for the safeguarding of fundamental values within the EU, i.e. membership conditionality (Chapter 3.1.), Article 7 TEU (Chapter 3.2.) and corresponding practice, with special emphasis on the EU's response to the situations in Poland (Chapter 3.2.4.1.) and Hungary (Chapter 3.2.4.2.). It then proceeds to explaining the role of the infringement procedure in safeguarding fundamental values (Chapter 3.3.) and presents current initiatives for strengthening the enforcement of fundamental values within the EU, focusing in particular on the proposal for the regulation on the protection of the Union's budget in case of generalised deficiencies in the rule of law in the member states (Chapter 3.4.). In the second part of the paper mechanisms for the adoption of sanctions by the EU for the protection of its fundamental values in relation to the wider world (third states) are presented, i.e. conditionality in international agreements (Chapter 4.1) and restrictive measures under the CFSP (Chapter 4.3.), mentioning briefly also the possibility of the EU to rely on general international law to adopt sanctions against third states (Chapter 4.2.).

Three preliminary caveats must be formulated in order to further delineate the scope of this contribution. First, this paper focuses on the adoption of sanctions by the EU, as an international organisation with a legal personality separate from its member states.<sup>2</sup> Excluded from the analysis are therefore e.g. sanctions adopted by one EU member state against another member state. Second, this contribution only focuses on non-judicial sanctions and mentions the EU's judicial enforcement mechanism only to the extent necessary for clarifying its indirect role for the protection of the EU's fundamental values. Third, this paper is not meant to provide an exhaustive

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<sup>2</sup> Article 47 TEU. See also *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion I.C.J. Reports 1949, p. 174, pp. 177-179.

overview of the practice relating to the adoption of non-judicial sanctions by the EU under the mechanisms presented here, but rather provides examples of the EU's relevant sanctions activities, to disclose a broader picture relevant for our discussion.

## 2. Clarifying Basic Concepts

### 2.1. Sanctions

There exists no common definition of sanctions under EU law or under international law; therefore, this concept is a source of significant controversy and is associated with various terms that have different legal connotations.<sup>3</sup> In the EU, the term 'sanctions' is commonly used interchangeably with restrictive measures under the CFSP,<sup>4</sup> as well as to describe measures adopted under Article 7 TEU<sup>5</sup> and under conditionality clauses.<sup>6</sup> This paper adopts a wide, breach-oriented definition of sanctions including various measures that the EU is entitled to adopt against its member states as well as against third states under different mechanisms in response to violations of common values of the EU,<sup>7</sup> i.e. Article 7 TEU, membership conditionality, conditionality clauses in international agreements, and restrictive measures under the CFSP.

### 2.2. The Fundamental Values of the EU

The fundamental values of the EU are enshrined in 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

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<sup>3</sup> E.g. restrictive measures, retorsion, institutional sanctions or collective measures, countermeasures. Gaetano Arangio-Ruiz, 'Third report on State responsibility', UN Doc. A/CN.4/440 and Add.1 (1991) YILC vol. II part one, p. 1, para. 8; Alain Pellet and Alina Miron, 'Sanctions', in Rüdiger Wolfrum (ed.) *The Max Planck Encyclopedia of Public International Law*, vol. IX (Oxford University Press, 2012) 1-15.

<sup>4</sup> See e.g. Council of the European Union, 'Guidelines on the implementation and evaluation of restrictive measures', 5664/18, 4 May 2018, p. 4.

<sup>5</sup> See e.g. Stelio Mangiameli and Gabriella Saputelli, 'Commentary to Article 7 TEU', in Hermann-Josef Blanke and Stelio Mangiameli (eds.), *The Treaty on European Union (TEU), A commentary* (Springer, 2013) 349-373.

<sup>6</sup> See e.g. Lorand Bartels, *Human rights conditionality in the EU's international agreements* (Oxford University Press, 2005); Clara Portela, 'Aid suspensions as coercive tools? The European Union's experience in the African-Caribbean-Pacific (ACP) context' (2007) 3.2 Review of European and Russian Affairs 38-53.

<sup>7</sup> Regardless of different uses of the notion of sanctions, there is a common understanding that sanctions are reactions to a prior breach. See e.g. Hans Morgenthau, 'Théorie des sanctions internationales' (1935) 16 Rev. Droit Int'l & Legis. Comp. 809-836; Math Noortmann, *Enforcing International Law: From Self-help to Self-contained Regimes* (Ashgate, 2005), p. 53.

rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

This provision, sometimes referred to as the ‘homogeneity clause’,<sup>8</sup> has a long-standing history in the EU.<sup>9</sup> To some extent shared commitment to freedom based on human rights, democratic institutions, and the rule of law has been present since the beginning of the European integration process. These values, however, were more prominently discussed and highlighted in the first enlargement process,<sup>10</sup> when they “proved necessary for securing peace and developing prosperity in the European Union.”<sup>11</sup> It was the Amsterdam Treaty that included them, as part of EU primary law, explicitly and introduced a mechanism to enforce them.<sup>12</sup> Fundamental values do not *stricto sensu* fall within the scope of the ordinary *acquis communautaire*. They cannot form a basis for the adoption of concrete legislation; however, “their inclusion within the broader ambit of EU law cannot be disputed”.<sup>13</sup>

Fundamental values such as democracy, rule of law, and respect for human rights are rather abstract notions not further defined in Article 2 TEU; however, they are concretized in other provisions of the EU treaties and case law. Concrete and detailed provisions on separate fundamental values were included in the EU primary law at different points in time, and evolved either through jurisprudence or through institutional and political debate.<sup>14</sup>

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<sup>8</sup> Stelio Mangiameli, ‘Commentary to Article 2 TEU’, in Hermann-Josef Blanke and Stelio Mangiameli (eds.), *The Treaty on European Union (TEU), A commentary* (Springer, 2013) 109-155.

<sup>9</sup> For the history of the adoption Article 2 TEU see Mangiameli, ‘Commentary to Article 2 TEU’, pp. 110-115.

<sup>10</sup> Heads of State or Government Summit Conference of Copenhagen on 14/15 December 1973, *Declaration on Europe’s Identity*, pp. 118-122.

<sup>11</sup> European Council, *Tampere European Council 15 and 16 October 1999 - Presidency Conclusions*, available at [https://www.europarl.europa.eu/summits/tam\\_en.htm#c](https://www.europarl.europa.eu/summits/tam_en.htm#c) (last accessed 6 April 2020).

<sup>12</sup> See Articles 6 and 7 of the Treaty on the European Union as modified by the Amsterdam treaty. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ C 340, 10/11/1997.

<sup>13</sup> Dimitry Kochenov and Laurent Pech, ‘Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation’ (2016) 54.5 *Journal of Common Market Studies* 1062-1074, p. 1063; Mangiameli, ‘Commentary to Article 2 TEU’, pp. 117-119.

<sup>14</sup> Mangiameli, ‘Commentary to Article 2 TEU’, pp. 115-119.

For instance, there are different nuances to the notion of ‘rule of law’ in the member states;<sup>15</sup> however, certain common core elements can be defined: 1) governance based on and limited by law (the principle of legality), 2) laws must be laid down in advance, they must be general and publicly available (formal legality) and 3) access to legal remedies, i.e. an independent and unbiased judiciary enforcing these principles.<sup>16</sup> The notion of the rule of law is given a more concrete expression e.g. in Article 19 TEU<sup>17</sup> and the Charter of Fundamental Rights of the European Union<sup>18</sup> and was further defined in the case law of the Court of Justice of the European Union (CJEU),<sup>19</sup> confirming that the EU is a “community based on the rule of law”.<sup>20</sup> In its recent endeavours to strengthen the rule of law amongst its members, the Commission has put forward a broad definition of the rule of law that includes human rights and democracy.<sup>21</sup>

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<sup>15</sup> Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Bloomsbury Publishing, 2017), pp. 38-39; Mangiameli, ‘Commentary to Article 2 TEU’, p. 132.

<sup>16</sup> See Rafał Mańko, ‘Protecting the rule of law in the EU Existing mechanisms and possible improvements’ European Parliament Research Service, November 2019, p. 2. See also Robert Stein, ‘Rule of law: what does it mean’ (2009) 18 *Minnesota Journal of International Law* 293-303; Martin Krygier, ‘The Rule of Law’, in Michel Rosenfeld and András Sajó (eds.), *The Oxford handbook of comparative constitutional law* (Oxford University Press, 2012) 233-249; Brian Z. Tamanaha, ‘The history and elements of the rule of law’ (2012) *Singapore Journal of Legal Studies* 236-246. More on the rule of law and its definition see Judgment of the CJEU of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, Case 294/83; Council of Europe, ‘Rule of Law Checklist’, adopted by the Venice Commission at its 106th Plenary Session, Venice, 11/12 March 2016; United Nations, *The United Nations Rule of Law Indicators* (2011); European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, *The Triangular relationship between Fundamental Rights, Democracy and Rule of Law in the EU-Towards an EU Copenhagen Mechanism* (2013), pp. 26-27.

<sup>17</sup> See also European Commission, ‘Communication from the Commission: Further strengthening the Rule of Law within the Union’, COM(2019) 163 final, 3 April 2019.

<sup>18</sup> E.g. Article 41 (Right to good administration) and Article 47 (Right to an effective remedy and to a fair trial). Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

<sup>19</sup> Thomas Von Danwitz, ‘The Rule of Law in the Recent Jurisprudence of the ECJ’ (2014) 37 *issue 5 Fordham Int’l LJ* 1311-1347. See also Judgment of the CJEU (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, Case C-64/16, para. 32; Judgment of the CJEU (Grand Chamber) of 28 March 2017, *PJSC Rosneft Oil Company v Her Majesty’s Treasury and Others*, Case C-72/15, para. 73.

<sup>20</sup> Judgment of the CJEU of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, Case 294/83, para. 23.

<sup>21</sup> European Commission, ‘Communication: Further strengthening the Rule of Law within the Union’, COM(2019) 163 final. See also European Commission, ‘Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law’, COM(2014) 158 final, 11 March 2014; European Commission, ‘Communication from the Commission to the European parliament, the European Council, the Council, the European economic and social committee and the Committee of the regions: Strengthening the rule of law within

Similarly, with the Lisbon Treaty, human rights became strongly entrenched in EU primary law, the underlying provision being Article 6 TEU recognising the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union as having the same legal value as the Treaties.<sup>22</sup> Moreover, the fundamental rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms (ECHR)<sup>23</sup> and those resulting from the constitutional traditions common to the member states form part of the general principles of the Union's law.<sup>24</sup>

As emphasised by the Parliament, respect for the fundamental values such as the rule of law and human rights are a prerequisite for “the upholding of all rights and obligations deriving from the Treaties and from international law, and is a precondition for mutual recognition and trust as well as a key factor for (different) policy areas”.<sup>25</sup> Consequently, the possible erosion of these values “pose[s] a serious threat to the stability of the Union”.<sup>26</sup> Indeed Article 2 TEU values, sometimes referred to as principles,<sup>27</sup> are considered “the very foundations of [EU] legal order”<sup>28</sup>

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the Union, A blueprint for action’, COM(2019) 343 final, 17 July 2019; Article 2(a) of the European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States’, COM(2018) 324 final – 2018/0136 (COD). Definitions of other international organisations also adopt such broad notion of the rule of law including notions such as human rights and democracy. See e.g. the UN definition in United Nations Security Council, ‘The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General’, UN Doc. S/2004/616, 23 August 2004, p. 4, para. 6. For a view that human rights and democracy should be excluded from the definition see Tamanaha, ‘The history and elements of the rule of law’, pp. 234-236.

<sup>22</sup> Article 6(1) TEU

<sup>23</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.

<sup>24</sup> Article 6(3) TEU. For a more detailed overview of concrete fundamental values see Mangiameli, ‘Commentary to Article 2 TEU’, pp. 117-135.

<sup>25</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8\_TA(2016)0409, OJ C 215/162, para. H.

<sup>26</sup> European Parliament resolution of 25 October 2016, OJ C 215/162, para H.

<sup>27</sup> Mangiameli, ‘Commentary to Article 2 TEU’, pp. 115-117.

<sup>28</sup> Dimitry Kochenov, ‘The Acquis and Its Principles: The Enforcement of the ‘Law’ versus the Enforcement of ‘Values’ in the European Union’, in András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press, 2017) 9-27, p. 9, ft. 4.

and the EU pledges to promote these values amongst its member states<sup>29</sup> as well as in relations with its candidate countries<sup>30</sup> and with the wider world.<sup>31</sup>

### 3. Safeguarding Fundamental Values within the EU

At the EU's inception, it was presumed that member states could be trusted to respect the common values and therefore there would be no need for the possibility of imposing penalties against its own member states.<sup>32</sup> Compliance with fundamental values first became important in relation to future member states, with the EU's enlargement leading to the adoption of the Copenhagen criteria in 1993.<sup>33</sup> However, while in the past accession procedures a rigorous system checking the adherence to fundamental values was in place, no such mechanism systematically scrutinizing the state of affairs regarding the respect of fundamental values in each country existed after a state had attained full membership.<sup>34</sup> To address possible serious infringements of EU values such as violations of the rule of law within EU members, Article 7 TEU was introduced, providing the legal basis for the adoption of sanctions against a member that is seriously and persistently violating fundamental values.

#### 3.1. Membership Conditionality

The EU applies 'membership conditionality' to ensure that candidate countries comply with the EU's fundamental values.<sup>35</sup> In 1993, the European Council established the accession criteria for candidates for EU membership, the so-called 'Copenhagen criteria', aimed at preventing 'democratic backsliding' of new member

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<sup>29</sup> Article 3(1) TEU.

<sup>30</sup> Article 49 TEU.

<sup>31</sup> Article 3(6) TEU.

<sup>32</sup> Konstantinos D. Magliveras, *Exclusion from Participation in International Organisations: The Theory and Practice Behind Member States' Expulsion and Suspension of Membership*, vol. 5, (Kluwer Law International, 1999), p. 194.

<sup>33</sup> The European Council, Copenhagen, 21/22 June 1993, Conclusions, Bull EC 6-1993.

<sup>34</sup> An exception to this is the Cooperation and Verification Mechanism for Bulgaria and Romania, which was set up by the Commission as a transitional measure to assist the two countries in remedying some shortcomings in the field of judicial reform, corruption, and (for Bulgaria) organised crime. This is a temporary mechanism allowing the Commission to regularly assess and support the situation in these two countries in relation to defined areas. No special sanctions are, however, foreseen in this mechanism. European Commission, Cooperation and Verification Mechanism for Bulgaria and Romania, available at [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en) (last accessed 6 April 2020).

<sup>35</sup> Article 49 TEU.



states. These criteria stipulate that applicant countries have to ensure the “stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities”.<sup>36</sup> They were granted primary law status with the Treaty of Amsterdam, with which respect of fundamental values became the basic test for the membership of the EU.<sup>37</sup> They presuppose the adoption of sanctions in cases of violations of fundamental values in the form of the postponement or rejection of membership to the EU. However, conditionality commonly also includes the adoption of other measures, e.g. suspension of financial assistance granted to applicant states.<sup>38</sup>

This approach was initially intended only for Central and Eastern European countries; however, it was later applied and modified in relation to other countries as well. Today, the EU’s policy in this respect remains focused on the ‘fundamentals first’ principle prioritising reforms in the areas of the rule of law, fundamental rights, and democracy.<sup>39</sup>

In practice, membership was postponed e.g. in the case of Croatia, because it was considered not to be cooperating sufficiently with the International Criminal Tribunal for the Former Yugoslavia (“ICTY”).<sup>40</sup>

### 3.2. Article 7 TEU

Protection of fundamental values within the EU is not enforceable through the classical infringement procedure, but rather through a non-judicial sanctioning procedure under Article 7 TEU that is aimed at addressing systemic ‘serious and persistent’ violations of fundamental values. The Article 7 TEU mechanism can be

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<sup>36</sup> The European Council, Copenhagen, 21/22 June 1993, Conclusions, Bull EC 6-1993, point I.13.

<sup>37</sup> Article 49(1) TEU.

<sup>38</sup> See e.g. Article 4 of Council Regulation (EC) No 622/1998 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships and paragraph 5 of the Annex of the Council Decision of 13 September 2004 on the principles, priorities and conditions contained in the European Partnership with Croatia, 2004/648/EC, OJ L 297/19. See Bartels, ‘Human rights conditionality in the EU’s international agreements’, p. 59.

<sup>39</sup> Council of the European Union, ‘EU Annual Report on Human Rights and Democracy in the World in 2015 – Country and Regional Issues’, 12299/16, 20 September 2016, p. 9.

<sup>40</sup> See e.g. European Commission, Croatia 2005 Progress Report, COM(2005) 561 final, SEC (2005) 1424, 9 November 2005.

considered a safeguard clause ensuring the continued homogeneity between the legal order of the states and that of the EU.<sup>41</sup>

Arguably, the main significance of the procedure under Article 7 TEU is its scope. This is because it is not limited solely to violations of values within the competence of the EU, but also aims to prevent and sanction violations that may occur in the area of the competence of the member states, thus exhibiting a ‘general and horizontal nature’.<sup>42</sup> The scope of Article 7 TEU sanctions is therefore broader than the scope of judicial sanctions in cases of infringement procedures. The aim of the latter is supervision of the treaties, therefore there has to exist a link between the situation in a member state and EU law in order for the Commission to start judicial procedure<sup>43</sup>, whereas the Article 7 TEU mechanism is not based on explicit breaches of EU law, but may result from domestic behaviour of the member state.<sup>44</sup> Even if a member state e.g. commits violations of fundamental rights that have no connection with the EU law, recourse to the Article 7 TEU mechanism can be had.<sup>45</sup> It has to be stressed that the activation of Article 7 TEU and the possible adoption of sanctions does not affect the obligations that the member states concerned have under EU law, so that they continue to be bound by obligations under the treaties.<sup>46</sup>

With regard to the nature of violations, it is important for the activation of Article 7 TEU that what has occurred was not merely a violation of a certain fundamental value but rather a breach of the “very foundation of the Union”; in addition, such breach must be serious and persistent.<sup>47</sup> There has to be a systemic problem going beyond

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<sup>41</sup> Mangiameli and Saputelli, ‘Commentary to Article 7 TEU’, p. 354. Other international organisations have similar provisions on the possibility of sanctioning its member states in cases of organisation’s basic principles. See e.g. Articles 2 and 6 of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI; Article 8 of the Statute of the Council of Europe, London, 5 May 1949, 87 UNTS 103.

<sup>42</sup> Mangiameli and Saputelli, ‘Commentary to Article 7 TEU’, p. 351. See also European Commission, ‘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 final, 15 October 2003, point 1.1.

<sup>43</sup> See Chapter 3.3. below.

<sup>44</sup> Mangiameli and Saputelli, ‘Commentary to Article 7 TEU’, p. 355.

<sup>45</sup> European Commission, ‘Communication from the Commission: Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’, COM(2010) 573 final, 19 October 2010, p. 10.

<sup>46</sup> Article 7(3) TEU.

<sup>47</sup> European Commission, ‘Commission Communication on Article 7 of the Treaty on European Union’, COM(2003) 606 final.

mere isolated violations.<sup>48</sup> It has been argued, however, that even a single act of a scale and gravity directly affecting the protected values could trigger the activation of the mechanism.<sup>49</sup>

In essence, the Article 7 TEU mechanism consists of two mechanisms: a prevention and a sanctioning mechanism, whereas in 2014 an early warning mechanism, the so called Rule of Law Framework, was added as a ‘pre Article-7 procedure’.

### 3.2.1. Prevention Mechanism

It was the so called Haider affair in Austria in 2000 that was instrumental for the inclusion of the prevention mechanism in Article 7 TEU. At that time, a political party that was considered undemocratic was to participate in the government of Austria, triggering calls for the first activation of the Article 7 TEU sanctioning mechanism. However, the mechanism was considered as too forceful and was therefore not initiated. A solution was reached outside the framework of Article 7 with the adoption of coordinated bilateral diplomatic measures by 14 member states against Austria.<sup>50</sup> Even though the Article 7 TEU mechanism was not triggered, the affair strongly influenced Article 7 TEU, since it led to its modification, extending it to include the preventive mechanism with the Treaty of Nice.<sup>51</sup>

The prevention mechanism under Article 7 TEU enables the EU to intervene not only in retrospect but also in cases of clear risk of a serious breach of its values. It can be initiated by a reasoned proposal of one of the competent organs (one third of the member states, the Parliament or the Commission).<sup>52</sup> The Council then, by a majority of four fifths of its members and after obtaining the consent of the Parliament, determines that there is a clear risk of a serious breach of one or several values enshrined in Article 2 TEU by a member state. Before making such a determination,

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<sup>48</sup> Protection of individual rights is to be dealt with through domestic, European and international court procedures. European Commission, ‘Commission Communication on Article 7 of the Treaty on European Union’, COM(2003) 606 final.

<sup>49</sup> Mangiameli and Saputelli, ‘Commentary to Article 7 TEU’, p. 352.

<sup>50</sup> Sanctions included the suspension of contacts with Austrian government officials, the withdrawal of EU support for Austrian applications for senior positions in international organizations, and the absence of contacts with Austrian ambassadors. Matthew Happold, ‘II. Fourteen Against One: The EU Member states’ Response To Freedom Party Participation In The Austrian Government’ (2000) 49.4 *International & Comparative Law Quarterly* 953-963.

<sup>51</sup> For the genesis of Article 7 TEU see Mangiameli and Saputelli, ‘Commentary to Article 7 TEU’, pp. 356-359.

<sup>52</sup> Article 7(1) TEU. See Diego López Garrido and Antonio López Castillo, ‘The EU framework for enforcing the respect of the rule of law and the Union’s fundamental principles and value’, Policy Department for Citizens’ Rights and Constitutional Affairs, January 2019, p. 15.

the Council has to hear the member state in question and may address recommendations to it.<sup>53</sup> This amounts to a formal warning to a member state accused of violating fundamental values. If the state concerned does not conform to the recommendations of the Council, the sanctioning mechanism can be triggered.

### 3.2.2. Sanctioning Mechanism

In this phase, first a determination of the actual existence of a ‘serious and persistent breach’ has to be made, followed by the possible adoption of sanctions.<sup>54</sup> Such determination is to be made by the European Council (and not the Council of the European Union), which has to act unanimously (with the exception of the member state concerned)<sup>55</sup> after obtaining the European Parliament’s consent. A determination of the existence of a breach can only be made upon the proposal of one third of the member states or of the Commission.<sup>56</sup> The most contested part of this stage is the fact that all member states have to agree on the existence of the breach. Such consensus will usually be extremely hard to obtain, especially when there is more than one country showing non-democratic tendencies domestically, as is currently the case.<sup>57</sup> It was argued that this mechanism is therefore almost impossible to apply successfully in practice.<sup>58</sup>

After the determination of the existence of a breach the Council has the ‘right’ (and not the obligation) to adopt sanctions against the member state concerned with a qualified majority. Possible sanctions include the suspension of rights “deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.”<sup>59</sup> The Council enjoys discretion not only on whether to act but also as to the choice of

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<sup>53</sup> Article 7(1) TEU.

<sup>54</sup> It has to be stressed that Article 7 TEU is commonly interpreted in a way, that preventive mechanism under Article 7(1) TEU is not a necessary precondition for the activation of other mechanisms under Article 7(2) and 7(3) TEU. Mangiameli and Saputelli, ‘Commentary to Article 7 TEU’, p. 364.

<sup>55</sup> Article 7(2) TEU. See Garrido and Castillo, ‘The EU framework for enforcing the respect of the rule of law and the Union’s fundamental principles and value’, p. 15.

<sup>56</sup> Article 7(2) TEU.

<sup>57</sup> See Chapter 3.2.4. below.

<sup>58</sup> Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner, speech: ‘The EU and the Rule of Law - What next?’, Centre for European Policy Studies/Brussels, 4 September 2013, available at [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_13\\_677](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677) (last accessed 6 April 2020).

<sup>59</sup> Article 7(3) TEU.

sanctions to be adopted, and the consent of the European Parliament is not required. However, the Council has to take “into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.”<sup>60</sup> It is not entirely clear what other rights, apart from the voting rights in the Council, can be suspended,<sup>61</sup> since this mechanism has never been used in practice. In principle this could concern any ‘right deriving from the application of the Treaties’ of the member state concerned. Some have argued that the adoption of economic sanctions under relevant instruments of secondary law could be possible within the Article 7 TEU procedure.<sup>62</sup> Finally, if the member concerned abides by the EU recommendations and ceases its violations of fundamental values, the measures taken can be modified or revoked.<sup>63</sup>

### 3.2.3. Early Warning Mechanism

With the growing perception that Article 7 TEU is an inadequate tool to address violations of fundamental values within the EU, the Commission decided in 2014 to complement the existing prevention and sanctions mechanisms with a new monitoring mechanism, the ‘Rule of Law Framework’.<sup>64</sup> This early warning instrument is meant to be a “pre-Article 7” procedure with the aim of resolving “future threats to the rule of law in member states before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met”.<sup>65</sup>

The Commission has absolute discretion in deciding upon activating the Rule of Law Framework and can do so in situations where member states take measures or tolerate situations which are likely to “systematically and adversely affect the integrity,

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<sup>60</sup> Article 7(3) TEU.

<sup>61</sup> Article 7(3) TEU does make, however, suspension or ceasing of membership legally impermissible, which was explicitly recognised by the Commission as well. European Commission, ‘Commission Communication on Article 7 of the Treaty on European Union’, COM(2003) 606 final.

<sup>62</sup> Leonard Besselink, ‘The Bite, the Bark and the Howl. Article 7 TEU and the Rule of Law Initiative’ 2016-2 Amsterdam Law School Legal Studies Research Paper, University of Amsterdam, p. 9; Gábor Halmai, ‘The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member states’, EUI Department of Law Research Paper 2018/06, pp. 13, 18-19. For a view that such sanctions would necessitate amendment of treaties see Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ (2014) LEQS Paper No. 79, p. 16.

<sup>63</sup> Article 7(4) TEU.

<sup>64</sup> European Commission, ‘Commission Communication: A new EU Framework to strengthen the Rule of Law’, COM(2014) 158 final.

<sup>65</sup> European Commission, ‘Commission Communication: A new EU Framework to strengthen the Rule of Law’, COM(2014) 158 final, point 1. See also Garrido and Castillo, ‘The EU framework for enforcing the respect of the rule of law and the Union’s fundamental principles and value’, p. 7.

stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law”.<sup>66</sup> It consists of three phases: 1) the assessment phase, resulting in the ‘rule of law’ opinion, which is sent to the government concerned. 2) If no actions are taken by the relevant member states in the second phase, a non-binding ‘rule of law’ recommendation is addressed to the government, possibly indicating ways and means to resolve the situation within a certain time framework. 3) The follow-up phase consists of the Commission’s monitoring the implementation of its recommendation. It may decide at this phase to take recourse to Article 7 TEU procedures.<sup>67</sup>

This mechanism, which was triggered for the first and only time in the case of Poland, does not, however, provide for the adoption of sanctions against member states and it is doubtful whether early warning mechanism alone could address systemic violations of EU values.<sup>68</sup>

#### 3.2.4. Practice Relating to the Enforcement of Fundamental Values by the EU through the Adoption of Sanctions Against its Member States

There are only two examples of the EU actually activating Article 7 TEU mechanisms: Poland and Hungary. However, only the early warning and prevention phases were triggered and no sanctions were adopted so far.

##### 3.2.4.1. *Poland*

Since 2015, Poland has adopted numerous consecutive laws affecting the entire structure of the justice system in the country, allowing the executive or legislative powers to systematically and significantly interfere with the composition, the powers, the administration, and the functioning of judicial bodies.<sup>69</sup> These changes led to a lack of an independent and legitimate constitutional review and undermined the

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<sup>66</sup> European Commission, ‘Commission Communication: A new EU Framework to strengthen the Rule of Law’, COM(2014) 158 final, point 4.1.

<sup>67</sup> European Commission, ‘Commission Communication: A new EU Framework to strengthen the Rule of Law’, COM(2014) 158 final, point 4.1. See also Maňko, ‘Protecting the rule of law in the EU Existing mechanisms and possible improvements’, p. 4.

<sup>68</sup> Halmai, ‘The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member states’, p. 12.

<sup>69</sup> For an overview of legislative changes see European Commission, ‘Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law’, COM(2017) 835 final, 20 December 2017.

independence of the judiciary and the separation of powers in Poland, which are key components of the rule of law.<sup>70</sup>

The Commission responded in 2016 with the initiation of the Rule of Law Framework in the course of which it issued three recommendations to Poland.<sup>71</sup> Despite maintaining an extensive dialogue with the Polish authorities there has been no progress<sup>72</sup> and the situation in Poland has deteriorated. For this reason, the Commission decided in 2017 to activate the Article 7(1) TEU procedure for the first time, concluding that there exists a clear risk of a serious breach of the rule of law in Poland and submitting a reasoned proposal for a Decision of the Council on the matter.<sup>73</sup> The Council activated the Article 7(1) TEU procedure and has heard the Polish government on the issue three times. However, the Council has taken no further action and the situation in Poland continues to deteriorate.<sup>74</sup>

### 3.2.4.2. Hungary

Since 2010, Hungary has undergone substantive constitutional reforms which dismantled the checks and balances in the country; it has also adopted numerous legislative changes relating to independence of the judiciary, asylum and immigration policy, civil society activities, minority rights, media freedom and freedom of religion or belief.<sup>75</sup> These measures could present not only a clear risk of a breach but possibly

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<sup>70</sup> European Commission, 'Proposal for a Council Decision', COM (2017) 835 final, para. 5.

<sup>71</sup> Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, OJ L 217/53; Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, OJ L 22/65; Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146, OJ L 228/19; Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ L 17/50.

<sup>72</sup> Poland disagreed with the Commission. See The Chancellery of the Prime Minister, *White Paper on the Reform of the Polish Judiciary* (Warsaw, March 2018), available at [https://www.premier.gov.pl/files/files/white\\_paper\\_en\\_full.pdf](https://www.premier.gov.pl/files/files/white_paper_en_full.pdf) (last accessed 6 April 2020).

<sup>73</sup> European Commission, 'Proposal for a Council Decision', COM(2017) 835 final. The European Parliament agreed with the Commission on the risks to the rule of law in Poland. European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP)) OJ C 129/13, 5 April 2019.

<sup>74</sup> On the situation in Poland and EU's response to it see also Garrido and Castillo, 'The EU framework for enforcing the respect of the rule of law and the Union's fundamental principles and value', pp. 22- 29.

<sup>75</sup> For an overview of Hungarian constitutional developments since 2010 see Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, 'Report Following her Visit to Hungary from 4 to 8 February 2019', CommDH(2019)13, 21 May 2019; Council of Europe, European

amount to the ‘serious and persistent breach’ of the values referred to in Article 2 TEU. This was recognised by the European Parliament, which initiated the Article 7 TEU procedure against Hungary.

In 2013, the European Parliament first expressed grave criticism of Hungary’s policies and considered them as incompatible with the values referred to in Article 2 TEU.<sup>76</sup> It envisaged the establishment of a special “Copenhagen Commission” as a high level expert body which would review continued compliance with the Copenhagen criteria used for admission to the EU on the part of any member state.<sup>77</sup> The European Parliament further adopted successive resolutions on the political situation and fundamental rights in Hungary<sup>78</sup> and in 2018, it approved a proposal which called on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.<sup>79</sup> The European Parliament’s concerns included a broad array of issues, including immigration and asylum policy, judicial reforms, academic freedom, religious freedom, non-governmental organisations’ funding, and minority rights.<sup>80</sup> This is the first time that the European Parliament has formally voted on an Article 7 TEU resolution and requested the Council to confirm the existence of a clear risk of a serious violation of the founding values of the Union.<sup>81</sup> Since then, the Council

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Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘Report on the visit to Hungary from 20 to 26 October 2017’, CPT/Inf (2018) 42; Council of Europe, Special Representative of the Secretary General on migration and refugees, ‘Report of the fact-finding mission to Serbia and two transit zones in Hungary 12-16 June 2017’, SG/Inf(2017)33, 13 October 2017; European Parliament, ‘Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))’, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Rui Tavares, A7-0229/2013, 24 June 2013, paras. AB-AF.

<sup>76</sup> European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), P7\_TA(2013)0315, OJ C 75/52, para. 58.

<sup>77</sup> European Parliament resolution of 3 July 2013, OJ C 75/52, para. 80.

<sup>78</sup> See European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), P8\_TA(2015)0227, OJ C 407/46; European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)), P8\_TA(2015)0461, OJ C 399/127; European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), P8\_TA(2017)0216, OJ C 307/75.

<sup>79</sup> European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8\_TA(2018)0340, OJ C 433/66.

<sup>80</sup> European Parliament resolution of 12 September 2018, OJ C 433/66, para. 1.

<sup>81</sup> Article 7(1) TEU.



has been dealing with the matter,<sup>82</sup> but without concrete results to date. Two hearings were held with Hungary; however, no decision on the threat or violation of fundamental values was made. The Commission, on the other hand, for a long time argued that in the case of Hungary it was unnecessary to trigger Article 7 TEU mechanism.<sup>83</sup>

In January 2020, the European Parliament adopted a resolution on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary whereby it expressed concern that hearings were not organised in a regular, structured, and open manner<sup>84</sup> and regretted that no meaningful progress had been made so far. Moreover, it pointed out that “the failure by the Council to make effective use of Article 7 of the TEU continues to undermine the integrity of common European values, mutual trust, and the credibility of the Union as a whole”.<sup>85</sup> It called on the Commission “to make full use of the tools available to address a clear risk of a serious breach by Poland and Hungary of the values on which the Union is founded”.<sup>86</sup> Parliament also requested the Council to speed up the process under Article 7 TEU in relation to Hungary and Poland,<sup>87</sup> noting that the situation in both Poland and Hungary had deteriorated since the activation of this mechanism.<sup>88</sup>

### 3.3. The Role of the Infringement Procedure in Safeguarding Fundamental Values

As explained above, the scope of sanctions under Article 7 TEU is broader than that of judicial sanctions in cases of infringement procedures. The line between different procedures can sometimes, however, be very thin and often both mechanisms (infringement procedure and Article 7 TEU) can be applied simultaneously or

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<sup>82</sup> See General Affairs Council, 3674th Council meeting, 19 February 2019, 6547/19.

<sup>83</sup> See e.g. statement of Věra Jourová, the Commissioner for Justice, ‘Situation in Hungary: Follow-up to the European Parliament Resolution of 10 June 2015, European Parliament Debate’ CRE 02/12/2015-17. Despite a long list of violations of EU law committed by Hungary, she concluded that there are no “grounds at this stage to trigger Article 7 or the Rule of Law Framework”.

<sup>84</sup> European Parliament resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2020/2513(RSP)), P9\_TA-PROV(2020)0014, 16 January 2020, para. 1.

<sup>85</sup> European Parliament resolution of 16 January 2020, P9\_TA-PROV(2020)0014, para. 3.

<sup>86</sup> European Parliament resolution of 16 January 2020, P9\_TA-PROV(2020)0014, para. 3.

<sup>87</sup> European Parliament resolution on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary, (2020/2513(RSP)), B9-0032/2020, 9 January 2020.

<sup>88</sup> European Parliament resolution of 16 January 2020, P9\_TA-PROV(2020)0014, para. 3

successively.<sup>89</sup> This is because activities of countries undermining fundamental values are often concurrently in breach of concrete provisions of EU law. In such cases, the Commission<sup>90</sup>, as the “guardian of the Treaties”,<sup>91</sup> can start infringement procedures against the violating member state.<sup>92</sup> Another way of addressing issues undermining the fundamental values of the EU is through preliminary rulings, i.e. legally binding interpretations of EU law confirming that a specific member state’s law, regulations, or practices violate the rule of law.<sup>93</sup>

There is no doubt that judicial sanctions are amongst the most highly regarded when it comes to the assessment of a particular legal order and the EU’s infringement procedure is indeed regularly and successfully used to solve specific violations of EU law. However, in cases of addressing systematic, structural, and persistent violations within the EU, the infringement procedure suffers from certain shortcomings. First, the Commission enjoys discretion in terms of instituting the infringement procedure, although it is expected to ensure that EU law is observed by EU institutions and member states. Second, under the infringement procedure only single, concrete violations of EU law can be sanctioned on a case-by-case basis. This means that these procedures are rather narrow and therefore largely unable to address more systemic breaches. Third, these procedures are lengthy and are unable to promptly address the situation in individual member states. Fourth, and connected to the previous point, these judicial procedures are triggered *ex post facto* and thus fail to prevent actual breaches which threaten the fundamental values of the EU, such as the rule of law.

The Commission started infringement procedures against both Poland and Hungary. In the case of Poland, it claimed breaches of EU law, mostly due to its judicial reform, e.g. in relation to different pension ages for male and female judges;<sup>94</sup> in relation to the enforced early retirement of Supreme Court judges;<sup>95</sup> and in relation to new

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<sup>89</sup> Mangiameli and Saputelli, ‘Commentary to Article 7 TEU’, p. 353.

<sup>90</sup> Article 258 of the Treaty on the Functioning of the European Union (TFEU). Consolidated version of the Treaty on the Functioning of the European Union, O J C 326/47, 26 October 2012.

<sup>91</sup> See Article 17(1) TEU.

<sup>92</sup> Articles 258 and 259 TFEU.

<sup>93</sup> Article 267 TFEU. See also Mańko, ‘Protecting the rule of law in the EU Existing mechanisms and possible improvements’, p. 8.

<sup>94</sup> Judgment of the CJEU of 5 November 2019, *European Commission v Republic of Poland*, Case C-192/18, whereby the Court found a violation of the Equal Treatment Directive, Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union.

<sup>95</sup> Judgment of the CJEU of 24 June 2019, *European Commission v Republic of Poland*, Case C-619/18, whereby the Court found a violation of Article 19(1) TEU.

disciplinary regime for judges.<sup>96</sup> There were also a few preliminary rulings on the issue of judicial independence in Poland.<sup>97</sup> In relation to Hungary, the Commission started procedures due to its judicial reform and migration policy, e.g. regarding the lowering of the retirement age of judges and other legal professionals;<sup>98</sup> non-compliance of its asylum and return legislation with EU law in transit zones; regarding legislation criminalising activities that support asylum and for the non-provision of food by Hungary in transit zones.<sup>99</sup>

Despite legal success in some of these cases, violations of EU law continue to take place in both countries; what is more, the situation has deteriorated.<sup>100</sup> At the end of 2019, Poland even enacted a law presupposing non-compliance with the EU rule of law requirements and strengthening an arbitrary disciplinary regime for judges.<sup>101</sup>

In general, the EU has remained unable to address broader institutional issues threatening fundamental values such as the rule of law and democracy in two countries.<sup>102</sup> Indeed, infringement procedures directly or indirectly address most of

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<sup>96</sup> *European Commission v Republic of Poland*, C-791/19.

<sup>97</sup> See e.g. Judgment of the CJEU of 19 November 2019, joined Cases *A. K. v. Krajowa Rada Sądownictwa*, C-585/18, *CP v Sąd Najwyższy*, C-624/18 and *DO v Sąd Najwyższy*, C-625/18. More than eighteen requests for a preliminary ruling raising judicial independence issues, are now pending before the Court. Laurent Pech and Partyk Wachowiec, '1460 Days Later: Rule of Law in Poland R.I.P. (Part I)', *Verfassungsblog on Matters Constitutional*, 13 January 2020, available at: <https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-i/> (last accessed 6 April 2020).

<sup>98</sup> Judgment of the CJEU of 6 November 2012, *Commission v Hungary*, Case C-286/12, whereby the Court concluded that the Hungarian compulsory retirement scheme constitutes unjustified discrimination and is contrary to the Equal Treatment Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>99</sup> See European Commission, 'Migration and Asylum: Commission takes further steps in infringement procedures against Hungary', 19 July 2018, available at [https://europa.eu/rapid/press-release\\_IP-18-4522\\_en.htm](https://europa.eu/rapid/press-release_IP-18-4522_en.htm) (last accessed 6 April 2020); European Commission, 'Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones', 25 July 2019, available at [https://europa.eu/rapid/press-release\\_IP-19-4260\\_en.htm](https://europa.eu/rapid/press-release_IP-19-4260_en.htm) (last accessed 6 April 2020).

<sup>100</sup> See e.g. Open Letter to the President of the European Commission regarding Poland's disciplinary regime for judges and the urgent need for interim measures in *Commission v Poland* (C-791/19), available at <https://www.amnesty.org/download/Documents/EUR3715702019ENGLISH.pdf> (last accessed 6 April 2020).

<sup>101</sup> Mariusz Jałoszewski, 'PiS' night-time attack on the independence of the courts in Poland and on the CJEU judgment. The new bill, point by point', *Rule of Law*, 13 December 2019, available at <https://ruleoflaw.pl/pis-night-time-attack-on-the-independence-of-the-courts-in-poland-and-on-the-cjeu-judgment-the-new-bill-point-by-point/> (last accessed 6 April 2020).

<sup>102</sup> Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member states' (2015) 21.2 *European Law Journal* 141-160, p. 148.

the issues as underlined in the proposals for the Article 7 TEU procedures of Hungary and Poland.<sup>103</sup> However, with judicial proceedings, the Court is only indirectly able to address the issues of violations of fundamental values from Article 2. Moreover, the bulk of measures and changes introduced by Hungary and Poland relate to internal affairs, i.e. affairs in which states do not implement EU law, which means that the Court is unable to address them in the first place. Judicial action should therefore only complement the Article 7 TEU mechanism for the protection of the fundamental values of the EU.

### 3.4. Towards a New Sanctioning Mechanism for the Protection of Fundamental Values?

The lack of use in practice of the Article 7 TEU sanctions mechanism is commonly attributed to the fact that the Council has broad discretion in determining whether there is a “risk” of a breach or if there exists an actual “serious and persistent breach” of the values referred to in Article 2 TEU.<sup>104</sup> The decision is political and, paradoxically, the CJEU cannot intervene in the substance of the decision, since it only has jurisdiction with regard to procedural aspects.<sup>105</sup> In addition to the procedural condition of unanimity, the discretion of the Council underlines the political nature of the procedure; therefore, the Article 7 TEU mechanism has been described as a “highly discretionary political mechanism.”<sup>106</sup>

Different calls for alternative ways of protecting and enforcing EU values have been made in recent years. There were proposals for the establishment of new mechanisms for a regular review of the fundamental values within member states, which do not, however, provide for the adoption of sanctions, but could complement the existing sanctioning mechanism under Article 7 TEU. For example, in 2016 the European Parliament recommended to the Commission the establishment of an EU mechanism on democracy, the rule of law, and fundamental rights that would include an annual independent, evidence-based, non-discriminatory review assessing, on an

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<sup>103</sup> Commission’s proposal highlighted the lack of an independent and legitimate constitutional review and the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland. See European Commission, ‘Proposal for a Council Decision’, COM(2017) 835 final.

<sup>104</sup> Garrido and Castillo, ‘The EU framework for enforcing the respect of the rule of law and the Union’s fundamental principles and value’, p. 16.

<sup>105</sup> Article 269(1) TFEU.

<sup>106</sup> Mangiameli and Saputelli, ‘Commentary to Article 7 TEU’, p. 370; Konstadinides, ‘The Rule of Law in the European Union’, p. 163.

equal footing, the compliance of all EU member states with the values stipulated in Article 2 TEU.<sup>107</sup> Similarly, in 2019 the Commission proposed to set up a Rule of Law Review Cycle covering all EU member states.<sup>108</sup> This would be a preventive mechanism for monitoring the rule of law situation in all EU member states, its output being an annual report summarising the situation in all member states.

More importantly, proposals for some sort of conditionality between respect for common values and EU funds in the form of negative financial sanctions have regularly been made since 2016.<sup>109</sup> This led to the proposal of the Commission for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the member states based on Article 322(1)(a) TFEU in 2018.<sup>110</sup> According to this proposal, the Commission could take action in the form of suspension of funds against one of the members, if the latter jeopardises the EU's financial interests through a generalised degradation of the rule of law.<sup>111</sup> In particular, the Commission could adopt sanctions<sup>112</sup> in the form of a suspension or reduction of

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<sup>107</sup> European Parliament resolution of 25 October 2016, OJ C 215/162.

<sup>108</sup> European Commission, 'Commission Communication: Strengthening the rule of law within the Union, A blueprint for action', COM(2019) 343 final.

<sup>109</sup> In 2016 the European Parliament for example considered "that if in the future Treaty revision would be considered, the following changes may be provided for [...] Reviewing Article 7 TEU in order to provide for relevant and applicable sanctions against any member State, identifying the rights of Member states at fault (in addition to Council voting rights) that may be suspended, for example financial sanctions or the suspension of Union funding". European Parliament Resolution of 25 October 2016, OJ C 215/162, para. 20. For an overview of the proposal and support for such conditionality see Halmai, 'The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member states', pp. 15-20.

<sup>110</sup> European Commission, 'Proposal for a Regulation on the Protection of the Union's Budget', states COM(2018) 324 final ("the Proposal"). The European Parliament already adopted the first-reading legislative resolution on the proposal, however, the Council is yet to adopt a position on the proposal. European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member states (COM(2018)0324 - C8-0178/2018 - 2018/0136(COD)), P8\_TA(2019)0349, 4 April 2019. In 2019 the Commission adopted a blueprint for action in relation to the strengthening of the rule of law within the Union, whereby it urged the Parliament and the Council to adopt their proposed regulation. European Commission, 'Commission Communication: Strengthening the Rule of Law within the Union. A Blueprint for Action', COM(2019) 343 final, p. 16.

<sup>111</sup> This proposal adds to the existing regulatory framework for financial management under the current Multiannual Financial Framework. European Commission, 'Proposal for a Regulation on the Protection of the Union's Budget', COM(2018) 324 final, p. 1.

<sup>112</sup> The Proposal avoids using the term "sanction" and uses the term "financial measures". See Article 4 of the Proposal.

payments from the EU budget. This proposal is based on negative conditionality,<sup>113</sup> similarly to the one included in cooperation and development agreements of the EU with third states (see below). The Commission's proposal is limited to rule of law deficiencies and therefore seems to have a narrower scope than Article 7 TEU sanctions. The Commission justified this decision by clarifying that "the rule of law is a prerequisite for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights".<sup>114</sup>

In terms of process, the Commission would be entitled, upon finding a possible situation of generalised deficiencies regarding the rule of law in a member state,<sup>115</sup> after having heard the observations of the relevant country and having analysed all the information received, to propose necessary measures against generalised rule of law deficiencies.<sup>116</sup> The European Parliament and the Council would deliberate on this proposal and the decision would be considered approved if neither the European Parliament (by majority of votes cast) nor the Council (by qualified majority) amended or rejected it.<sup>117</sup> The decision-making threshold is therefore lower than in Article 7 TEU, which requires unanimity in the European Council. As opposed to Article 7 TEU and infringement procedure, the proposal also includes relatively strict deadlines for the members and the Council to respond to the Commission's findings; the Council, e.g. would have only one month to reject the Commission's proposal on sanctions.<sup>118</sup> Different sets of measures could be adopted under this procedure, including the suspension of payments and the suspension of commitments; however, when adopting sanctions, the Commission would be limited by the principle of

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<sup>113</sup> Michael Blauburger and Vera van Hüllen, 'Conditionality of EU funds: an instrument to enforce EU fundamental values?' (2020) *Journal of European Integration*, pp. 3-4.

<sup>114</sup> European Commission, 'Proposal for a Regulation on the Protection of the Union's Budget', COM(2018) 324 final, Preamble.

<sup>115</sup> To monitor and assess the rule of law situation in member states and assist the Commission in identifying generalised deficiencies a panel of independent experts is to be established. See Article 5 of the Proposal.

<sup>116</sup> While the proposed regulation relatively clearly defines the 'rule of law', it is less clear how a 'generalized deficiency' is to be interpreted and it seems that the Commission has a large degree of discretion with regard to this: "generalised deficiency as regards the rule of law' means a widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law". See Article 2(b) of the Proposal. Parliament therefore proposed a more detailed definition of 'generalised deficiencies.' European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member states, P8\_TA(2019)0349, Amendment 32.

<sup>117</sup> Article 5 of the Proposal.

<sup>118</sup> Article 5 of the Proposal.

proportionality.<sup>119</sup> Sanctions could be lifted in full or in part if the generalised deficiency regarding the rule of law had been remedied or had ceased to exist.<sup>120</sup>

This mechanism seeks to provide for a swift and quick response in case of violations of the rule of law, avoiding the requirement of unanimity and lengthy proceedings.<sup>121</sup> Moreover, there is quite some potential for the adoption of sanctions under this instrument, since it could affect any funding under shared management by the Commission and member states. In the cases of Poland and Hungary, for example, the percentage of such shared management resources is very high.<sup>122</sup>

It has been stressed by some that this proposal primarily seeks to protect the EU's financial interests<sup>123</sup> rather than the rule of law, since the Commission can intervene only if the financial interests of the EU are at risk. However, according to the proposal, the rule of law is “an essential precondition” to complying with the principles of sound management of the Union's budget.<sup>124</sup> It therefore seems that the proposal establishes an automatic link between the two, allowing for the adoption of sanctions even when there is no evidence of an actual risk to the financial interests of the EU:

“In abstract, any deficit in the proper functioning of the States' institutions poses a risk for the Union's budget, be it because spending is not adequately controlled, because fraud occurs, or because fraud is not investigated or sanctioned.”<sup>125</sup>

#### 4. Safeguarding the EU's Fundamental Values through the Adoption of Sanctions in Relation to the Wider World

Article 7 TEU is rarely used in practice, and even when it is used, the procedure is lengthy and has not yet resulted in the adoption of sanctions. It is paradoxical in a

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<sup>119</sup> Article 4(3) of the Proposal.

<sup>120</sup> Article 6 of the Proposal.

<sup>121</sup> Lorena Bachmaier, ‘Compliance with the Rule of Law in the EU and the Protection of the Union's Budget:

Further reflections on the Proposal for the Regulation of 18 May 2018’ (2019) 2 *eucri* 120-126.

<sup>122</sup> See Blauberger and van Hüllen, ‘Conditionality of EU funds: an instrument to enforce EU fundamental values?’, p. 11.

<sup>123</sup> Preamble, para. 11, Articles 2 and 3 of the Proposal.

<sup>124</sup> Preamble, paras. 4 and 10 of the Proposal.

<sup>125</sup> Bachmaier, ‘Compliance with the Rule of Law in the EU and the Protection of the Union's Budget’, p. 122.

way that on the other hand, the EU often adopts measures against third states on the basis of alleged violations of human rights, rule of law, and democracy, i.e. values that are considered fundamental to the EU.

The promotion and upholding of its values in relation to the wider world is enshrined in EU primary law, in particular Articles 3(5) and 21(1) TEU,<sup>126</sup> and is repeatedly reiterated by EU institutions.<sup>127</sup> In general, the EU considers itself “well placed to promote democracy and human rights”<sup>128</sup> in third states.

In order to promote its fundamental values in external relations, the EU draws on a wide range of instruments, e.g. diplomacy, bilateral dialogues, and sanctions.<sup>129</sup> In this respect the EU’s relevant practice clearly predates its practice in relation to sanctioning its own members. It was already in the 1970s and 1980s that the EU adopted sanctions against e.g. Uganda and the Soviet Union in order to protect fundamental values, without, however, having proper legal justification to do so in its primary law or agreements with these states.<sup>130</sup> This practice was later followed by the introduction of the legal basis for the adoption of sanctions in the 1990s. Since then, the EU has regularly sanctioned third states in the framework of the conditionality clauses in its international agreements and with the adoption of restrictive measures under the CFSP.

#### 4.1. Conditionality in International Agreements

The EU’s development, cooperation, partnership, association, and trade policies are commonly grounded on the promotion of human rights, democracy, the rule of law,

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<sup>126</sup> See also Article 21(2) TEU.

<sup>127</sup> The Commission e.g. stressed that in its relation to third countries, protection of fundamental rights, “together with the promotion of pluralistic democracy and effective guarantees for the rule of law and the fight against poverty, are among the European Union’s essential objectives.” European Commission, ‘Communication from the Commission to the Council and the European Parliament on the European Union’s role in promoting human rights and democratisation in third countries’, COM(2001) 252 final, p. 3. The Council publishes an annual report on human rights and democracy in the world including EU’s work and achievements in the advancement of human rights through its external action. See The Council, ‘EU Annual Report on Human Rights and Democracy in the World 2018’, 9024/19, 13 May 2019.

<sup>128</sup> European Commission, ‘Commission Communication on the European Union’s role in promoting human rights and democratisation in third countries’, COM(2001) 252 final, pp. 3-4.

<sup>129</sup> European Commission, ‘Commission Communication on the European Union’s role in promoting human rights and democratisation in third countries’, COM(2001) 252 final, p. 6.

<sup>130</sup> See Chapters 4.1 and 4.3. below.



and good governance,<sup>131</sup> and most of its agreements with third states on these issues contain provisions concerning the respect of these values and corresponding execution clauses.

It was already in 1977 that the EU should respond to human right violations in Uganda in the form of a suspension of development aid under the 1975 Lomé Convention I,<sup>132</sup> to which Uganda was a party and therefore benefited from financial aid and export stabilization payments.<sup>133</sup> The EU, however, lacked proper legal justification for doing so under the Convention since the latter did not mention human rights, democracy, and the rule of law; the EU finally suspended aid to Uganda, without claiming official suspension of the Lomé Convention I.<sup>134</sup> This prompted a new approach of the EU towards cooperation and development agreements, whereby ‘basic human rights clauses’<sup>135</sup> started to be used in order to prevent situations similar to the one with Uganda. The first of such clauses was included in the EU’s cooperation agreement with Argentina<sup>136</sup> and was later adopted in subsequent cooperation agreements with other developing countries.<sup>137</sup> It was,

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<sup>131</sup> See European Commission, ‘Commission Communication on the European Union’s role in promoting human rights and democratisation in third countries’, COM(2001) 252 final, p. 4.

<sup>132</sup> The Lomé Convention I, 1976, OJ L 25/1, 28 February 1975 was concluded between the EU and 46 African, Caribbean and Pacific (ACP) countries. Membership was later expanded with successive Lomé Conventions II, III and IV to 69 countries.

<sup>133</sup> Article 19 and 40 of the Lomé Convention I.

<sup>134</sup> The Community *de facto* suspended aid to Uganda, without claiming official suspension of the convention, by paying only 5 percent of development assistance owed to Uganda under the Lomé Convention I, stating that development assistance should not contribute to human rights violations in Uganda. Some have argued that suspension of aid to Uganda in the absence of concrete treaty provision and impossibility to rely on the suspension of the agreement under the law of treaties, could be classified as a third party countermeasure. See Martin Dawidowicz, *Third-Party Countermeasures in International Law* (CUP, 2017), p. 123. In a similar way the EU also adopted sanctions in the form of unofficial suspension of aid to Guinea, and Central African Empire (nowadays Central African Republic). After a coup in Liberia in April 1980 and occupation of the French embassy in May 1980, the Community also delayed payment of development aid to Liberia. For a more detailed overview see Bartels, ‘Human rights conditionality in the EU’s international agreements’, pp. 7-12.

<sup>135</sup> Bartels, ‘Human rights conditionality in the EU’s international agreements’, pp. 15-17.

<sup>136</sup> Article 1 of the Framework Agreement for trade and economic cooperation between the European Economic Community and the Argentine Republic, OJ L 295/67, 26 October 1990.

<sup>137</sup> E.g. Framework Agreement for Cooperation between the European Economic Community and the Republic of Chile, OJ L 79/2, 26 March 1991; Framework Agreement for cooperation between the European Economic Community and the Republic of Paraguay, OJ L 313/72, 30 October 1992; Agreement on trade and economic cooperation between the European Economic Community and Mongolia, OJ L 41/46, 18 February 1993.

however, because of the situations in Haiti<sup>138</sup> and in Yugoslavia,<sup>139</sup> in which the EU lacked a clear legal basis for the adoption of sanctions, that ‘modern conditionality clauses’ came to be included in the EU’s international agreements. Since 1992, the EU has systematically included conditionality in its agreements with third states in the form of ‘essential elements clauses’ and ‘non-execution clauses’.<sup>140</sup> In 1995, the EU adopted an official policy of inclusion of such clauses in all new trade and cooperation agreements negotiated with third countries.<sup>141</sup>

A typical ‘essential elements clause’ states that respect for human rights and democratic principles (and the rule of law<sup>142</sup>) constitutes an essential element of the agreement,<sup>143</sup> while ‘non-execution clauses’ provide for a mechanism on consultations to be followed by the adoption of sanctions in cases of failure of one of the parties to

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<sup>138</sup> After a coup in Haiti, which was a party to the Lomé IV Convention, the EU discussed the adoption of trade embargo, however, it was only adopted when the UNSC Chapter VII resolution expressly authorised such embargo against Haiti. Council Regulation (EEC) No 1608/93 of 24 June 1993 introducing an embargo concerning certain trade between the European Economic Community and Haiti, OJ L 155/2; UN Security Council Resolution 841, UN Doc. S/RES/841, 1993. See also Bartels, ‘Human rights conditionality in the EU’s international agreements’, p. 19.

<sup>139</sup> After the outbreak of fighting in Yugoslavia, the Community decided to suspend and later denounce the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia. For the adoption of such sanctions, the EU relied on the fundamental change of circumstances or *rebus sic stantibus* doctrine under general international law arguing that warfare in Yugoslavia made it impossible to perform the agreement. See Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, OJ L 41/2, 1983; Decision of the Council and the Representatives of the Governments of the Member states, meeting within the Council of 11 November 1991 suspending the application of the Agreements between the European Community, its Member states and the Socialist Federal Republic of Yugoslavia, 91/586/EEC, OJ L 315/47; Council Decision of 25 November 1991 denouncing the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, 91/602/EEC, OJ L 325/23; Judgment of the CJEU of 16 June 1998, *A. Racke GmbH & Co. v Hauptzollamt Mainz*, Case C-162/96.

<sup>140</sup> European Commission, ‘Commission Communication on the European Union’s role in promoting human rights and democratisation in third countries’, COM(2001) 252 final, p. 4.

<sup>141</sup> Resolution on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries (COM(95)0216 - C4-0197/95), OJ C 320, 28 October 1996, p. 261, paras. 3 and 4.

<sup>142</sup> See e.g. Article 9(2) of the Cotonou Agreement. Partnership agreement between the members of the African, Caribbean and Pacific Group of states of the one part, and the European Community and its Member states, of the other part, signed in Cotonou on 23 June 2000, 2000/482/EC, OJ L 317/3.

<sup>143</sup> For an overview of the wording of ‘essential elements clauses’ see Bartels, ‘Human rights conditionality in the EU’s international agreements’, pp. 26-29.

fulfil its obligations under the agreement.<sup>144</sup> Sanctions adopted under such non-execution clauses are typically limited by the fact that the measures adopted must be such as to ‘least disturb the functioning of the agreement’ and must be proportionate to the breach.<sup>145</sup> Measures adopted under non-execution clauses can be subject to dispute settlement procedures if provided for under the concrete agreement,<sup>146</sup> the CJEU on the other hand lacks jurisdiction over third countries and therefore cannot solve these disputes.

In terms of the competence of the EU, the fact that the EU is entitled to adopt sanctions under such agreements is not disputed if agreements are concluded only by the EU. These are the so-called ‘pure’ agreements where the EU holds exclusive competences,<sup>147</sup> whereas in case of mixed agreements, to which category most development and cooperation agreements fall, this issue may be solved by an internal agreement between the EU and its member states whereby decision-making power is delegated by member states to the Commission,<sup>148</sup> as is the case with the Cotonou Agreement. These agreements also regulate the procedure for the adoption of sanctions.<sup>149</sup> Where no such agreement exists, it is said that “the Community must be considered to represent the Member States within the context of the agreement.”<sup>150</sup> Procedure-wise in such cases Article 218 TFEU applies, whereby the Council, upon a proposal from the Commission or the High Representative of the Union for

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<sup>144</sup> See e.g. Article 96 of the Cotonou Agreement and Article 8(3) of the EU trade agreement with Colombia and Peru. Trade Agreement between the European Union and its Member states, of the one part, and Colombia and Peru, of the other part, OJ L 354/3, 21 December 2012. Not all cooperation agreements, however, include such non-execution clauses, see e.g. EU cooperation agreement with India. Cooperation Agreement between the European Community and the Republic of India on partnership and development, OJ L 223/24, 27 August 1994. For an overview of the wording of ‘non-execution clauses’ see Bartels, ‘Human rights conditionality in the EU’s international agreements’, pp. 29-31.

<sup>145</sup> See e.g. Article 96(2)(c) of the Cotonou Agreement.

<sup>146</sup> See Article 98 of the Cotonou Agreement.

<sup>147</sup> E.g. free trade agreements concluded under the common commercial policy. See Article 3(1)(e) TFEU.

<sup>148</sup> See e.g. Internal Agreement between the representatives of the governments of the Member states, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement, OJ L 317/376, 15 December 2000.

<sup>149</sup> See e.g. Internal Agreement ACP-EC Partnership Agreement, OJ L 317/376, Articles 1 and 3.

<sup>150</sup> Bartels, ‘Human rights conditionality in the EU’s international agreements’, pp. 140-141.

Foreign Affairs and Security Policy, adopts a decision suspending application of an agreement.<sup>151</sup>

This approach is most prominently reflected in the 2000 Cotonou agreement governing the relationship between the EU and 79 African, Caribbean, and Pacific (ACP) countries, which is based on respect for human rights, democratic principles, the rule of law, and good governance.<sup>152</sup> This agreement arguably includes the most wide-ranging conditionality clause in its Article 96, providing for the adoption of ‘appropriate measures’ in case of non-fulfilment of an obligation stemming from respect for human rights, democratic principles, and the rule of law.<sup>153</sup> Such clauses are also included in numerous association agreements. One of the first association agreements including indirect reference to fundamental values in its preamble is the Greece association agreement.<sup>154</sup> This agreement did not, however, include a separate human rights clause or a non-execution clause. Therefore, when in 1967, after a military coup in the country, the Community suspended financial assistance to Greece under protocol 19 of the agreement,<sup>155</sup> its legal basis for doing so was questioned and some argued that the EU’s suspension could be based on countermeasures under general international law.<sup>156</sup> Drawing on this experience, ‘essential elements’ and ‘non-execution clauses’ were later included in the ‘new generation’ of association agreements.<sup>157</sup>

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<sup>151</sup> Article 218(9) TFEU. This Article is, however, silent on the procedure for termination of international agreements.

<sup>152</sup> Article 9(1) of the Cotonou Agreement.

<sup>153</sup> Article 96(2a) of the Cotonou Agreement. The EU also regularly engages in political dialogue to assess the ACP countries on their progress with regard to the EU’s fundamental values. See Article 8(4) of the Cotonou Agreement. If political dialogue is not successful consultations can be started, and if these do not lead to a solution acceptable to both parties appropriate measures may be taken, i.e. sanctions.

<sup>154</sup> Agreement establishing an Association between the European Economic Community and Greece, 63/ 107/EEC, OJ 1963 294/63, 9 July 1961.

<sup>155</sup> The Association Agreement provided for common external tariff, elimination of quantitative restrictions on trade, free movement of services, movement and capital and possibility of taking loans from the Community.

<sup>156</sup> Martin Dawidowicz, ‘Public law enforcement without Public law safeguards? An analysis of state Practice on third-Party countermeasures and their relationship to the un security council’ (2007) 77.1 *The British Year Book of International Law* 333-416, p. 356.

<sup>157</sup> See Articles 2 and 422(a) of the Association Agreement with Georgia, Articles 2 and 455 of the Association Agreement with Moldova, and Articles 2 and 478 of the Association Agreement with Ukraine. Association Agreement between the European Union and the European Atomic Energy Community and their Member states, of the one part, and Georgia, of the other part, OJ L 261/4, 30 August 2014; Association Agreement between the European Union and the European Atomic Energy Community

The EU also regularly adopts ‘essential elements’ clauses in its trade agreements.<sup>158</sup> In Opinion 2/15 on the free trade agreement between the EU and Singapore, the CJEU explicitly clarified that the common commercial policy should be conducted in line with the principles and objectives of Articles 21(1) and (2) TEU.<sup>159</sup> However, not all of these agreements include the so called ‘execution clauses’, i.e. enforcement mechanisms in the form of sanctions.<sup>160</sup>

While for a long time such ‘essential elements’ and ‘non-execution clauses’ were limited to EU agreements with developing countries,<sup>161</sup> recently adopted agreements between Canada and the EU mark the first instances of the inclusion of the essential elements clause in an agreement with a developed country, despite Canada’s opposition to linking the EU-Canada Comprehensive Economic and Trade Agreement (CETA)<sup>162</sup> with human rights issues. Article 2 of the Strategic Partnership Agreement between the EU and Canada therefore presupposes that respect for democratic principles, human rights, and fundamental freedoms constitutes an essential element of the agreement.<sup>163</sup> Moreover, Article 28 explicitly states that particularly serious and substantial violations of human rights could serve as a ground for the termination of CETA.<sup>164</sup>

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and their Member states, of the one part, and the Republic of Moldova, of the other part, OJ L 260/4, 30 August 2014; Association Agreement between the European Union and its Member states, of the one part, and Ukraine, of the other part, OJ L 161/3, 29 May 2014. See also Samantha Velluti, ‘The promotion and integration of human rights in EU external trade relations’ (2016) 32 *Utrecht J. Int'l & Eur. L.* 41-68, pp. 54-55.

<sup>158</sup> See e.g. Article 1 of the EU trade agreement with Colombia and Peru.

<sup>159</sup> Opinion 2/15 of the CJEU of 16 May 2017, *Free Trade Agreement between the EU and Singapore*, paras. 141–142 and 167. See also Yumiko Nakanishi, ‘Mechanisms to Protect Human Rights in the EU’s External Relations’, in Yumiko Nakanishi (ed.), *Contemporary Issues in Human Rights Law* (Springer, Singapore, 2018), p. 15.

<sup>160</sup> The ‘execution clause’ is e.g. foreseen in Article 8(3) of the EU trade agreement with Colombia and Peru. The EU trade agreement with Korea on the other hand includes provisions on the enforcement through consultations in Article 13.14 and 13.15. Free Trade Agreement between the European Union and its Member states, of the one part, and the Republic of Korea, of the other part, OJ L 127/6, 14 May 2011.

<sup>161</sup> Lorand Bartels, ‘Human rights conditionality in the EU’s international agreements’, p. 34.

<sup>162</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member states, of the other part, OJ L 11/23, 14 January 2017.

<sup>163</sup> Article 2(1) of the Strategic Partnership Agreement between the EU and its Member states, of the one part, and Canada, of the other part, ‘Upholding and advancing democratic principles, human rights and fundamental freedoms’, OJ L 329/45, 3 December 2016.

<sup>164</sup> Article 28(7) of the Strategic Partnership Agreement between the EU states and Canada. See also Article 30(9) CETA. Comprehensive Economic and Trade Agreement (CETA) between Canada, of

In practice, however, sanctions under these agreements are selective and rarely used, mostly due to lack of political will. Most of the relevant practice relates to the Lomé Convention and the Cotonou Agreement, whereby typically the poorest and least developed countries were sanctioned in reaction to undemocratic changes of government.<sup>165</sup> There were calls by the European Parliament for the EU to start adopting such sanctions more often to enforce human rights clauses.<sup>166</sup> However, the EU did not adopt sanctions for example in the case of Israel's activities on the occupied Palestinian territory under the EU-Israel Association agreements.<sup>167</sup>

#### 4.2. Sanctions under General International Law

In cases where an international agreement includes only an 'essential element clause', but not a 'non-execution clause', violations of e.g. human rights by one of the parties to the agreement can nevertheless amount to a breach of the agreement and therefore justify the adoption of sanctions on the basis of international treaty law concepts of breach of treaty<sup>168</sup> and fundamental change of circumstances,<sup>169</sup> or countermeasures under the law of international responsibility.<sup>170</sup>

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the one part, and the European Union and its Member states, of the other part, OJ L 11/23, 14 January 2017.

<sup>165</sup> Under Article 96 of the Cotonou Agreement sanctions were adopted against Central African Republic, Ivory Coast, Fiji, Haiti, Guinea Conakry, Togo and Zimbabwe. Bartels, 'Human rights conditionality in the EU's international agreements', p. 37. For the overview of cases under Article 96 of the Cotonou agreement see: Portela, 'Aid suspensions as coercive tools? The European Union's experience in the African-Caribbean-Pacific (ACP) context.', pp. 38-53.

<sup>166</sup> European Parliament Resolution on human rights in the world in 1997 and 1998 and European Union human rights policy, OJ C 98/270, 9 April 1999, para 3.

<sup>167</sup> See e.g. para. 8 of the European Parliament Resolution on the Middle East, P5\_TAPROV(2002)0173.

<sup>168</sup> Under general international law, a material breach of a treaty by one of the parties entitles the other party to suspend or terminate a treaty. Article 60 of the Vienna Convention on the Law of Treaties (VCLT) and Article 60 of the Vienna Convention on the Law of Treaties between states and International Organizations or between International Organizations 1986 (not yet in force). Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

<sup>169</sup> Article 62 VCLT and Article 62 of the Vienna Convention on the Law of Treaties between states and International Organizations or between International Organizations.

<sup>170</sup> Countermeasures are a means of unilateral enforcement giving a subject injured by a wrongful act of the responsible State a right to take measures that would otherwise be contrary to international law. In essence, their aim is to ensure cessation of the alleged breach and where appropriate ensure reparation for injury. They are governed by the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) and Articles on Responsibility of International Organisations (ARIO) *qua* customary international law. ARSIWA Yearbook of the International Law Commission, 2001, vol. II, Part Two; ARIO Yearbook of the International Law Commission, 2011, vol. II, Part Two; *Naulilaa Incident Arbitration (Portugal v. Germany)* 2 R.I.A.A., 1928, 1012; *Gabčikovo-Nagymaros Project*

This, however, is not possible in relation to its member states. The possibility of relying on self-help mechanisms by the EU in relation to its members under general international law, including suspension or termination of treaties<sup>171</sup> and countermeasures,<sup>172</sup> was ruled out by the CJEU in the *Luxembourg & Belgium, the Dairy Products* case:<sup>173</sup>

“except where otherwise expressly provided, the basic concept of the Treaty requires that the Member States shall not take the law into their own hands. Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs.”<sup>174</sup>

This judgment thus precluded the adoption of self-help mechanisms between the EU (its institutions) and member states,<sup>175</sup> ruling out the possibility of reliance on the

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(*Hungary v. Slovakia*), Judgment, 1997, ICJ Rep 7; *Air Services Agreement of 27 March 1946 between the United States of America and France*, R.I.A.A., 1978, Vol. XVIII.

<sup>171</sup> Oliver Dörr, ‘Article 5’, in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna convention on the law of treaties, A commentary* (Springer, 2011) 89-99, pp. 92-93.

<sup>172</sup> The adoption of countermeasures by international organisations against their member states is limited under the law of responsibility. Article 22(2) and Article 22(3) ARIO. See also Article 52 ARIO.

<sup>173</sup> Judgment of the CJEU of 13 November 1964, *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium*, Joined cases 90/63 and 91/63.

<sup>174</sup> Judgment of the CJEU of 13 November 1964, *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, European Court of Justice Reports 1964, 626, p. 631. The Council had committed itself to establish a European market organisation for dairy products, which would replace existing national organisations. When it failed to do so in the foreseen time framework, Luxembourg-Belgian dairy products market organization (operated together by Luxembourg and Belgian governments) by reorganising custom duties, effectively increased the tariffs on the import of dairy products from other member states, in contradiction with Article 12 of the Treaty of Rome on intra-Community customs barriers. They claimed that Council’s failure justified their nonfulfillment of obligations under EU law, since reciprocity, *exception non est adimpleti contractum*, was a widely accepted principle of international law: in particular they claimed that their violation was justified, since EU institutions themselves have failed to fulfil their obligations under treaties. The Court, however, dismissed these claims. See also Judgment of the CJEU of 23 May 1996 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.*, Case C-5/94, para. 20. See William Phelan, ‘Goodbye to all that: Commission v. Luxembourg & Belgium and European Community’s Law Break with the enforcement mechanisms of general international law’, in Nicola Fernanda and Bill Davies (eds.), *EU Law Stories* (Cambridge University Press, 2017), 121-124; Henry G. Schermers and Denis F. Waelbroeck, *Judicial protection in the European Union* (Kluwer Law International BV, 2001), para. 196.

<sup>175</sup> In subsequent case law, CJEU confirmed, that this also applies to inter-State relations. See Judgment of the CJEU of 27 May 1981, *Amministrazione delle Finanze dello Stato v Essevi SpA and Carlo Salengo*, Joined cases 142 and 143/80; Judgment of the CJEU of 11 January 1990, *Ministère public v Guy Blanguernon*, Case C-38/89.

classical rules on the law of treaties in relation to the suspension of the operation of an international treaty in case of a material breach and under the law of countermeasures in order to defend their non-performance of the Treaties. This is perceived as one of the distinctive features of the EU legal order:

“The Community legal order, on this view, is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the face of actual or potential failure. Without these features, so central to the classic international legal order, the Community truly becomes something ‘new’”.<sup>176</sup>

### 4.3. Restrictive Measures

The adoption of restrictive measures under the CFSP is another way in which the EU sanctions third states in order to pursue its fundamental values. All the EU’s actions under CFSP are to be guided by common provisions and therefore also by the fundamental values of the EU.<sup>177</sup> Restrictive measures are one of the EU’s tools to promote and uphold the EU’s values and fundamental interests, along with the observance of international law, the preservation of peace and the prevention of conflicts and strengthening international security.<sup>178</sup> The aim of such restrictive measures is primarily

“to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles.”<sup>179</sup>

The EU’s sanctioning system under the CFSP has its roots in the 1980s, when the EU adopted sanctions against the Soviet Union as a response to its policies in Afghanistan and Poland.<sup>180</sup> These sanctions lacked the necessary legal basis in the treaties or a United Nations Security Council (UNSC) resolution adopted under the

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<sup>176</sup> JHH Weiler, ‘The Transformation of Europe’ (1991) 100.8 Yale Law Journal 2403-2483, p. 2422.

<sup>177</sup> Articles 2 and 3(5) TEU.

<sup>178</sup> The Council, ‘Basic Principles on the Use of Restrictive Measures (Sanctions)’, 10198/1/04, 7 June 2004, para. 3.

<sup>179</sup> European Commission – Restrictive measures, 2008, p. 1, available at [http://ec.europa.eu/archives/docs/cfsp/sanctions/docs/index\\_en.pdf](http://ec.europa.eu/archives/docs/cfsp/sanctions/docs/index_en.pdf) (last accessed 7 April 2020).

<sup>180</sup> Dawidowicz, ‘Public law enforcement without Public law safeguards?’, pp. 366-367.; Andries S. Brandsma, and AJ Hughes Hallett, ‘Do Economic Sanctions Against the Soviet Union Make Sense?’ (1984) 14.4 Interfaces 53-68.



Chapter VII of the United Nations Charter.<sup>181</sup> In the 1990s, the EU increasingly started to play a more significant role in the adoption of sanctions, mostly on the basis of UNSC resolutions, since the need for coordination amongst member states in the implementation of such sanctions was growing.<sup>182</sup> Law followed practice, and in 1993 the Maastricht Treaty<sup>183</sup> introduced a legal basis for the adoption of restrictive measures by the EU in Article 301 TFEU, a predecessor of the current Article 215 TFEU. The adoption of restrictive measures now forms an “integral part of the EU’s external relations toolbox.”<sup>184</sup> Currently there are over 40 different restrictive measures in place against 34 different countries.<sup>185</sup> It has to be stressed that the EU adopts two types of restrictive measures: 1) so called non-autonomous sanctions whereby it merely implements existing UN sanctions and 2) autonomous sanctions. For the purposes of this article, it is the adoption of autonomous sanctions that are of particular interest, since we focus on instances in which the EU protects its fundamental values in the wider world. In cases of the adoption of non-autonomous sanctions, it is the UNSC who decides and justifies the adoption of sanctions and the EU merely implements that decision,<sup>186</sup> while in cases of autonomous sanctions the EU makes a decision on the need and underlying reasons for the adoption of sanctions. The international legal justification for the adoption of such autonomous sanctions has been subject to numerous debates,<sup>187</sup> but this goes beyond the scope of the present article.

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<sup>181</sup> Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>182</sup> Daniel Bethlehem, ‘The European Union’, in Vera Gowlland-Debbas (ed.), *National implementation of United Nations sanctions: A comparative study*, Vol. 4. (Martinus Nijhoff Publishers, 2004), 123-166, pp. 131-132.

<sup>183</sup> Treaty of Maastricht, 7 February 1992, OJ C 325/5, 24 December 2002.

<sup>184</sup> European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)), P8\_TA(2019)0215, para. C. For an overview of current sanctions in force see EU Sanctions map, available at <https://www.sanctionsmap.eu/#/main> (last accessed 7 April 2020).

<sup>185</sup> European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)), P8\_TA(2019)0215, para. C. For an overview of current sanctions in force see EU Sanctions map, available at <https://www.sanctionsmap.eu/#/main> (last accessed 7 April 2020).

<sup>186</sup> The Council, ‘Guidelines on the implementation and evaluation of restrictive measures’, p. 5, para. 3.

<sup>187</sup> Most commonly they are seen as measures taken by a subject, other than an injured subject under the law of responsibility as a response to a violation of an *erga omnes* obligation. See Articles 48, 54 ARSIWA and Articles 49, 57 ARIIO. ARSIWA Yearbook of the International Law Commission, 2001, vol. II, Part Two, Commentary to Chapter II, p. 139; *Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain)* (Judgment) ICJ Rep 3, 1970, p. 32; *Institut de droit international*, Krakow resolution 2005; James R. Crawford, ‘The Relationship Between Sanctions and Countermeasures’, in Vera Gowlland-Debbas, Mariano Garcia Rubio, and Hassiba Hadj-Sahraoui

Restrictive measures are adopted in a two-stage procedure under the Lisbon treaty.<sup>188</sup> The first stage relates to a unanimous Council decision within the CFSP on the basis of Article 29 TEU.<sup>189</sup> From here, there are two options. Sanctions which are not in the competence of the EU are implemented directly by member states (e.g. arms embargoes or restrictions on admission (visa or travel ban)),<sup>190</sup> which are legally bound to act in conformity with CFSP Council Decisions. On the other hand, measures falling within the competence of the EU, i.e. economic measures interrupting or reducing, in part or completely, economic relations with a third country (i.e. asset freeze and/or other types of financial sanctions), are implemented at the EU level. At this stage, the High Representative and the Commission present a joint proposal for a Council regulation. Acting by a qualified majority, the Council then adopts the necessary legislative implementation measures on the basis of Article 215 TFEU, i.e. restrictive measures.<sup>191</sup> The regulation lays down the precise scope of these measures and the details for their implementation. This regulation is binding and directly applicable throughout the EU, which means that no additional national measures of implementation of such sanctions are required.<sup>192</sup> Moreover, regulations and Council Decisions providing for restrictive measures against natural and legal persons may be subject to judicial review by the CJEU.<sup>193</sup>

Such sanctions can be adopted against natural or legal persons and groups or non-state entities,<sup>194</sup> i.e. governments of non-EU countries, entities (companies), groups or organisations, such as terrorist groups, and individuals.<sup>195</sup> The EU nowadays primarily

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(eds.), *United Nations Sanctions and International Law*, vol. 1 (Martinus Nijhoff 2001) 57-68; Dawidowicz, 'Third-Party Countermeasures in International Law'; Jarna Petman, 'Resort to Economic Sanctions by Not Directly Affected states', in Laura Picchio Forlati and Lino-Alexandre Sicilianos (eds.), *Les sanctions économiques en droit international/Economic sanctions in International Law*, Hague Academy of International Law (Martinus Nijhoff Publishers 2004) 309-377; Lino-Alexandre Sicilianos, 'Countermeasures in Response to grave violations of obligations owed to the international community', in James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds.), *The Law of International Responsibility* (OUP 2010) 1137-1148, p. 1137.

<sup>188</sup> Bert Van Vooren and Ramses A. Wessel, *EU External Relations Law, Text Cases and Materials* (Cambridge University Press, 2014), p. 395.

<sup>189</sup> See also Articles 24, 28 and 31 TEU.

<sup>190</sup> Paul Craig and Gráine de Búrca, *EU Law, Text, Cases and Materials*, 5th edn. (Oxford University Press, 2011), p. 330.

<sup>191</sup> Article 215(1) TEU. The European Parliament has to be informed about such a regulation. Craig and de Búrca, 'EU Law, Text, Cases and Materials', pp. 104 and 190.

<sup>192</sup> Article 288(2) TFEU.

<sup>193</sup> See The Council, 'Guidelines on the implementation and evaluation of restrictive measures', p. 6.

<sup>194</sup> Article 215(2) TFEU.

<sup>195</sup> The Council, 'Guidelines on the implementation and evaluation of restrictive measures'.

adopts targeted sanctions, which means that the adopted sanctions target those responsible for the policies or actions that have prompted the EU decision to impose restrictive measures on those benefiting from and supporting such policies and actions,<sup>196</sup> rather than indiscriminate sectoral sanctions. Such sanctions apply *ratione personae* only to persons or assets within the jurisdiction of the EU but not extraterritorially.<sup>197</sup>

Following the example of the US Global Magnitsky Act<sup>198</sup> the EU is currently preparing ‘a European human rights sanctions regime’, allowing for the adoption of restrictive measures against any individual or entity responsible for or involved in gross human rights violations.<sup>199</sup> If and when legislation for such a sanctions regime is adopted, the EU will be able to sanction individuals, as opposed to the current sanctions regimes targeting situations in specific countries.<sup>200</sup>

A wide range of sanctions are being adopted by the EU under the CFSP. These include, but are not limited to, the freezing of funds and economic resources, restrictions on admission, arms embargoes, embargoes on equipment, other export restrictions, import restrictions, flight bans, bans on the provision of financial services, investment bans as well as sectoral bans or measures to prevent the misuse of equipment, technology, or software for the monitoring and interception of the internet or of other forms of communication.<sup>201</sup>

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<sup>196</sup> The Council, ‘Guidelines on the implementation and evaluation of restrictive measures’, p. 8, para. 13.

<sup>197</sup> That is the “territory of the European Union, aircrafts or vessels of Member States, nationals of Member States, companies and other entities incorporated or constituted under Member States’ law or any business done in whole or in part within the European Union”. The Council, ‘Guidelines on the implementation and evaluation of restrictive measures’, p. 19, para. 51.

<sup>198</sup> This Act has its roots in the Sergei Magnitsky Rule of Law Accountability Act of 2012 which intended to sanction the individuals responsible for the death of Sergei Magnitsky during pre-trial detention in a Russian prison. On the basis of this Act a Global Magnitsky Act was adopted in 2016, allowing for the adoption of sanctions against individuals involved in gross human rights violations on the global level. Nienke van der Have, ‘The Proposed EU Human Rights Sanctions Regime: A First Appreciation’ (2019) 30 Security and Human Rights 1-16, pp. 3-4.

<sup>199</sup> European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)), P8\_TA(2019)0215, para. 4.

<sup>200</sup> For a critical analysis see van der Have, ‘The Proposed EU Human Rights Sanctions Regime’ 1-16.

<sup>201</sup> See The Council, ‘Guidelines on the implementation and evaluation of restrictive measures’ p. 8, para. 14; EU restrictive measures, Factsheet, 2014, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/135804.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf) (last accessed 7 April 2020).

Restrictive measures are regularly reviewed in order to ensure that they contribute towards achieving their objectives. Council decisions imposing autonomous sanctions typically apply for 12 months or include an expiration date, whereas the corresponding regulations are open-ended. Before extending restrictive measures in relation to a particular situation, the Council reviews measures and, depending on the situation, decides to extend, amend, suspend, or terminate them.<sup>202</sup>

The EU has adopted autonomous sanctions against numerous third states, including Belarus, Bosnia and Herzegovina, Burundi, China, Comoros, Egypt, Guinea, Haiti, Iran, Libya, Moldova, Montenegro, Myanmar (Burma), Nicaragua, Russia, Serbia, Syria, Tunisia, Turkey, Ukraine, United States, Uzbekistan, Venezuela, and Zimbabwe.<sup>203</sup> In some cases, it adopted sanctions in parallel to the UN, imposing measures additional or different from the ones called for in the UNSC resolution. These, sometimes referred to as supplementary measures<sup>204</sup> or mixed sanctions regimes,<sup>205</sup> were adopted against Côte d'Ivoire, the Democratic Republic of the Congo, Guinea-Bissau, Iran, Libya, North Korea, South Sudan, and Sudan.

The EU's autonomous sanctions are often justified by the breaches and undermining of democracy, the rule of law, and human rights in the targeted country. For example, sanctions against Myanmar (Burma) were adopted due to its undemocratic practices and gross violations of human rights against the Rohingya population,<sup>206</sup> sanctions against Syria were adopted due to violence and continued widespread and systematic gross violations of human rights and violations of international humanitarian law,<sup>207</sup> and sanctions against Zimbabwe were adopted due to an escalation of violence and

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<sup>202</sup> The Council, 'Guidelines on the implementation and evaluation of restrictive measures', pp. 14-15.

<sup>203</sup> For the list of all EU sanctions see EU sanctions map, available at <https://www.sanctionsmap.eu/#/main> (last accessed 7 April 2020).

<sup>204</sup> Thomas Biersteker and Clara Portela, 'EU sanctions in context: three types', European Union Institute for Security Studies, July 2015.

<sup>205</sup> European Union, Different types of sanctions, available at <https://www.consilium.europa.eu/en/policies/sanctions/different-types/> (last accessed 7 April 2020).

<sup>206</sup> See Council Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP, OJ L 111, 2013 and Council Regulation (EU) No 401/2013 of 2 May 2013 concerning restrictive measures in respect of Myanmar/Burma and repealing Regulation (EC) No 194/2008, OJ L 121, 2013.

<sup>207</sup> See Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria OJ L 147, 2013 and Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011, OJ L 16, 2012.

due to worrying legislation regulating the media, infringing on the freedoms of speech and of assembly and association, as well as a denial of democracy.<sup>208</sup>

## 5. Concluding Remarks

The EU is committed to protecting its fundamental values through the adoption of sanctions both within its borders and in relation to the outside world. The overview of existing mechanisms for the adoption of such sanctions and corresponding practice shows, however, that the EU is better equipped and more willing to adopt such sanctions against third states than against its members. The reason for this seems to be obvious: it is easier to sanction ‘outsiders’, than to address the issue of fundamental values deficit within the EU. In fact, non-judicial sanctions aimed at protecting fundamental values of the EU within its membership have not been adopted so far, despite the fact that there is an increasing deficit in human rights, democracy and the rule of law amongst its members. The potential of Article 7 TEU in terms of its scope seems to be quite remarkable due to its general application, whereby it can prevent and sanction violations that may occur in members outside the area of competence of the EU. However, the mechanism is not effectively used in practice. The main reason for this arguably lies in the fact that Article 7 TEU<sup>209</sup> imposes a stringent voting procedure for the adoption of sanctions, and does not limit the duration of procedures, when the prevention or sanctions mechanisms are actually triggered. In two cases where Article 7 TEU was activated, Poland and Hungary, this resulted in lengthy discussions of relevant EU institutions on the issue, with no meaningful result. While, indeed, the primary means to sanction breaches of EU law remains the infringement procedure, the CJEU does not have jurisdiction over Article 2 TEU. The Court can nevertheless indirectly address questions of safeguarding fundamental values in its member states through singular violations of EU law, which may simultaneously amount to violations of fundamental values. However, as has been explained, such case-by-case evaluation of specific EU law provisions fails to effectively address systemic problems relating to fundamental values in member states. If adopted, the initiative for a regulation on the protection of the Union’s budget in case of generalised deficiencies in the rule of law in the member states could potentially change this practice. This is because the current proposal explicitly allows for the adoption of economic sanctions against member states in cases of rule

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<sup>208</sup> See Council Decision 2011/101/CFSP of 15 February 2011 concerning restrictive measures against Zimbabwe OJ L 42/6, 2011 and Council Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe, OJ L 55, 2004.

<sup>209</sup> Article 7(2) TEU requires unanimous decision of the European Council for the adoption of sanctions.

of law deficiencies, which are to be adopted under more lenient processual requirements. As opposed to the EU's relations with third states, in relation to its members the EU is also precluded from relying on concepts under the law of treaties (termination or suspension of a treaty on the basis of breach of treaty or fundamental change of circumstances) and the law of responsibility (countermeasures).

On the other hand, legal frameworks for the adoption of sanctions against third states seem to be more developed and practice under them more extensive. The first sanctions of this kind were adopted already in the 1980s and have now become a common practice. Membership conditionality, conditionality in international agreements concluded with third states, as well as the adoption of restrictive measures under the CFSP all provide for a relatively swift adoption of sanctions in cases of violations of human rights, democracy, and the rule of law. Most extensive by far is the EU's practice in relation to the adoption of restrictive measures, so that over 40 different restrictive measures are in place against 34 different countries.<sup>210</sup> This being said, one has to acknowledge at the same time that the EU's practice of sanctioning third states suffers from several deficiencies as well, the most important being the selectiveness of the adoption of sanctions. Even though there exists evidence of e.g. extensive human rights violations by some third countries, the EU has so far refused to adopt sanctions under a conditionality clause or CFSP against them.

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<sup>210</sup> European Parliament resolution of 14 March 2019 on a European human rights violations sanctions regime (2019/2580(RSP)), P8\_TA(2019)0215, para. C. For an overview of current sanctions in force see EU Sanctions map, available at <https://www.sanctionsmap.eu/#/main> (last accessed 7 April 2020).

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