# LEGAL SIGNIFICANCE OF THE VALUES OF THE EUROPEAN UNION

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*Keywords: European Union, economic and monetary Union, European Communities, economic integration, European Defence Community, European Political Community.*

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**I. The European Union as a community of law**

The European Union is not merely an economic and monetary union, even if its predecessors, the European Communities, had their focus on economic integration. This was caused by the fact that the more ambitious projects of a European Defence Community and a European Political Community had failed in 1954; after this setback it was considered wise to start by laying the economic grounds for a later more comprehensive Union.

It should be stressed, however, that the three Communities – the European Coal and Steel Community, the European Atomic Community and, most important of all, the European Economic Community – were based on strict legal rules and thus already were "communities of law." This fact can be easily demonstrated by the case law of the European Court of Justice and the legal protection rendered by it, especially in the field of human rights and fundamental freedoms.[1] By filling out *lacunae* in Community law by the general principles of law common to the Member States, the Court conceived a comprehensive legal order, the subjects of which are not only the Member States but also private natural (i.e. physical) and legal persons.[2]

This more comprehensive Union envisaged right from the beginning was achieved through the establishment of the European Union by the Maastricht Treaty of 1992; and the non-economic aspects of that kind of integration, constituted by the second and third of the original three pillars of the Union was continuously strengthened by the subsequent Treaties of Amsterdam 1997, Nice 2000/01 and Lisbon 2007. Especially the latter, suppressing the pillar structure and integrating the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters (the greater part of what was originally called the Cooperation in the Area of Justice and Home Affairs had already been

[1] Long before fundamental principles or values were inscribed in the Treaties, the European Court of Justice has given legal protection for fundamental rights on the basis of the general principles of law common to the Member States and deriving from their respective constitutional traditions. Cf. *Stauder*, Case C-29/69; *Internationale Handelsgesellschaft*, Case C-11/70. For an extrensive treatment of this issue, cf. CRISTINA HERMIDA DEL LLANOS, *Los derechos fundamentales en la Unión Europea*, Barcelona 2005.

[2] Cf. *Van Gend en Loos*, Case 26/62, Coll. 1963, no. 12.

transferred into the first pillar, the European Communities) in one (almost[3]) uniform Union system, demonstrate the European Union as a union of law and values. This is made explicit by the Unions task of establishing an area of freedom, security and justice, the summation of the different policies designed to ensure free movement, security, and legal protection for everyone legally staying within the European Union.[4]

## *II. The values of the European Union*

The values of the European Union are set out in Article 2 TEU in the following wording: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

### A. The values as part of the constitution of the European Union

While the European Union does not have a constitution in the formal sense, and while therefore the Treaty on European Union, the Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights of the European Union must all be considered "constitutional instruments",[5] it still is possible to determine those rules which by necessity have to form part of any constitution if the polity should be able to function. They especially comprise the rules which govern the organs or institutions, their powers and the procedures for the exercise of these powers. The rules concerning human rights and fundamental freedoms also belong to the constitution in the substantive meaning, for political rights form part of the institutional structure and civil rights either limit the powers of the organs or provide an additional basis for their action. (Thus, the third-party effect of fundamental rights creates, for the organs, an obligation of protection against encroachments by a private party.)

### B. The common good of the European Union

Since establishment and preservation of the common good is the only *raison d'être* for the State as well as for the European Union and their respective laws, the common good constitutes the highest value in any body politic. The common good comprises three goods that are common to all men (thence the designation "*common* good"), namely peace (and security), freedom and welfare. Among the values of the European Union listed in Article 2 TEU, only one of these goods is expressly mentioned, namely freedom. Neither peace (and security) nor welfare are mentioned here.

#### *1. The common good reflected in Articles 2 and 3 TEU*

This does not mean that the European Union would not consider itself responsible for these goods. According to Article 3, Paragraph 1 TEU, "[t]he Union's aim is to promote peace, its values and the well-being of its peoples." Peace (and security) as well as welfare are thus placed on the same level with freedom which is comprised among the values. The reason for not including them into the catalogue of values could be that peace (and

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[3] Cf. Article 24, Paragraph 1, Sub-Paragraph 2 TEU: "The common foreign and security policy is subject to specific rules and procedures. […] The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union."

[4] Cf. Treaty on the Functioning of the European Union, Part Three: Union Policies and Internal Actions, Title V: Area of Freedom, Security and Justice, Articles 67 et seqs,

[5] Cf. Article 1, Paragraph 3 TEU, and Article 6, Paragraph 1 TEU.

security) and welfare are related to freedom in the same way as are the social rights to the civil rights. Only the latter, the so-called classic rights, are absolute rights, for they require (at least as a rule[6]) only refraining from interference on the part of the State or of the European Union because here non-interference means for the individual not to be curtailed in its respective rights; and this already constitutes the intended effect. In contrast, the social rights require action on the part of the State or of the Union, an action which cannot, however, guarantee the enjoyment of the right in question beyond what is possible under the given circumstances. The Union can only strive for peace (and security) and welfare of its peoples, it cannot guarantee them. Freedom, in contrast, it can guarantee, as least as regards freedom from interference on its own part; because all it has to do is to refrain from such interference.

Freedom is thus in the centre of Article 2 TEU. Everything else in that article relates to it, everything else is either a condition for, or an elaboration of, freedom.

#### *2. Pluralism and the values of the European Union*

Since Article 2 TEU can be understood correctly only before the background of a State or Union legal order which is characterised by the recognition of, and the respect for, the pluralism of society, the reference, in the second sentence of the article, to "values […] in a society in which pluralism […] prevail[s]" is an indication that the European Union and its Member States are aware of the fact that pluralism of the society is a decisive parameter of their system.

### C. The values of the European Union in detail

#### *1. Human dignity*

Human dignity, respect for which is the first-mentioned value, also belongs into this context; because from the pluralistic point of view human dignity is the *status libertatis* of the individual, following from the fact that in a pluralistic society no one – not even the State or the European Union – is entitled to impose his own views on anyone as long as the latter observes the rules of the game on which alone under the conditions of pluralism the recognition of the law is based because they are a practical necessity for the common good.

#### *2. Human rights*

Human rights are a substantive aspect of the central value of freedom. Originally, they constituted that sphere of liberty of the individual which by its very nature was free from the grasp of the State. In the meantime it has been recognised that human rights may also have effect as against private parties. This fact imposes on the body politic, in addition to the obligation to refrain from interference, the obligation to protect against interference by third parties. The reference in Article 2 TEU to "the rights of persons belonging to minorities" is only a concretisation in a selected issue.

#### *3. Equality and the rule of law*

As regards equality and the rule of law, both are to be regarded formal aspects of freedom. This is evident with regard to the rule of law because it primarily means the possibility for the individual to enforce his or her rights through legal procedures, i.e. procedures governed by law. This possibility is a necessary complement to the subjective rights, for without such procedures the status of these rights would remain precarious.[7]

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[6] With the exception of the third-party effect of fundamental rights. Cf. *supra*.

[7] Cf. the famous dictum by Chief Justice Holmes in *United States v. Thompson*, 257 U.S. 419, 433 (1922): "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp."

Of course, equality might also be seen as a substantive quality. This would mean that all men are equal, either in general or regarding their rights and obligations. However, experience tells us that men are not equal in all regards but endowed with different qualities; and since these natural differences are a fact they cannot be removed by legally decreeing equality. And since the facts do not follow the law and rather the law has to follow the facts, it would not make sense to invest all men with the same rights and obligations. The rule of equality not only forbids to treat the like in an unlike manner but also to treat the unlike in a like manner.[8]

Equality is thus a formal quality. If all men are equal before the law ("Equal justice under law!"[9]), this is but to say that all men have equal access to those procedures by which they can enforce their (necessarily different) rights, and that all men are subject to those procedures by which their obligations can be enforced against them and by which sanctions for violating these obligations can be imposed upon them.

### *4. Democracy*

Democracy, in Article 2 TEU mentioned immediately after freedom, is also related to this central value. It is the essence of freedom that man can freely design the plan of his life and equally freely can transform this plan into reality. The only limits of freedom are the necessities of the common good. Therefore, man is subject to the laws which the legislator enacts for the implementation of the common good. Even in a pluralistic society man can be expected to make his contribution to the common good; for this reason his freedom – which is a constitutive element of the pluralistic system – is limited by the requirements of the common good – which is another constitutive element of the same system – in a way that is in conformity with this system.

Yet, there may exist different opinions about the best realisation of the common good; and even if good order – which must not be disturbed because of every difference of opinions lest damage be done to the common good – requires that man subjects himself to the existing laws to the extent these laws do not infringe upon the values under discussion here, it is quite legitimate for man to wish to participate in the decision making process that leads to the enactment of laws in a practicable way. This process can only be a democratic one; because pluralism by its very nature does not permit to exclude anyone *a priori* from co-determination.

This is valid for the system of indirect or representative democracy which essentially works in such a way that the citizens elect persons of their trust of whom they expect that they have enough expertise in order to make the appropriate decisions. In contrast, direct democracy quickly reaches the limits of what is responsible from then point of view of the common good.

### *5. Additional values or conditions for, and consequences of, the values of the European Union*

Besides these – in Article 2 First Sentence TEU expressly so called – values the specific qualification of which has been just made, Article 2 Second Sentence contains an indication of the quality of a society in which these values exist. This society is

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[8] This has been the principle reflected in the case law of many constitutional courts of Member States.

[9] Cf. Chief Justice Melville Fuller in *Caldwell v. Texas*, 137 U.S. 692 (1891): "[…] no State can deprive particular persons or classes of persons of equal and impartial justice under the law." The phrase "Equal justice under law" is engraved on the front of the United States Supreme Court building in Washington D.C., which was built 1932-1935.

characterised by "pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men".

Of course, immediately the question comes up whether these criteria have a merely descriptive or also a normative character. However, it may be presumed that when the provision was drafted a society in which these characteristics prevail was regarded a necessary condition for the realisation of the values in question. That it is a truly necessary condition can be shown by the following considerations.

**a. Pluralism**

As regards pluralism, it has already been stated that it is the decisive criterion from the viewpoint of both the Union and the Member States because their legal orders receive their legitimation from the recognition of, and the respect for, pluralism.[10]

**b. Non-discrimination and equality of women and men**

As regards non-discrimination and the equality of women and men, they are apparently comprised by the value of freedom. Whether equality of women and men is more than a special case of non-discrimination, depends on whether equality in Article 2 TEU is a formal aspect of freedom; if so, then equality between women and men can only be regarded as a prohibition of discrimination. Whether, in addition, positive discrimination in favour of the disadvantaged sex may be justified, even necessary from the point of view of the common good, cannot be discussed here.[11]

**c. Tolerance**

Tolerance is an attitude towards people of different opinions and convictions which is proper in a society whose pluralism forbids the imposition of one's own opinions and convictions upon others. Yet, tolerance has no independent legal significance because it is already comprised, and also exceeded, by freedom. This applies to the situation where tolerance is regarded a concession to dissenters to which the latter do not have a claim. Since the individual has a claim to freedom in the limits of what is necessary for the common good, it does not depend on the tolerance of the society and its forms of political organisation. Tolerance is a minimum requirement for – and thus only a deficient form of – the correct relationship with people of other opinions and convictions[12].

**d. Justice**

In contrast to certain other aspects of freedom, the central value in Article 2 TEU, and to certain of its conditions, justice has a formal as well as a substantive side. The formal side coincides with the equality before the law and with the rule of law granting unlimited access to all procedures necessary for the enforcement of individual rights and obligations.

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[10] In a certain sense, the pluralism of society and the conseqeunces resulting therefrom for the State, the European Union, and for their legal orders, transgress the old conflict between iusnaturalism and positivism by a practical approach. The ineasiness with the traditional positions is also reflected in ANDRÉS OLLERO/JUAN ANTONIO GARCÍA AMADO/CRISTINAHERMIDA DEL LLANO, *Derecho y moral: una relación desnaturalizada*, Madrid 2012.

[11] Reverse or positive discrimination – i.e. preferential treatment of members of a minority group over a majority group, either by sex, race, age, marital status or sex orientation – is sometimes permitted in order to promote the overriding interest of equality of opportunity as compared with equality of qualification. The European Court of Justice uses the expression "preferential treatment". In the United States, also the term „affirmative action" is used. Some regard positive discrimination as illegal and unlawful.

[12] Cf., in this context, *Köck*, Kirche und Staat – Die Freiheit der Kirche, die Religionsfreiheit des Einzelnen und die Werteordnung der Europäischen Union. Wer schützt wen vor wem? Ed. by the KirchenVolksBewegung Wir sind Kirche, Munich 2012, pp. 7 et seqs..

The substantive side consists in the obligation (incumbent on the State and the European Union) to let everyone have his share in the common good. Even in a pluralistic society the State and the European Union cannot dispense themselves from the task of determining the right share[13] of everyone. This is so because their *raison d'être* – also under the pluralistic approach – is their obligation to allot to everyone, as much as possible, what is due to him.

**e. Solidarity**

Solidarity can be understood in two different ways. Solidarity can be the attitude of an individual; solidarity can also be an objective of the political forms of organisation of society, the State and the European Union. As the attitude of an individual, solidarity has an ethic-moral quality and as such no direct influence on the law. As a legal objective for the European Union and its Member States, however, it has a direct impact upon their law. Whether solidarity has an independent character different from justice depends on how it is distinguished from justice. This again depends on how the scope of justice is defined. If this scope is narrowed down to justice within the law (i.e. within the particular positive law), then solidarity will have to be regarded an objective that goes beyond this justice within the law and that creates an obligation to improve the latter's imperfect result from the point of what is due under the common good. If, on der other hand, the law itself is directed to bringing about justice to its full extent then it will not need a correction under the title of solidarity. Solidarity then will be comprised by justice as tolerance is comprised by freedom.

***6. The interdependence between the values and their conditions and consequences***

On the basis what has been said so far, it is clear that only a society that fulfils the criteria in Article 2 Second Sentence TEU offers the necessary pre-conditions for the realisation of the values listed in the First Sentence. Between these values and the just-mentioned criteria there exists an indissoluble connection.

***7. The values of the European Union also values of the Member States***

Article 2 TEU provides that "[t]hese values are common to the Member States". This statement makes clear that the Member States are bound by the values of the European Union and that their societies are expected to fulfil the criteria listed in the Second Sentence of the provision.

## *III. The legal value of the of the values of the European Union*

### A. Guideline for interpretation

The values mentioned in Article 2 TEU permeate all of the Union's legal order. Both primary and secondary Union law are to be interpreted by having regard to these values. In addition, the Union's legislation has given special attention to them in the enactment of related norms in various areas of law. The proceedings against institutions of the Union and against Member States before the European Court of Justice provided for in the Treaties are also intended to eliminate violations of these values.

### B. Justiciability

An important question is whether the values of the European Union are justiciable. As regards the values *stricto sensu* in Article 2 First Sentence TEU, the answer must be in the affirmative; and since the criteria set out in the Second Sentence are necessary requirements for these values, the criteria have also to be justiciable.

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[13] The *suum cuique* was and is the classic formula in natural law thinking for substantive justice. Cf. *Thomas Aquinas*, Summa theologiae, II 2, quaestio 57, ad 1. On this cf. *Hollerbach*, Gerechtigkeit. II. Gerechtigkeit und Recht, in: Staatslexikon, 7th ed., Vol. 2, Freiburg-Basel-Wien 1986.

Where these values and criteria impose only obligations of abstention, justiciability becomes an issue only if these obligations are violated. Where the various values and criteria also impose obligations to positive action (as in the case of the third-party effect of fundamental rights), violations of these obligations are also justiciable. Whether recourse can have only to actions for nullity or for breach of treaty and to what extent an individual may bring an action for such kind of violations is also a practical question and probably depends on the kind of implementation these values and criteria have found in secondary Union law. The complete realisation of the value of the rule of law would certainly require the possibility, for an individual, to contest violations of these values and criteria which are to his detriment through legal proceedings and to claim compensation for damages suffered.[14]

That these values are justiciable, does not apply only to those values which are related to the area of civil rights. Values concerning civic and political rights have also to be justiciable. This also applies with regard to values and criteria like democracy and pluralism. They, too, must be subject to an action for breach of treaty.

### C. Political enforcement

In addition, Article 7 TEU contains a special mechanism for cases where the values stated in Article 2 TEU are at risk or have already been breached. This mechanism complements the judicial protection exercised by the European Court of Justice by measure taken by non-judicial organs. Article 7 TEU is supplemented by Article 354 TFEU which contains certain special procedural rules, and by Article 269 TFEU which sets out the role of the European Court of Justice in this context.

#### *1. Proceedings under Article 7 TEU*

Starting point for the proceedings provided for in Article 7 TEU is a situation in a Member State of the European Union which gives rise to concern because of the risk or, worse, the existence of a breach of the values referred to in Article 2 TEU. In such a case the other Member States may react to such potential or actual breach. In this context, Article 7 TEU provides for a special procedure. It does not appear from the text of Article 7 TEU whether this procedure is intended to preclude, and in fact precludes, reactions outside the framework of the European Union on the basis of an understanding reached under international law. Since the constitutional instruments of the European Union are (whatever additional character they may have[15]) certainly international treaties and since the Member States have remained the "Masters of the Treaties", common action outside the Treaties cannot be excluded. Such action would have to rely on the means provided for in international law and codified by the Vienna Convention on the Law of Treaties of 1969.[16] However, the special consequences of a breach of values provided for in Article 7 TEU can be brought about only by the proceedings provided for by the same article.

Within the framework of Article 7 TEU, the Member States do not act as such but through two organs of the European Union, the Council and the European Council. Council and

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[14] It is not possible to discuss here whether the legal institutes of Union liability and State liability in their present form are suited to put things sufficiently right.

[15] Some writers consider the legal order of the European Union to be something different from domestic law as well as from international law. The European Court of Justice, however, has always upheld the basic international character of the Treaties which, however, have set up a new legal order the subjects of which are both the Member States and private persons. Cf. *supra*, fn. 2.

[16] Reference can be made here to Article 60 of the Vienna Convention on the Law of Treaties of 1969 which deals with Termination or suspension of the operation of a treaty as a consequence of its breach.

European Council do not act alone but in coordination with other organs of the Union, the Commission and the European Parliament.
Article 7 TEU deals, in fact, with two different cases or, rather, with two different stages of one and the same case.
The situation envisaged in Paragraph 1 is that of a clear risk of a serious breach. The situation envisaged in Paragraphs 2 *et seqs.* is the existence of a serious breach. The distinction between these two situations depends not only on the difference between a "risk" and an "existence" (of a serious breach) but also on the interpretation of the qualification of the term "breach" by the adjective "serious". In contrast to what seems to appear *prima vista*, both the difference between "risk" and "existence" and the difference between a simple breach and a serious breach are in a certain way interdependent.

**a. Criteria for a "serious" breach**

What constitute a "serious" breach? If we accept as an answer that this depends on the value in question, this would introduce a distinction between different values, attaching more weight to some of them than to the others. Such a distinction cannot be justified from the text of the Article and cannot be insinuated to its drafters. Of course, a scrutiny of the provision reveals a hierarchy of values, as some of them are but the condition for, or the consequence of, a particular value. But all of them are fundamental for the European Union and its Member States, and the answer to the question of whether or not there exists a serious breach cannot be given by making a distinction between them.
From this point of view, each and every violation of one of the values in Article 2 TEU is serious. But since the Article evidently distinguishes between serious and other ("simple") breaches because the various legal consequences stated in Article 7 TEU apply only in cases where a serious breach is concerned, the differentiation has to be made on the basis of other criteria.
One criterion could be whether the violation was intentional or caused by negligence. Another criterion could draw on the subject or the object of the violation. Yet another criterion could be whether it was a one-time violation or whether the violation continues or is being constantly repeated.

***i. Negligence v. intention***

Violations of values caused by negligence do not seem to qualify for "serious" breaches. It is the daily business of constitutional and comparable courts to rule on violations of fundamental rights; and it is the daily business of the European Court of Human Rights to rule on violations of human rights embodied in the European Convention for which redress could not be had under the system of national legal protection. Yet, such violations by the States Parties to the Convention which are also Member States of the European Union are regarded accidents rather than serious breaches in the meaning of Article 7 TFEU. As a rule, they give rise to claims for compensation under private law and not to public action under international or, more specifically, under Union law. Even if the State organ has acted intentionally, the situation would not essentially changed; only the success of action for damages under the Union's Member State liability would be more easily assured.

***ii. The subject committing the breach***

The subject of the breach may be relevant for its qualification as "serious". It makes a difference whether the breach has been committed by some subordinate organ or by one of the highest organs of the Member States, e.g. by the government or by parliament. The reason for this distinction will be the difference in effect. Violations by subordinate organs are usually limited to a single person or group of persons, the effects of violations by the

highest organs will usually not be so limited, especially if we take into consideration not only the direct but also the indirect effects.

***iii. The object suffering from the breach***

By the same considerations, the object of the breach may also be of relevance for its qualification as "serious". It makes a difference whether some subordinate state official is removed from his or her post in a manner inconsistent with the applicable rules or whether, again e.g., the president of the State is ousted from his office in such a way that is either inconsistent with the rules providing for his deposition of consistent with them only because certain changes have been made in the rules in a way that is inconsistent with the values in question.

***iv. Repeated breach***

Whether the breach was a one-time violation or whether the violation continues or is being constantly repeated may also be of relevance. Thus, a sporadic violation of human rights by subordinate organs will usually – as has already been pointed out – not offer a ground for measures under Article 7 TEU, even if it has been committed intentionally. However if such violations are committed regularly and reveal a certain pattern of conduct, or if such a violation continuous, either as such or with regard to its effects, and if the government does nothing to stop the violation or to redress its negative effects, the breach of a value becomes persistent and will give rise to concern.

***v. All circumstances of the breach***

If all these points are taken into consideration, it is probably not possible to give an abstract definition of a serious breach other than in very general terms. The decision whether a certain breach is to be regarded a serious one will therefore have to be made on the basis of all relevant circumstances.

**b. Risk v. existence of a serious breach**

Contrary to what the plain wording of Article 7 Paragraphs 1 and 2 TEU seems to suggest, the difference between the "risk" and the "existence" of a serious breach does not, or not only, consist in the fact that in the first case the breach has not yet happened and in the second it has already occurred. This can be easily shown by cases which become serious only because the violation of the value continues and the government – although it has the relevant information at its disposal – does not do anything to stop the violation and to offer the necessary redress. There will always be some span of time between the first information of a violation reaches the competent authority in the government and the government takes action to stop the incriminated conduct. The length of this time will depend on how quickly and how intensively the verification of the alleged violation is carried out and how long it will take to come to the necessary decision to stop it. All this will be influenced by objective and subjective circumstances that will again differ from case to case. Thus, an already *existing* breach may be regarded to merely be the *risk* of a *serious* breach.

On the other hand, the values of Article 2 TEU may be considered to be seriously breached even if the violation is not persistent in such a way as to still continue. Thus, the murder of a high political opponent if either instigated by the government or tolerated by it in such a way as not doing enough to bring the perpetrator and the men behind him to justice, can be regarded a serious breach of the values in question, even if the effects of the offense cannot be (fully) remediated (the murdered person cannot be revived) and therefore no obligation to do so exists. Here, to qualify as a serious breach of values no further cases of political assassination are required.

Does the enactment of laws that are incompatible with the values of Article 2 TEU already constitute a serious breach of these values? Or is, for the characterisation as a serious breach, the application and enforcement of these laws required? Does then the enactment of such laws constitute only the risk of a serious breach? Or does the declared political intention of the leader of the parliamentary majority to have these laws enacted already constitute such a risk? Here, again, the answer will depend on the circumstances of the given case.

***i. Clear risk of a serious breach***

Article 7, Paragraph 1 TEU speaks of "a clear risk of a serious breach". Qualifications like "clear", "evident" or "obvious" are intended to rule out any situation or conclusion that could be considered "far-fetched". They rely on common understanding and on common sense. However, there are situations where the line between "clear" and "not so clear" etc. proves difficult to draw. A good example is offered by the European Convention of Human Rights. According to its Article 35, Paragraph 3, "[t]he Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is […] manifestly ill-founded […]". Once, when the former Commission of Human Rights had to deal with this ground of inadmissibility it stated that a complaint was only "manifestly ill-founded" if no reasonable man could qualify it otherwise. However, the "no reasonable man"-test failed in a later case, *Iversen v. Norway*,[17] where the complaint was declared to be "manifestly ill-founded" by six votes against four, four of the six votes based on different grounds than the other two.

Since a definition of a "clear" risk *in abstracto* will always have to rely on general terms, it is for the Council to decide whether in a concrete case the risk is to be qualified as being "clear". The Council is obliged to do so in good faith.

It appears from what has been said so far that the Member States acting through the Council or the European Council as well as the other organs of the European Union involved in the proceedings under Article 7 TEU have a wide range of elements that can be taken into consideration when deciding on the qualification of a certain Member State conduct as constituting or not constituting a serious breach of the values referred to in Article 2 TEU and on the qualification of the situation before as a risk or as the existence of such a serious breach.

***ii. A margin of appreciation***

Since theory and practice of Union law tends to a use of the notion of discretion that can be regarded rather loose,[18] it is necessary to stress in this context that the conclusion that there is a risk, or the existence, of a serious breach is not a question of discretion. The mere difficulty to establish the relevant facts or to discern the relevant law grants no discretion, even if different persons may come to different conclusions.

Yet, both Paragraphs 1 and 2 contain an element of discretion and this in a prominent way. The Council and the European Council, respectively, are not obliged to take measures under Article 7. They "may" do so. It is thus left to the political discretion of all institutions involved, and thus first and foremost, of the Member States. This discretion is not limited in any other way than what may be derived from Article 3, Paragraph 1 ("The Union's aim is to promote peace, its values and the well-being of its peoples") and from

[17] Application no. 1468/62

[18] The notion of a „substantial breach of Union law", introduced by the European Court of Justice in the joint Cases C-46/93 et C-48/93, *Brasserie du Pêcheur et Factortame*, Coll. 1996, I-1029 et seqs., makes it very difficult for the wronged individual to get adequate compensation.

Article 4, Paragraph 3, Subparagraph 1 ("Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"). But the practical implementation of these provisions is again a matter of discretion. This discretion will find its limits only where the Union or the Member States or both would completely fail to live up to the requirements of the common good.

**c. The political character of proceedings under Article 7 TEU**

The primarily political character of the procedures under Article 7 TU is also indicated by a small but significant detail. While in the legislative field the Commission has the exclusive right of initiative, so that no legal act can be adopted without a proposal by the Commission, the proposal for the determination of a risk of a serious breach is not limited to the Commission but can also be made by one third of the Member States and by the European Parliament which decides by a two-thirds majority of at least half of its members present. Equally, the proposal for the determination of the existence of a serious breach may come not only from the Commission but again also from one third of the Member States, and the role of the Parliament is even stronger in this context because its consent is required for such a determination. Thus, the role of the Commission as the watch-dog of the Union which is based on Article 258 TFEU[19] and which even requires Member States, before bringing an action for breach of treaty against another Member State to submit the matter to the Commission,[20] is reduced in a double way: First, it has to share its role with one third of the Member States and with the European Parliament; secondly, it can only propose the determination of a risk or of the existence of a serious breach but cannot, by doing so, require the Council or European Council even to take up the matter.

Whether the Council or the European Council, respectively, determine a certain situation as constituting a mere risk of a serious breach or already the existence of a serious breach makes a difference with regard to the consequences. Sanctions may only be imposed in the case of the existence of a serious breach. In the case of a mere risk, no negative consequences result for the Member State concerned.

**d. Consequences of the determination of a risk of a breach**

Yet, a Member State against which proceedings for determining a risk of a serious breach of values are instituted will not be left without any consequences. According to Article 7, Paragraph 1, Last Sentence, "[b]efore making such a determination, the Council […] may address recommendations to [that Member State]". It is likely that the Council will regard non-compliance with such a recommendation as a ground for determining that there is a risk of a serious breach. On the other hand, if the Member State complies with the recommendation, it will be difficult for the Council to decide that there still is such a risk in the area dealt with by the recommendation.

**e. The position of the Member State concerned**

The Member State against whom the allegation of a risk of a serious breach or of the existence of a serious breach are raised has no vote under Article 7 TEU.[21] This

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[19] Article 258 TFEU provides: „If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

[20] Cf. Art. 259 TFEU.

[21] Art. 7, Paragraph 1: „[T]he Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the [majorities required]".

corresponds to the general principle that no one should be judge in his own cause. On the other hand, the Member State has a right to be heard both under Paragraph 1 (determination of a risk) and Paragraph 2 (determination of a serious breach). This corresponds to the general principle of *audiatur et altera pars*.

In proceedings for the determination of the existence of a serious breach according to Article 7, Paragraph 2 TEU, the European Council has to "invit[e] the Member State in question to submit its observations". Whether the Member State follows this invitation or refuses to do does not make any procedural difference. In contrast, in proceedings for the determination of a risk of a serious breach, Article 7, Paragraph 1 TEU provides that "the Council shall hear the Member State in question". The fact that nothing is expressly provided for a situation where the Member State refuses to submit to such hearing indicates that the drafter of the provision did expect the situation to have, at this point, deteriorated to such an extent that one side would break of further talks.

At any rate, the provision in question must be read in such a way as to give a right to the Member State in question to be heard but not a right to block further proceedings by its refusal to submit to such a hearing. The legal consequences of a refusal, by the Member State, to be heard are therefore the same under Paragraph 2 and Paragraph 1.

**f. Proceedings against more than one Member State**

Article 7, Paragraph 1 TEU does not deal with the question how to proceed if two or more Member States engage in a serious breach of the values referred to in Article 2 TEU at the same time. Is there a joint proceeding against all of them or has each case to be dealt with separately? In joint proceedings, all of them would have no vote. In separate proceedings, however, each of them may claim to have a vote in the case(s) brought against the other(s). Would participation by a Member State charged with risking a serious breach of one of the said values in a vote in the course of proceedings under Article 7 TEU against another Member State against which the same charges are brought make sense? Would participation make more sense, if the charge brought against the other Member State relates to the violation of a different value? All that can be said here with a sufficient amount of certainty is that if the majority of the Member States would engage in a serious breach of values this would constitute a crisis of the European Union as a whole, a crisis that probably could not be overcome just by having resort to Article 7 TEU.

**g. Majority required for determination and imposition of sanctions**

For the determination, by the Council, of a risk of a serious breach, Article 7, Paragraph 1 TEU requires a majority of four fifths of the Member States.

If the European Council determines the existence of a serious breach of values under Article 7, Paragraph 2 TEU– a determination which requires unanimity[22] –, it is up to the "Council, acting by a qualified majority, [to] decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council."

In contrast to the decision of the European Council determining the existence of a serious breach, the decision by the Council under Article 7, Paragraph 3 may be reached by majority. The majority called for is a qualified majority of at least 72 per cent of the members of the Council representing the participating Member States, comprising at least 65 per cent of the population of these States.[23] It is in the discretion of the Council[24]

[22]Cf. Article 354, Paragraph 1, Second Sentence TFEU: „Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2 of that Article."

[23] Cf. Article 238, Paragraph 3, lit. b TFEU, referred to by Article 354, Paragraph 2 TFEU.

whether and to what extent it will impose sanctions upon the Member State in question. This discretion has but the same limits as those which apply to the discretion under Paragraphs 1 and 2.[25]

**h. Third party effects of sanctions**

It should be noted that Article 7, Paragraph 3 TEU makes it a duty for the Council to "take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons." Since the overriding object of Article 7 is to bring to heal a Member State that is in serious breach of the values referred to in Article 2 TEU, eventual negative consequences of sanctions for private persons do not bar the Council of imposing such sanctions. Yet, the provision should be interpreted in such a way as to make it an obligation for the Council to choose that kind of sanction(s) that interferes least with the rights of private parties, provided, of course, that the Council has the choice between two or more different sanctions which would supposedly be equally or sufficiently effective.

**i. Variation and lifting of sanctions**

Subsequently, the Council may decide to vary the measures taken against the Member State in question if it sees fit to do so, e.g. because it believes that different or additional sanctions are required to make that Member State to abstain from further violating the values referred to in Article 2 TEU, or because it comes to the conclusion that the original sanctions carry undue negative consequences for private persons.

If the Member State in question stops violating the values in question and offers, if so required under the given circumstances, to make the necessary amends, the Council "may decide to revoke [the] measures taken" against that Member State. In contrast to what applies under Article 7, Paragraphs 1 and 2, the word "may" does not mean that the Council has discretion to revoke or to not revoke the sanctions. Since the only reason for sanctions is the serious breach of values, sanctions have to cease if the breach of values has ceased. To continue sanction under sufficiently changed circumstances would run counter the principle of bona fides which the Council of course is bound to observe.

The decision of the Council on whether or not to revoke the measure taken against the Member State in question is therefore but the consequence of a finding, by the Council, whether or not the Member State has stopped its value-infringing conduct. Of course, the conclusion derived at by the various Member States may differ; but each Member State is bound to reach an opinion in good faith. The possible difference of opinion among the Member States and the resulting uncertainty about the outcome of the vote in the Council has nothing to do with discretion.

***2. Limits to judicial review of proceedings under Article 7 TEU***

Is the procedure under Article 7 TEU subject to review by the European Court of Justice?

It has already been said that violations of the values referred to in Article 2 TEU are justiciable. This follows already from the character of Article 2 itself which contains legal obligations both for the institutions of the European Union and its Member States as well as from Article 3 TEU, were the promotion of its values is stated to be part of the Union's aim, together with the promotion of peace and of the well-being of its peoples.[26] If the values in question were not legally binding, Article 7 TEU would have no basis because no Member State can be reproached for not observing a non-existent obligation.[27]

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[24] As regards possible limits to the discretion of the Council, cf. *supra*, text following fn. 18.

[25] Cf. *supra*, ibid.

[26] Cf. *supra*, at fn. 6.

[27] If the observance of the Union's values were only a political question, no legal consequences could be attached to their non-observance.

It has also been said that violations of the values referred to in Article 2 TEU can be challenged by the legal procedures open to Member States, Union institutions and private persons under the Treaties. The procedure laid down in Article 7 TEU does not substitute these procedures; it complements them.
Decisions taken by the European Council and the Council under Article 7 TEU are legal acts of the European Union as mentioned in Article 288 TFEU, Paragraph 1; Paragraph 3 contains the definition of a decision. Unless otherwise provided, all legal acts of the Union are subject to judicial review.
Article 269 TFEU limits the competence of the European Court of Justice *ratione personae, ratione materiae* and *ratione temporis*. It limits the competence *ratione personae* because only "the Member State concerned by a determination of the European Council or of the Council" may request the Court "to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7". It also limits the competence *ratione materiae* because such a request may be made "in respect solely of the procedural stipulations contained in that Article". And it limits the competence *ratione temporis* because the request must be made within one month from the date of such determination." To have the opinion of the Court as soon as possible, "[t]he Court shall rule within one month from the date of the request."

**a. The time factor**

Why has the competence of the Court been limited in such a manner? The answer to this question is usually based on two different arguments.
First, a serious breach of the values referred to in Article 2 TEU would constitute a crisis with which the European Union and its Member States would have to deal as speedily as possible. In such a case, legal proceedings would usually be too tedious. This argument would be valid only if the imposition of sanctions under Article 7, Paragraph 3 TEU would be barred until the Court would have rendered its decision. But such an *ante factum* review is not provided for anywhere in the Treaties with the exception of Article 218, Paragraph 11 TEU,[28] where it is only optional. On the other hand, a *post factum* review would not impede the immediate imposition of sanctions, as the review under 269 TFEU does not impede it. The only difference between the review under 269 TEFU and regular review would be that regular review would not be limited to the procedural stipulations contained in Article 7 TEU but would also extend to the substantive issues of the case. The primary question would then be: Was the determination of a risk of a serious breach, or of a serious breach, of the values referred to in Article 2 TEU justified? And: Can the sanction imposed pass the test of proportionality and of the least incisive means, also and in particular with regard to the obligation contained in Article 7, Paragraph 3, "to take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons."[29] It is clear that the limits on the competence of the Court set out in Article 269 TFEU are just intended to prevent a judicial review of the substantive aspects of the case.

**b. Political v. legal questions**

This brings us to the second argument, namely, that the Court is not capable of making such as decision. A crisis of the European Union, caused by the risk of a serious breach of,

[28] „A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."
[29] Cf. *supra*, after fn. 25

or the serious breach of the values referred to in Article 2 TEU, would be a political matter and should therefore be dealt with by the political organs of the Union, the Council and the European Council. Political questions should not be decided by courts; in fact, if the European Court of Justice were to be called upon to decide on a political question it would have to reject the request according to the principle of judicial restraint.

This argument is not good either. First of all, the concept of political matters as opposed to legal matters is outdated and since long has no relevance in international jurisdiction.[30] According to Article 36, Paragraph 2 of the Statute of the International Court of Justice – a provision that dates back to 1920 – legal disputes are "disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation." The same must apply to obligations under Union law, their violation and the reparation due. Secondly, the argument is at cross with one of the very values mentioned in Article 2 TEU, namely the rule of law. To make the determination of a risk of serious breach of values, or of the existence of such a serious breach under Article 7, Paragraphs 1 and 2, and the decision on the reaction by the European Union a political question and to exempt its substantive aspect from the jurisdiction of the European Court of Justice, itself a deplorable breach of the values referred to in Article 2 TEU.

It is therefore to be hoped that future amendments to the Treaties will remedy this unsatisfactory situation.

[30] In fact, it is difficult if not impossible to imagine a case that could not be decided on the basis of the law. The distinction between legal and political questions would only make sense if it would be permissible to invoke the political claim to change the law against the law as it stands. Since, however, law itself – if correctly understood – contains the necessary means to alter its obligations if new circumstances so require (cf. e.g., the changed circumstances clause in Article 62 of the Vienna Convention on the Law of Treaties), there is no need for a separate category of political questions which are but a disguise for the refusal to live up to one's legal obligations.