German Law Journal (2024), **25**, pp. 128–151
doi:10.1017/glj.2023.118

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Trust and the Procedural Requirements of Article 7(2) TEU: When More than One Bad Apple Spoils the Barrel

Sofiya Kartalova

Department of Public Law, Max Planck Institute for the Study of Crime, Security and Law, Freiburg im Breisgau, Germany and School of Law at the University of Nottingham, Nottingham, the United Kingdom
Email: Sofiya.Kartalova@nottingham.ac.uk

(Received 15 June 2022; accepted 21 November 2022; first published online 05 April 2024)

Abstract
This article discusses a currently hypothetical, but increasingly more likely, situation where Article 7(2) TEU is activated against more than one backsliding Member State at the same time. To prevent the offending Member States from teaming up to block the sanction mechanism, an extension of the exclusion from voting in Article 354 TFEU beyond "the Member State in question" is likely to be considered by the CJEU. However, such a use of this mechanism is contrary to the *effet utile* of Article 7 TEU, if interpreted in the context of trust. This interdisciplinary study uses insights from trust theory to demonstrate that the outcome will inevitably be further distrust and fragmentation between the EU and its Member States. This is why Article 7(2) TEU is not meant to be (and ought not to be) used against more than one Member State at the same time in this manner. This impression is reinforced considering that the existing legal solutions for implementing the extension of the exclusion from voting under Article 354 TFEU violate general principles of EU law and will therefore cause further distrust and fragmentation.

Keywords: trust; Article 7 TEU; Article 354 TFEU; EU rule of law crisis; backsliding Member States

A. Introduction

It is often said that "one bad apple spoils the barrel." In keeping with this old adage, Article 7 of the Treaty on the European Union (TEU)[1] protects the European Union when a Member State threatens to violate the core values enshrined in Article 2 TEU. This fear became a reality when Poland's blatant disregard for the rule of law necessitated the triggering of Article 7(1) TEU in 2017. With the activation of the same preventive mechanism in respect of Hungary in 2018, the European community was faced with the alarming possibility that *more than one* bad apple would spoil the barrel.

Before the result of the 2023 parliamentary elections in Poland, which marked a turning point in the country's descent into illiberalism, there had been little doubt that Hungary and Poland were prepared to defend each other's interests, presenting a united front of resistance against the liberal and democratic values at the heart of the EU project.[2] Moreover, the likelihood that another

[1]The Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326), 13 [hereinafter TEU].

[2]Please note that this Article was written and accepted in its current form prior to the 2023 parliamentary elections in Poland. Although the political climate in Poland has since changed, this Article still holds scientific value and high actuality, as it explores a hypothetical scenario which may manifest itself in the future, as another EU Member State might take Poland's place as Hungary's potential ally in promoting illiberalism. It must not be forgotten that in the past Poland showed its commitment to supporting Hungary, when the activation of Article 7(1) TEU against Hungary was unsuccessfully challenged

Member State might join Hungary in the future, once the former is brought to account under Article 7(1) TEU, is perhaps diminished, in the light of these recent events, but certainly not dismissed. Indeed, this possibility is no mere speculation given recent reports of initial signs of rule of law backsliding observed in other EU Member States such as Romania, Malta, and the Czech Republic.[3]

Evidently, the EU rule of law is still under threat, and it is simply a matter of time before the tides turn and the activation of Article 7(2) TEU against one (or all) of the current (or future) backsliding Member States becomes a necessity.[4] The main procedural hurdle on this path is the procedural requirement that the existence of a serious and persistent breach of values in Article 2 TEU, which any given Member State can commit, can only be determined by a unanimous decision of the European Council. Article 354 of the Treaty on the Functioning of the European Union (TFEU)[5] excludes "the Member State in question" from voting on the determinations under Article 7(1) and (2) TEU but makes no mention of exclusion from voting of any other Member State against which Article 7 TEU might be invoked *at the same time*. Therefore, as the situation stands, if a political decision is taken to invoke Article 7(2) TEU in respect of any other backsliding Member State (previously, Poland), there is nothing to preclude Hungary from backing up its ally in the potential vote in the European Council, thereby blocking the determination of a serious and persistent breach under Article 7(2) TEU.[6] The same will be true if Article 7(2) TEU is activated against Hungary or any other Member State if Article 7(1) TEU is triggered. Without a determination of "a serious and persistent breach" under Article 7(2) TEU, the Union cannot impose sanctions under Article 7(3) TEU. Therefore, what is actually at stake here is the overall capability of the Union to sanction a violation of Article 2 TEU through the Article 7 TEU mechanism.[7]

For these reasons, it is worth exploring the legal implications of a currently hypothetical but increasingly more likely scenario where Article 7(2) TEU is activated simultaneously against more

on procedural grounds before the Court of Justice of the European Union [hereinafter CJEU] in an action for annulment under Article 263 of Treaty on the Functioning of the European Union. (Case C-650/18, *Hungary and Poland v European Parliament*, 2021 E.C.R. I-426). As of the date of acceptance of this manuscript in November 2022, there was little to suggest that the efforts of Poland and Hungary to legally oppose the application of Article 7 TEU would have stopped there. In fact, the EU rule of law crisis had been further aggravated by the Polish Constitutional Tribunal's direct challenge to the primacy of EU law, in which several provisions of the TEU were declared incompatible with the Polish Constitution in its rulings of July 14, 2021 and October 7, 2021 (Thomas Wahl, *Rule of law Issues July-Mid-October 2021*, Eucrim, (Nov. 11, 2021), https://eucrim.eu/news/poland-rule of law-issues-july-mid-october-2021/. In response, the European Commission launched an infringement procedure against Poland in December 2021. European Commission Press Release, *Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal*, (Dec. 22, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070, (visited Jan. 4, 2022).

[3]*See generally*, T. Wahl, 'Rule of law Developments in Other EU Countries', Eucrim (July 8, 2021) https://eucrim.eu/news/rule of law-developments-in-other-eu-countries/.

[4]For this purpose, the term 'backsliding Member State' will be applied here to Member States against which Article 7(1) TEU has been activated.

[5]The Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326), 47 [hereinafter TFEU]. See *supra* note 2, para. 111.

[6]Back in October 2016, a similar logic is likely to have guided the decision to invoke Article 7(1) TEU in respect of Hungary, alongside Poland. *See also* Kim Lane Scheppele, *Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too*, VerfBlog (Oct. 24, 2016), https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/.

Even so, this political decision fails to address the legal limitations of the EU Treaties when it comes to precluding the possibility of backsliding Member States teaming up to block the Article 7 mechanism.

[7]Tom Theuns proposes another way of expressing the inability of Article 7 TEU to counteract the rule of law crisis in the EU, namely by referring to the performative contradiction at its heart: "... stripping a Member State in serious and persistent breach of EU fundamental values of their right to vote in the Council itself undermines the EU fundamental values of democracy and equality. As such, Article 7 is in a performative contradiction with the fundamental values listed in Article 2: it cannot adequately express them and, consequently, is hampered in both its declarative and instructive functions." Tom Theuns, *The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7*, Res Publica (2022). https://doi.org/10.1007/s11158-021-09537-w

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

than one backsliding EU Member State. This political decision will probably be taken in an attempt to prevent the aforementioned obstruction to the implementation of this mechanism by legal means, namely by extending the exclusion from voting beyond "the Member State in question" to cover other Member States currently undergoing the same scrutiny under Article 7(2) TEU. The main aim of this interdisciplinary Article is to demonstrate, with the help of insights from trust theory in the social and political sciences, that this legal approach, which mainly finds support in the writings of Dimitry Kochenov, will fail to produce the desired effect of counteracting the EU rule of law crisis. Moreover, it will have grave negative consequences for the EU legal order and therefore must be urgently reconsidered.

Dimitry Kochenov suggests that the legal means for executing this plan to tackle the EU rule of law crisis are readily available in EU law.[8] In his view, the idea that exclusion from voting could be extended to several backsliding Member States under Article 7 TEU *at the same time* is "clearly" implicit in the wording of Article 354 TFEU[9] and that the alternative would mean "all the procedural requirements of Article 7 TEU, especially those requiring unanimity, would end up deprived of their intended *effet utile* . . . ."[10] Reading between the lines, when speaking of the "intended *effet utile,*" Kochenov seems to be referring to the *practical effectiveness*[11] of the procedural requirements of Article 7(2) TEU. The implication appears to be that an interpretation that allows for Article 7(2) TEU to be easily blocked by an alliance of backsliding Member States would render the provision useless, which presents a serious danger to the effectiveness of the norm.[12] *Effet utile* comes into play in the CJEU's reasoning in circumstances where the uniformity and effectiveness of EU law might be jeopardized by a particular interpretation or through the conduct of a certain Member State.[13]

Since the wording of the provision neither allows nor precludes[14] extending the exclusion from voting to *any* Member State, against which Article 7(2) TEU may be triggered at the time, there is some interpretative freedom left to the adjudicator.[15] Kochenov suggests the possibility that the extent of the exclusion could be clarified by the CJEU when an offending Member State brings an action questioning the legality of the act under Article 269 TFEU.[16] For this purpose, Kochenov suggests two possible solutions to implementing the extension of the exclusion from voting for the

[8]Dimitry Kochenov, *Article 354*, *in* The EU Treaties and the Charter of Fundamental Rights: A Commentary (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin eds., 2019), 2081.

[9]Kochenov, *supra* note 8, at 2081.

[10]Kochenov, *supra* note 8, at 2081. Kochenov repeats the same argument in his recent publication on the matter, *see also*: Dimitry Kochenov, *A Commentary on a Much Talked-About "Dead" Provision*, *in* Defending Checks and Balances in EU Member States, 127, 143 (Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski & Matthias Schmidt eds., 2021).

[11]When speaking of *effet utile*, the CJEU uses the terms "volle Wirksamkeit" ("full effectiveness") and "praktische Wirksamkeit" ("practical effectiveness") without drawing any clear distinction between them for the purposes of introducing different content, levels, or factual situations to describe effectiveness in the context of EU law. The CJEU uses the term "practical effectiveness" more frequently than the alternative. Sibylle Seyr, Der *effet utile* in der Rechtsprechung des EuGH 290–92 (2008).

[12]This is one of the requirements for the unproblematic application of *effet utile* in CJEU jurisprudence: "If the classic methods of interpretation are applied exclusively, there will be a serious danger that the norm could not develop its practical effectiveness to the full, meaning that it is not effective or the proper functioning of EU law cannot be guaranteed." (Translation from German into English done by the author of this Article). Seyr, *supra* note 11, at 300.

[13]Seyr, *supra* note 11, at 297.

[14]It will be demonstrated later in this Article that this might not necessarily be the case, upon closer inspection of the wording of Article 7(2) TEU and Article 354 TFEU.

[15]This is another requirement for the unproblematic application of *effet utile* in the CJEU's jurisprudence: "The wording of the interpreted norm must not be clear and unambiguous, but must have several interpretations. (. . .) The solution found must not contradict the wording of the interpreted norm; the unambiguous wording, which indicates the alternative interpretation, also must not contradict the *effet utile*." (Translation from German into English done by the author of this Article). Seyr, *supra* note 11, at 300.

[16]Kochenov, *supra* note 8, at 2081.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

purposes of Article 7(2) TEU; that is, "requiring the application of Article 7(2) TEU to several backsliding [Member States] already subject to Article 7(1) TEU procedure simultaneously" (*Simultaneous consideration*) or "the default exclusion from the vote in the context of Article 7 TEU of any state subjected to Article 7(1) TEU in the context of any proceedings arising under Article 7 TEU without necessarily making the consideration of the value situation in several [Member States] simultaneous" (*Default exclusion*).[17]

Kochenov's position deserves further exploration because it asks the right questions at the right time - before the Article 7(2) TEU procedure is triggered against a Member State. It expresses a valid and prescient concern about the dangers associated with the inherent limitations of the unanimity requirement of Article 7(2) TEU in circumstances where there is more than one backsliding Member State at the same time. Further, it highlights the importance of determining the *effet utile* of Article 7 TEU in this context, which opens a long overdue debate that is much needed. It is also worth noting that Kochenov's commentary stands out among other EU Treaty commentaries, since it addresses these underlying issues in depth and proposes concrete legal solutions.[18] It is also one of only three commentaries on EU Treaties – the other two being Frank Schorkopf's and Philipp Voet van Vormizeele's[19] – that takes a stance on the interpretation of the

[17]Kochenov, *supra* note 8, at 2081–82. Kochenov suggests the same two solutions in his recent publication on the matter, *see also*: Dimitry Kochenov, *A Commentary on a Much Talked-About "Dead" Provision*, *in* Defending Checks and Balances in EU Member States, 127, 143 (Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski & Matthias Schmidt eds., 2021).

[18]The author considered a number of commentaries on the EU Treaties but found no noteworthy analysis of the problem with the inherent limitations of the procedural requirements of Article 7(2) TEU that arise where there is more than one backsliding Member State, and no suggestions for its legal resolution. Stelio Mangiameli and Gabriella Saputelli, *Article 7: The Principles of Federal Coercion*, *in* The Treaty on European Union (TEU): A Commentary (Hermann-Josef Blanke & Stelio Mangiamelli eds., 2013), 349–73. Carsten Nowak, *Artikel 354 AEUV: Aussetzung von Stimmrechten eines Mitgliedstaats [Article 354 TFEU: Suspension of the voting rights of a Member State], in* Frankfurter Kommentar zu EUV, GRC & AEUV [Frankfurt Commentary of the TEU, CFREU & TFEU], Volume 4 (Matthias Pechstein, Carsten Nowak & Ulrich Häde eds., 2017), 1599–1602. Carsten Nowak, Artikel 7 EUV: Schwerwiegende Verletzung der Werte der Union durch Mitgliedstaaten [Article 7 TEU: A serious breach of the Union values by the Member States], in Frankfurter Kommentar zu EUV, GRC & AEUV [Frankfurt Commentary of the TEU, CFREU & TFEU], Volume 1 (Matthias Pechstein, Carsten Nowak & Ulrich Häde eds., 2017), 308–27. Philipp Voet van Vormizeele, *Artikel 354 (ex-Artikel 309 EGU): Stimmrechtsaussetzung [Article 354 TFEU: Suspension of voting rights], in* Europäisches Unionsrecht: Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union [European Union Law: Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union, Volume 4 (Hans von der Groeben, Jürgen Schwarze, Armin Hatje eds. 2015), 2067–69. Matthias Pechstein & Juliane Kokott, *Art. 354 (ex-Art. 309 EGV): Schwerwiegende Verletzung der Werte der Union [Article 354 TFEU: A serious breach of the values of the Union], in* EUV/AEUV Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union (Rudolf Streinz ed., 2012), 2760–61. Matthias Pechstein, *Art. 7 EUV (ex-Art. 7 EUV): Schwerwiegende Verletzung der Werte durch einen Mitgliedstaat [Article 7 TEU: A serious breach of the values by a Member State], in* EUV/AEUV Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union (Rudolf Streinz ed., 2012), 76–82. Matthias Ruffert, *Art. 7 (ex-Art. 7 EUV): Aussetzung von Rechten [Suspension of rights], in* EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar [TEU/TFEU: The Constitutional Law of the European Union with the European Charter of Fundamental Rights] (Christian Calliess and Matthias Ruffert eds., 2011), 153–62. Hans-Joachim Cremer, Matthias Ruffert & Kirsten Schmalenbach, Art. 354 (ex-Art. 309 EGV): Abstimmungsmodalitäten bei der Aussetzung von Rechten [Voting conditions in respect of suspension of rights], in EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar [TEU/TFEU: The Constitutional Law of the European Union with the European Charter of Fundamental Rights] (Christian Calliess and Matthias Ruffert eds., 2011), 2758. Philipp Voet van Vormizeele, *Artikel 7 (ex-Artikel 7 EUV): Verletzung fundamentaler Grundsätze durch einen Mitgliedstaat [A breach of fundamental principles by a Member State], in* Europäisches Unionsrecht: Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union [European Union Law: Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union, Volume 4 (Hans von der Groeben, Jürgen Schwarze, Armin Hatje eds. 2015), 137–42.

[19]Out of the commentaries on the EU Treaties considered by the author (see *supra* note 19), only Frank Schorkopf's and Philipp Voet van Vormizeele's commentaries demonstrate some awareness of the procedural issues associated with

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

procedural requirements of Article 7(2) TEU when deciding whether to use the provision against several backsliding Member States at the same time. Despite its merits, Kochenov's position demands to be approached with the greatest caution and scrutinized with utmost care since it erroneously presupposes that there are currently no legal obstacles to taking this course of action should the political need arise. That is why this Article aims to provide more answers to Kochenov's expertly-raised questions.

It will be shown that Article 7(2) TEU is not meant to be (and ought not to be) used simultaneously against more than one backsliding Member State in this manner. This Article argues that the proposition put forward by Dimitry Kochenov is *fundamentally flawed* in terms of *principle* (the proposed interpretation of the *effet utile* of Article 7 TEU) and of *execution* (the proposed legal solutions). More specifically, the problem is that this plan is bound to *backfire*: instead of contributing towards the realization of the integrationist ideal of "an ever closer union among the peoples of Europe" (Article 1 TEU), it will only lead to even greater distrust and fragmentation in the European Union. Thus, this interdisciplinary study combines legal analysis with insights from trust theory in the social and political sciences to highlight the inherent limitations of the procedural requirements of Article 7(2) TEU, which will become evident in a situation where there is more than one backsliding Member State at the same time.

To this end, this Article challenges the traditional understanding of Article 7 TEU to protect the homogeneity of the Union as defined by Article 2 TEU, which appears to be the theoretical foundation for Kochenov's position. An unconventional reading of the *effet utile* of Article 7 TEU conceptualizes the provision as more than a mere means of protecting the homogeneity of the Union. It is a mechanism for promoting trust and mitigating distrust in the relationship between the Union and its Member States. To interpret the procedural requirements of Article 7(2) TEU in a manner that would authorize the extension of the exclusion from voting to more than one Member State *at the same time* would directly contradict this new conceptualization of the *effet*

Article 7(2) TEU that Kochenov highlighted. Schorkopf asserts that the plain and ordinary meaning of Article 7 TEU unequivocally dictates that the provision is directed at only one Member State and that, if more than one Member State is also eligible to be brought to account under Article 7 TEU, then individual sanctions procedures must be activated against them. Frank Schorkopf, *Art. 7 EUV: Verletzung fundamentaler Grundsätze durch einen Mitgliedstaat [A breach of fundamental values by a Member State]* (April 2017), *in* Das Recht Der Europäischen Union. Kommentar I [European Union Law. Commentary I], Volume 1, (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2021), 9–10. Similarly, Voet van Vormizeele (para. 7, p. 139) notes that the Article 7(1) TEU procedure concerns "a Member State" and that, in case there is a clear risk of a serious breach as a result of the conduct of several Member States, individual procedures under Article 7 TEU must be initiated since this provision does not impose collective sanctions [Translation from German into English done by the author of this Article]. Although Voet van Vormizeele does not make explicit reference to Article 7(2) TEU here, it could be surmised that the same logic would be applied there too, since these two paragraphs belong to the same provision. Philipp Voet van Vormizeele, *Artikel 7 (ex-Artikel 7 EUV): Verletzung fundamentaler Grundsätze durch einen Mitgliedstaat [A breach of fundamental principles by a Member State], in* Europäisches Unionsrecht: Vertrag über die Europäische Union, Vertrag über die Arbeitsweise der Europäischen Union, Charta der Grundrechte der Europäischen Union [European Union Law: Treaty on European Union, Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union, Volume 4 (Hans von der Groeben, Jürgen Schwarze, Armin Hatje eds. 2015), 139.

Moreover, Schorkopf expresses concern that the inherent limitations in the procedural implementation of Article 7 TEU, especially with regards to the requirement of unanimity, will be exposed in a situation where the provision is activated against more than one Member State. Nevertheless, in the next breath, he diminishes the importance of the concern he just raised by concluding that "this detailed critique will gain no decisive significance, since if it comes to a situation where there is more than one Member State exposed to the sanction procedure under Article 7 TEU, the Union would be in such a political state anyway that such technical questions would be attributed secondary importance" (Translation from German into English done by the author of this Article). Frank Schorkopf, *Art. 354 AEUV: Stimmrechtsaussetzung [Suspension of the right to vote]* (April 2017), *in* Das Recht Der Europäischen Union. Kommentar III [European Union Law. Commentary III] (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2021), 3. However, Schorkopf is mistaken in his premature dismissal of the problem. It is precisely on narrow technical points of procedure such as these that the fate of the Union could turn in circumstances where there is more than one backsliding Member State, as demonstrated by the CJEU in respect of the activation of Article 7(1) TEU and the interpretation of the concept of "votes cast" in the case of *Hungary and Poland v European Parliament* (see *supra* note 2).

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

utile of Article 7 TEU; it would inevitably lead to greater distrust and fragmentation in the Union. By the same token, the legal solutions recommended by Kochenov would also produce the same result if implemented by the CJEU since they violate some of the general principles of EU law. Neither of these proposed solutions could be considered reasonable in the circumstances,[20] as they would undermine the legitimacy and coherence of the CJEU's decision-making.

The *effet utile* of a legal norm in EU law must be placed in the big-picture context of the CJEU's efforts to devise legal solutions to achieve the ultimate goal of the integration project – "an ever closer union among the peoples of Europe" (Article 1 TEU). Empirical evidence suggests that *effet utile* is used in the CJEU's jurisprudence to "stabilize the law . . . and also to convey an impression of doctrinal continuity, effectiveness, and relevance."[21] In this context, *effet utile* could be defined as "a legal judicial means which allows the Court to develop a coherent body of case law without risking [a] major political backlash from the Member States."[22] In other words, the involvement of *effet utile* in the CJEU's reasoning tends to the relationship between the Union and its Member States by ensuring the coherence and acceptability of the Court's jurisprudence. Therefore, to accurately assess the *effet utile* of Article 7(2) TEU and its procedural requirements found in Article 354 TFEU, one must understand their role in the context of the relationship between the Union and its Member States, which is based on *trust*.

At this stage, it is important to justify the choice of the concept of *trust* as the foundation for building an argument regarding the *effet utile* of Article 7 TEU in the context of combating the ongoing EU rule of law crisis. The rare use of the Article 7 TEU mechanism in practice and the paucity of preparatory documents for its drafting make collecting persuasive evidence to draw conclusions about its overall purpose challenging. By association, the same goes for Article 7(2) TEU and its procedural requirements in Article 354 TFEU. For these reasons, a mere doctrinal analysis focusing solely on legitimacy may be of limited use here. The sociopolitical phenomenon of *trust* could help us contextualize the role of Article 7 TEU in the trusting relationship between the Union and its (backsliding or otherwise) Member States in order to define the *effet utile* of Article 7(2) TEU and its procedural requirements in a manner that is more accurate and faithful to the realities of the rule of law crisis in the EU.

In recent years, the European integration project has been seriously pressured by the forces of fragmentation, which has resulted in "eroding, rather than building up, trust among the EU's member states, public agencies, economic and social actors, and populations."[23] The rule of law in the EU has been identified as the main vulnerability in the EU legal order with respect to trust.[24] Through their refusal to apply EU legislation and their rigid stance when it comes to national sovereignty, the national interest, self-determination, and trust between Member States, the EU is in danger of being undermined.[25] In addition, the lack of trust and distrust in the EU project has culminated in a "conflict of values," which found expression in Brexit as well as the constitutional reforms threatening the independence of the judicial systems in Hungary and Poland.[26] There is "a

[20]This is the last requirement for the unproblematic application of *effet utile* in the CJEU's jurisprudence: "The result of the interpretation achieved through *effet utile* must satisfy the principle of reasonableness (i.e. it is adequate, necessary, and appropriate), so as to safeguard the effectiveness of the norm or EU law." (Translation from German into English done by the author of this Article). Seyr, *supra* note 11, at 300.

[21]Urška Šadl, *The Role of* Effet Utile *in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU* 8(1) *Eur. J. Leg. Stud* 18, 43 (2015).

[22]Šadl, *supra* note 23, at 42.

[23]Antonina Bakardjieva Engelbrekt, Niklas Bremberg, Anna Michalski & Lars Oxelheim, *Trust in the European Union: What Is It and How Does It Matter?*, *in* Trust in the European Union in Challenging Times (Antonina Bakardjieva Engelbrekt Niklas Bremberg, Anna Michalski & Lars Oxelheim eds., 2019), 2–3, 6–8.

[24]Bakardjieva Engelbrekt, *supra* note 26, at 10.

[25]Bakardjieva Engelbrekt, *supra* note 26, at 10.

[26]Joakim Nergelius, *What Explains the Lack of Trust in the EU Among Its Member States? A Constitutional Analysis of the EU's 'Value Crisis*, *in* Trust in the European Union in Challenging Times (Antonina Bakardjieva Engelbrekt Niklas Bremberg, Anna Michalski & Lars Oxelheim eds., 2019), 24–25.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

fundamental lack of trust between EU Member States, as well as between at least some of them and the EU institutions."[27] Thus, current scholarship indicates that the rule of law crisis in the EU could be framed as a crisis of trust based on a conflict of values.

In this context, Armin von Bogdandy claimed that " . . . it is theoretically robust to construe the European rule of law with theories of trust, and to address the crisis of the European rule of law as one of distrust against and between public institutions."[28] According to this account, trust and law share a "complementary" relationship, in that they are "interrelated and support each other."[29] Similarly, trust and legitimacy "reinforce each other."[30] To respond to the EU rule of law crisis effectively, Armin von Bogdandy recommends that legal instruments be "evaluated according to whether they help avoid an escalation of distrust and enable continued cooperation which implicitly nurtures trust."[31] This is why the Article 7 TEU mechanism needs to undergo an assessment in the context of (dis)trust.

This Article adopts an understanding of the concept of *trust* in rational choice theory, which claims that trust is the product of a cognitive process in which "the trustor calculates, or predicts, the trustee's level of trustworthiness."[32] Russell Hardin's theory of trust as *encapsulated interest* explains how trust bonds rational actors together. It must be noted that if "A trusts B to do X," then trust is limited to a particular context; that is, A trusts B to deal with a specific matter (X) in a specific situation, not in all cases.[33] Hardin explains his theory of trust in the following terms:

> Your trust turns not directly on your own interests but rather on whether these are encapsulated in the interests of the trusted. You trust someone if you believe it will be in her interest to be trustworthy in the relevant way at the relevant time, and it will be in her interest because she wishes to maintain her relationship with you.[34]

Therefore, trust is not generated based on mere expectations of the partner's behavior in the relationship but on the *reasons* behind such behavior.[35] Hardin clarifies that "[t]he typical reason for the expectations is that the relations are ongoing in some important sense," whether it is in the context of a dyadic (one-way trust or mutual trust) or a thick (group or societal) trusting relationship.[36] Thick trusting relationships define trust and distrust dynamics between Member States and the EU on an interstate and interorganizational level. This is because EU Member States share a rich history and an ongoing relationship of repeated cooperation among themselves and the Union on a wide array of issues.[37]

Following that line of thought, let us presuppose that a breach of the values in Article 2 TEU could be conceptualized as a betrayal of trust, sanctioned by Article 7 TEU, if viewed from the perspective of the EU and its law-abiding Member States. Building on Russell Hardin's theory of

[27]Nergelius, *supra* note 29, at 27.

[28]Armin von Bogdandy, *Ways to Frame the European Rule of Law: Rechtsgemeinschaft, Trust, Revolution, and Kantian Peace,* 14 Eur. Const. L. Rev. 675, 693 (2018).

[29]von Bogdandy, *supra* note 31, at 692.

[30]von Bogdandy, *supra* note 31, at 688.

[31]von Bogdandy, *supra* note 31, at 690.

[32]Karen S. Cook and Jessica J. Santana, *Trust and Rational Choice, in The Oxford Handbook of Social and Political Trust* (Eric M. Uslaner ed., 2018), *255.*

[33]Russell Hardin, *Trust and Trustworthiness* (2002), 9.

[34]Hardin, *supra* note 36, at 13.

[35]Hardin, *supra* note 36, at 14.

[36]Hardin, *supra* note 36, at 14.

[37]James Walsh's work on trust demonstrates that Hardin's theory on trust can be successfully applied in the context of the EU and its relationships with its Member States, albeit in respect of intelligence sharing. *See generally*, James I. Walsh, *Intelligence-Sharing in the European Union: Institutions are Not Enough* 44(3) JCMS 625 (2006). James Igoe Walsh, *Defection and Hierarchy in International Intelligence Sharing*, 27(2) *Journal of Public Policy 151* (2007).

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

trust as encapsulated interest, Henry Farrell argues *distrust* results from power[38] asymmetries in the trusting relationship between two parties, which, in this case, are the backsliding Member States and the EU.[39] Farrell further claims power is defined by the ability to make credible commitments to your partner: "To say I am incapable of making credible commitments to you is to say (among other things) that you are incapable of retaliating effectively should I betray your trust."[40] In other words, the tipping point of power in the trusting relationship is understood by Farrell as follows: "The point at which I am so powerful that I can no longer make credible commitments to you is the point at which I am so much more powerful than you that you can no longer trust me."[41]

Reflecting on Henry Farrell's theory detailed above, the most appropriate interpretation of the *effet utile* of Article 7 TEU (more specifically, of Article 7(2) TEU in conjunction with Article 354 TFEU) must be such that neither party reaches past the tipping point of power, otherwise the legal rule will generate distrust between the parties in the trusting relationship. Note that this is not a requirement for equal power. It simply means that the procedural requirements under Article 7(2) TEU must be interpreted in such a way that neither the offending parties (taken together or separately), nor the rest of the EU, community should be at a clear disadvantage, rendering them incapable of prevailing when voting.

Based on a broad formulation of trust in the EU, constructed based on theories by Russell Hardin and Henry Farrell, two possible scenarios lead to distrust of the Union, as represented by EU institutions and the Court of Justice of the European Union (CJEU). When the Union fails to deal with backsliding Member States effectively, it damages the trusting relationship between the Union and its law-abiding Member States. It causes distrust of the Union since it would show itself incapable of effectively sanctioning the offending Member States. Suppose the EU institutions and the CJEU fail to apply and interpret EU law coherently and legitimately. In that case, the distrust towards the Union that backsliding Member States are already experiencing will deepen and intensify due to being on the receiving end of such (perceived) unfair treatment. The bottom line is, regardless of which scenario plays out, using Article 7(2) TEU against more than one backsliding Member State at the same time in this manner would inevitably produce further distrust and fragmentation in the relationship between the Union and its Member States.

The following sections of this Article elaborate on this position in detail. In Section B, the traditional account of the *effet utile* of Article 7 TEU as a means of protecting the Union's homogeneity is presented. It seems likely that this conventional understanding served as the starting point for Dimitry Kochenov's overall assessment of the *effet utile* of Article 7(2) TEU and its procedural requirements, as well as the legal solutions he proposes for extending the exclusion from voting beyond "the Member State in question." Section C contains an unconventional interpretation of the *effet utile* of Article 7 TEU based on the trust theory, which asserts that the *effet utile* of Article 7 TEU is not simply to uphold the homogeneity of the Union but to promote trust and mitigate distrust between the Union and its Member States. Further, some justification for the theoretical and methodological choices made regarding the applicable trust theory will be provided while presenting a more critical outlook for pre-emptively addressing some of the main objections that may arise in response to the proposed understanding of trust. If the CJEU decides to interpret the *effet utile* of Article 7 TEU in the traditional way, then the provision's wording needs to be scrutinized more closely. For this reason, a thorough analysis of the wording of Article

[38]Henry Farrell, *Trust, Distrust, and Power*, *in* Distrust (Russell Hardin ed., 2004), 87. Farrell further clarifies the meaning of 'power' in this context: "I follow Jack Knight (. . .), who argues that 'to exercise power over someone or some group is to affect by some means the alternatives available to that person or group.' (. . .) Parties who have many possible attractive alternatives should a particular relationship not work out will be more powerful than parties who have few such alternatives because they can more credibly threaten to break off bargaining, thus affecting the other's feasible set."

[39]Farrell, *supra* note 41, at 85.

[40]Farrell, *supra* note 41, at 91.

[41]Farrell, *supra* note 41, at 91.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

7(2) TEU and Article 354 TFEU is laid out in Section D. The outcome of the analysis indicates that it is not possible to extend the exclusion from voting for the purposes of Article 7(2) TEU to more than one Member State at a time; that is, "the Member State in question." In principle, the general purpose and context of the provision could override this conclusion and lead to the CJEU authorizing the extension of exclusion from voting for the purposes of Article 7(2) TEU. That is why it is essential to scrutinize the two legal solutions proposed by Dimitry Kochenov more closely,[42] which the CJEU is likely to adopt. The analysis detailed in Section E will show that these legal solutions violate some of the general principles of EU law. If the CJEU decides to implement either, this would lead to further distrust and fragmentation in the EU. Finally, the conclusion presented in Section F summarizes these results and suggests a recommended course of action for counteracting the EU rule of law crisis in light of these findings.

B. The *Effet Utile* of Article 7 TEU as a Mere Means of Protecting the Union's Homogeneity?

Let us begin by exploring the origins and development of the traditional understanding of the *effet utile* of Article 7 TEU as a mechanism designed solely to protect the homogeneity of the Union. As it stands today, the provision was reaffirmed in its entirety by the Treaty of Lisbon (2009), but the idea for such a measure was first introduced in the Treaty of Amsterdam (1999). Although the ultimate function of Article 7 TEU could be characterized as punitive and remedial, the importance of the preventive component, which first appeared in the Treaty of Nice (2001), has been recognized as significant.[43]

The necessity for a mechanism to sanction a Member State for violating human rights was not immediately obvious in the foundational years of the European Community when its sole focus was building a single market and promoting economic prosperity.[44] The tides turned when the Treaty of Maastricht (1992) initiated the process of the European Union's gradual transformation into a more constitutionally oriented and politically involved international organization.[45] Furthermore, measures for protecting core EU values were hardly necessary when the Union comprised a close-knit community of Western countries that shared a "perceived commonality of political and legal cultures of the original like-minded members."[46] With the possibility of enlargement of the Union looming on the horizon, the need for such a mechanism became clear and pressing.[47] EU decision-makers were, in all likelihood, cognizant of the challenges associated with prevalent and systemic human rights abuse and undemocratic political practices in post-communist Central European (and later, Eastern European) candidates for membership of the Union.[48]

[42]Kochenov, *supra* note 8, at 2081–82.

[43]This is evident from the use of the emphatic use of "above all." "The ultimate purpose of [Article 7 TEU] is to penalise and remedy a serious and persistent breach of the common values. But first, and above all, [the provision is] intended to prevent such a situation arising by giving the Union the capacity to react as soon as a clear risk of a breach is identified in a Member State." (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, Oct. 15, 2003. 3. https://www.europarl.europa.eu/doceo/document/TA-5-2004-0309_EN.pdf (visited Mar. 7, 2022).

[44]Wojciech Sadurski, *Adding Bite to a Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider*, 16(3) Columbia J. Eur. Law 385 (2010), 386.

[45]Sadurski, *supra* note 47, at 386.

[46]Sadurski, *supra* note 47, at 386.

[47]Sadurski, *supra* note 47, at 386. The enlargement of the Union has been expressly mentioned by the EU Commission as one of the factors "of variable importance" that make a closer examination of the means of protecting fundamental rights and democracy necessary in the context of Article 7 TEU (Communication from the Commission to the Council and the European Parliament, *supra* note 37, at 4).

[48]Sadurski, *supra* note 47, at 386.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

Thus, the idea that EU values must be fortified against a potential assault by several new members seems to have precipitated the introduction of Article 7 TEU. It could easily be surmised that the EU lawmakers designed Article 7(2) TEU to be activated against more than one Member State. Whether it was envisioned that the new Member States would experience a rule of law crisis at the same time or that they would be acting in concert to undermine EU values is less clear. The common denominator between the new members would have been their limited experience of democratic governance. On this basis, it stands to reason that the corresponding procedural requirements were most likely devised so that the offending Member States would be prevented from teaming up to block the rule's implementation. This seems like the most likely route to take if one were to seek appropriate logical and theoretical justification for Kochenov's conclusion on the *effet utile* of Article 7 TEU. In other words, the purpose behind Article 7 TEU is traditionally understood to be the following:

> With the provision, the Union aims to sanction a Member State which can no longer be considered a democratic state that abides by the rule of law or even one which is on the road to becoming a dictatorship ... The sanction mechanism serves as protection of the homogeneity in the EU against one or more Member States' rejecting the fundamental values of the Union.[49]

As protected by Article 2 TEU, homogeneity means "the similarity between particular legal principles not only in relation to the integrated Member States among themselves but also in relation to the Union itself."[50] The homogeneity of the Union needs to be safeguarded against interference from backsliding Member States because it fulfills four functions: "to serve as a foundation for reaching consensus among the Member States for the purposes of enabling integration, to stabilize the legitimacy foundation of the Union, to facilitate the construction of a European identity, and to guarantee the Union functions in good order."[51] The idea of penalizing the odd deviation from the norm seems to define the legislative intent at the core of Article 7 TEU – if the provision is understood as a mechanism for protecting the homogeneity of the Union.

Indeed, the option of imposing sanctions under Article 7(3) TEU is only open to the Union when the unanimity threshold is met – when all Member States but one ("the Member State in question") vote in favor of the determination of a serious and persistent breach in Article 7(2) TEU. In this sense, the unanimity requirement is the true gatekeeper to EU values. As such, it must be the focal point of any discussion on the *effet utile* of Article 7 TEU.

The Reflection Group Report of the 1996 Inter-governmental conference, which paved the way for the Treaty of Amsterdam, sheds light on the discussions in response to the "urgent need" to introduce a mechanism for protecting fundamental rights in the context of "[enhancing] the Union's image as a community of shared values."[52] The report explicitly highlights the measure's relevance "above all in the run-up to enlargement."[53] Although no mention is made of the unanimity procedural requirement in the context of Article 7(2) TEU, the same report documents lengthy discussions on unanimity in decision-making procedures in the area of Common Foreign and Security Policy. These findings offer insight into the rationale behind using the unanimity procedural threshold in EU primary legislation at this particular moment. It is revealed there that unanimity may impede efficiency

[49]Schorkopf, *supra* note 20, at 6–7, paras 11–12. Translation from German into English done by the author of this Article.

[50]Christian Calliess, *Art. 2: Die Werte der Union [The Values of the Union], in EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta: Kommentar* [TEU/TFEU: The Constitutional Law of the European Union with the European Charter of Fundamental Rights] (Christian Calliess and Matthias Ruffert eds., 2011), 32. Translation from German into English done by the author of this Article.

[51]Callies citing Hilf/Schorkopf, *supra* note 53, at 32. Translation from German into English done by the author.

[52]General Secretariat of the Council of the European Union, "1996 Inter-governmental conference Reflection Group Report", March 24, 1996, 44–45, paras 31–33. https://op.europa.eu/en/publication-detail/-/publication/eca47994-fd0b-4c95-8303-ad3544db2ad5, visited on December 8, 2021.

[53]General Secretariat of the Council of the European Union, *supra* note 46, at 44–45, paras 31–33.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

in decision-making at the EU level due to the "the risk of deadlock," which also prompted the discussion of alternative and related decision-making methods.[54] Proponents of unanimity believe that "consensus at the right of veto [is] essential in matters which lie so close to the heart of national sovereignty,"[55] which, arguably, is equally applicable to the protection of EU values under Article 2 TEU. It was made expressly clear that greater efficiency through the procedural requirement of unanimity must not be pursued at the expense of the legitimacy of decision-making at the EU level since, "in some cases it might not be acceptable for a State to be put into a minority," especially when the protection of "a fundamental or vital national interest" is at stake.[56]

This description aligns closely with a Member State's contribution to defining the values "common to the Member States" under Article 2 TEU. It follows that introducing the unanimity requirement in Article 7(2) TEU could be interpreted as safeguarding a Member State's "fundamental or vital national interest." Therefore, unanimity could be conceptualized as a "power-balance stop," which guarantees that a Member State is powerful enough to protect its "fundamental or vital national interest" in cases where it finds itself in a minority of one. Thus, any procedural voting requirement that grossly interferes with a Member State's ability to defend this "fundamental or vital national interest" – such as an interpretation of Article 354 TFEU that allows the extension of the exclusion from voting beyond "the Member State in question" – is certainly going to be regarded as seriously questionable from a legitimacy perspective since it threatens to interfere with this essential power balance.

If one is to correctly implement Article 7 TEU to effectively manage the forces of fragmentation that threaten to tear the Union apart, one needs to understand what holds the Union together. The notion of homogeneity implicit in Article 2 TEU is essential to preserve the constitutional integrity of the Union since it sets the standard of values for its Member States. However, to say that the *effet utile* of Article 7 TEU is to uphold the homogeneity of the Union would be insufficient and thus inaccurate. Homogeneity is not an end in and of itself – it is a prerequisite to building trust among the Member States and between the Union and its Member States. Trust is the foundation of mutual recognition, which is essential to EU integration. If the product of the implementation of Article 7 TEU is distrust, achieving homogeneity would be pointless. Therefore, the actual *effet utile* of Article 7 TEU is to promote trust and mitigate distrust, not simply to ensure homogeneity of values.

C. The *Effet Utile* of Article 7 TEU as a Means of Promoting Trust While Mitigating Distrust Between the Union and its Member States

The following section presents a more detailed overview of the proposed understanding of trust (and distrust) to define the *effet utile* of Article 7 TEU within the framework of the EU rule of law crisis. The theoretical justification for its applicability in this particular context will be put forward. The methodological and theoretical choices made in this study are scrutinized more closely, and some potential weaknesses and vulnerabilities are identified. The central idea is to adopt a critical perspective on the proposed reasoning and pre-emptively counter some of the objections likely to be raised in response to it.

[54]General Secretariat of the Council of the European Union, *supra* note 46, at 78–79, para. 154. Ad hoc arrangements such as unanimity with a positive or constructive abstention, unanimity minus one, super-qualified majority or qualified majority with dispensation of the minority have been given careful consideration, for the purposes of fostering greater political and financial solidarity.

[55]General Secretariat of the Council of the European Union, *supra* note 46, at 78, para. 154.

[56]General Secretariat of the Council of the European Union, *supra* note 46, at 79, para. 155.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

I. Applying the proposed understanding of trust (and distrust) in the present context

The legal uncertainties surrounding the procedural requirements of Article 7(2) TEU, contained in Article 354 TFEU, doubtlessly have a bearing on the trusting relationships that bond the European Union and its Member States. This is true regarding the connection between the Union and the backsliding Member States and between the Union and the rest of its Member States. Indeed, the European Parliament openly admits that "any clear risk of a serious breach by a Member State of the values enshrined in Article 2 of the TEU *does not concern solely the individual Member State* where the risk materializes, but also *has an impact on the other Member States, on the mutual trust between them* and on the very nature of the Union and its citizens' fundamental rights under Union law."[57]

At the same time, promoting and preserving mutual trust in the Area of Freedom, Security and Justice has been identified as a priority of the highest order in implementing Article 7 TEU. The European Parliament Resolution on the Treaty of Amsterdam made it clear that mutual trust, as the foundation of the relationship between the Member States and EU institutions, is vital for realizing the new opportunities created by the Treaty, including the introduction of Article 7 TEU.[58] Since then, the need to safeguard mutual trust in the Area of Freedom, Security and Justice has been a recurring theme in communications between the EU institutions and European Parliament Resolutions on combatting the EU rule of law crisis.[59] However, this Article explores a more complex understanding of trust that includes, but is not limited to, mutual trust in the Area of Freedom, Security and Justice.

To elaborate on this representation of trust, let us view the trusting relationship between the European Union and its Member States from two perspectives. On the one hand, trust is understood as the law-abiding[60] Member States' confidence in the Union's capacity to devise and implement appropriate mechanisms in EU law to sanction backsliding Member States and thus overcome (or at least contain) the rule of law crisis in its territory. On the other hand, trust denotes the confidence that backsliding Member States have in the Union: EU law will be applied fairly and equitably by Union institutions and interpreted coherently and legitimately by the CJEU when it comes to the determination and sanctioning of their potential breach of Article 2 TEU. This twofold understanding of trust is integral to the interstate and interinstitutional relations that bond the Union and its Member States, which is evident in the European Commission's 2019 Communication to the European Parliament, the European Council, and the Council:

> If the rule of law is not properly protected in all Member States, the Union's foundation stone of solidarity, cohesion, and the trust necessary for mutual recognition of national decisions and the functioning of the internal market as a whole, is damaged ... An issue related to the rule of law in one Member State impacts the Union as a whole and so, whilst national checks and balances should always be the first recourse, the Union has a shared stake in resolving rule of law issues wherever they appear. Recent challenges to the rule of law in some

[57]Emphasis added. *European Parliament resolution on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary* (2020/2513(RSP), January 16, 2020, para. B. https://www.europarl.europa.eu/doceo/document/TA-9-2020-0014_EN.pdf

[58]*European Parliament Resolution on the Amsterdam Treaty* (CONF 4007/97 - C4-0538/97) A4-0347/97, para. 7. https://www.europarl.europa.eu/enlargement/positionep/resolutions/191197_en.htm (visited Mar. 7, 2022).

[59]*See most recently*: 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 the Union – A Blueprint for Action, Jul. 17, 2019, COM (2019) 343 final, 1, 5. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0343&from=EN, visited Mar. 7, 2022. *See* European Parliament Resolution of October 7, 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)), OJ C 395, Sept. 29, 2021, 2–13, paras F. and 14. https://www.europarl.europa.eu/doceo/document/TA-9-2020-0251_EN.pdf, visited Mar. 7, 2022.

[60]The term "law-abiding" is applied specifically with reference to a Member State's respect for the values in Article 2 TEU.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

> Member States have triggered concern about the ability of the Union to address such situations. Confidence that shortcomings can be resolved would help to strengthen trust both between Member States and between the Member States and EU institutions.[61]

Thus, it is argued that the *effet utile* behind Article 7 TEU is safeguarding the trusting relationships between the Union and its Member States by promoting trust, while mitigating distrust.

Let us now place these findings in the context of Henry Farrell's theory on the tipping point of power in a trusting relationship, which was explained in detail above. If Article 7(2) TEU is activated against two or more backsliding Member States simultaneously, to effectuate Kochenov's proposed plan of action, the CJEU will end up being caught between a rock and a hard place. If the CJEU authorizes the extension of the exclusion from voting, the outcome would be more distrust and fragmentation in the Union.

If two (or more) Member States are allowed to block the Article 7(2) TEU mechanism, the power balance is tipped in favor of the backsliding Member States, generating further distrust among the rest of the Member States towards them (and towards the Union itself, since it has shown itself powerless to stop them). If the divide between the EU community and the backsliding Member States becomes greater, this will result in further fragmentation within the Union since there is no mechanism in the EU Treaties to allow for the expulsion of an offending Member State.

On the other hand, if the CJEU issues an interpretation that excludes more than one backsliding Member State from voting, the balance of power shifts in favor of the EU. The power asymmetry in a typical case where only one Member State is disqualified from voting is not so great as to produce distrust. However, to deprive a backsliding Member State of the potential support from another Member State simply because it might vote in its favor would be taking this a step too far, past the tipping point of power. This move will doubtlessly alienate the backsliding Member States further and give ammunition to their governments to support their anti-EU propaganda, have a disheartening effect on those members of their population whose personal beliefs are more closely aligned with EU values, and embolden other Member States currently on the brink of backsliding, to follow through with their plans. Finally, it will give the proponents of Brexit a reason for gloating.

II. Adopting a critical perspective on the proposed understanding of trust (and distrust)

That being said, the analysis of the concept of *trust* and its applicability in this context would be incomplete without serious consideration being given to its potential theoretical and methodological vulnerabilities. Perhaps the most obvious and natural choice for a theory of trust that could assist EU lawyers in counteracting the EU rule of law crisis is mutual trust in the Area of Freedom, Security and Justice, since it has been developed and applied by the CJEU. The following shows why the notion of *mutual trust* in its current theoretical state is ill-equipped *on its own* to provide us with the necessary insight to work out an adequate solution to the problem at hand.

Valsamis Mitsilegas contends that it is possible to use the mutual trust paradigm as a stepping stone for advancing an overarching understanding of trust in a Union that engages different levels of trusting relationships – between the Union and its Member States and between the Union and its citizens.[62] It is doubtful that this research agenda could be fulfilled based on the current state of knowledge about mutual trust, illustrated by Michael Schwarz's detailed and comprehensive overview of the CJEU's construction of the notion of *mutual trust* in the Area of Freedom, Security and Justice. Schwarz's work is particularly notable, as it recognizes the relevance and contribution to this problem of theories of trust in the social sciences, much like Russell Hardin's did.

[61]Communication from the Commission to the European Parliament, the European Council and the Council, Further Strengthening the Rule of Law within the Union: State of Play and Possible Next Steps, Brussels, Apr. 3, 2019, COM (2019) 163 final, 2. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN (visited Mar. 7, 2022).

[62]Valsamis Mitsilegas, *Trust*, 21 Ger. Law J. 69 (2020).

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

Having analyzed the CJEU's jurisprudence on the subject of mutual trust, Michael Schwarz concluded that "[t]he Court conceives of trust as a three-part relation, where one Member State (trustor) trusts another Member State (trustee) to observe the pertinent provisions of EU law (object of trust)."[63] Schwarz argues that mutual trust follows the fiduciary logic of mutual recognition, which ultimately constitutes *recognition trust* – "a four-part relation, where one Member State trusts another on behalf of an individual to abide by the pertinent fundamental rights standards."[64] More importantly, Schwarz recognizes that the CJEU equates trust with reliance, suggesting that the trustee's internal justification for compliance is irrelevant and its relationship with the trustor is predicated simply on "the formal reciprocity of *quid pro quo*."[65] Schwarz dismisses Hardin's theory of trust as encapsulated interest as a matter of reliance, not trust, on the grounds that "[i]f the (assumed) motivation for the trustee's commitment makes no difference as [long] as she generates the expected output, then trust cannot be distinguished from mere reliance."[66] In Schwarz's view, recognition trust follows the well-trodden path of legality so closely that the Court's insistence that compliance with Article 2 TEU values justifies the existence of mutual trust "appears tautological."[67]

A significant problem with this account, which prohibits the extended application of the notion of mutual trust thus theorized to the legal problem of the *effet utile* of Article 7 TEU, is that Schwarz misinterprets Hardin's theory of trust as mere reliance. Contrary to Schwarz's claim, the motivation for a trustee's commitment *does* matter in Hardin's theory. In fact, it constitutes the very reason for the trusting expectations being formed – "[t]he typical reason for the expectations is that the relations are ongoing in some important sense."[68] In the case of the EU, the trusting relations were established and continued on an ongoing basis, thus earning the status of thick relationships because EU Member States share the same values as enshrined in Article 2 TEU (as is evident from Article 49 TEU, which sets out the eligibility requirements for Union membership). In addition, thick relationships are not only the source of knowledge for the trustor about the trustee's trustworthiness, but an incentive for them to be trustworthy.[69] The reputational effects in the thick community (of EU Member States) have a "substantial" impact on the trustworthiness among the members of that community: "Reputational effects give me an incentive to take your interests into account even if I do not value my relationship with you merely in its own right. They do this indirectly because I value relationships with others who might react negatively to my violation of your trust."[70] Therefore, the rational assessment that the trustee will prioritize the need to safeguard the thick relationship with the trustor informs their ultimate decision to trust, but without this motivation, the option to trust would not have been on the table in the first place.

Furthermore, according to Schwarz, "*recognition* trust is trust *in* the law, i.e. law as object matter of trust."[71] At the same time, Schwarz maintains that "*recognition* trust is trust *through* law" and elaborates on the effect that "... legal monitoring, controlling and sanctioning

[63]Michael Schwarz, *Let's Talk about Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice*, 24 Eur. Law J. 124 (2018), 130.

[64]Schwarz, *supra* note 85, at 136. Implicit in this formulation is the idea that the interests of the EU Member States and those of their respective citizens are necessarily aligned, since the former owes a fiduciary duty to the latter. This assumption might be enough for the purposes of theorizing the notion of mutual trust, but the trusting relationships between the EU Member States and their respective citizens as well as between the Union and the EU citizens must be examined in greater detail if one wishes to articulate a more global understanding of trust that transcends the boundaries of the Area of Freedom, Security and Justice and deals with the *effet utile* of Article 7 TEU. That is why this problem will be revisited later in this section.

[65]Schwarz, *supra* note 85, at 140.

[66]Schwarz, *supra* note 85, at 132.

[67]Schwarz, *supra* note 85, at 140.

[68]Hardin, *supra* note 36, 14.

[69]Hardin, *supra* note 36, 22.

[70]Hardin, *supra* note 36, 22.

[71]Schwarz, *supra* note 85, at 137.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

mechanisms attest to trust reservations. Equally, they enable the generation or stabilization of justified trust by providing anchor points for assessing trustworthiness and laying the groundwork for building or enhancing future trust."[72] Even if one were to disregard the aforementioned theoretical reservations and endeavor to extend the application of Schwarz's theory to the present scenario, the result would be disappointing. These theoretical observations fail to provide us with practical guidelines and standards on the issue of *precisely how* to apply these mechanisms in practice in the interpretation (or drafting) of EU Treaties and other legal instruments, in order to build trust or mitigate distrust *in/through* law effectively.

Thus, the theoretical foundations of mutual trust seem unable to adequately respond to the research agendas on trust and law in the EU set by Valsamis Mitsilegas and Armin von Bogdandy, which were both discussed earlier in this study. This finding justifies the need to break free from the theoretical confines of mutual trust to search for a more productive and practicable approach to theorizing the trusting relationships on interstate, interorganizational, and interpersonal levels in the Union, such as the one proposed here.

Having clarified why the reliance on the mutual trust paradigm taken on its own would be unhelpful in these circumstances, let us turn to the question of why *this* particular understanding of trust, as opposed to any other alternative available in the social or political sciences, was preferred. When it comes to trust as the expression of a trustor's beliefs about the trustee's intentions (that is, trustworthiness) or the trustor's willingness to accept risk or vulnerability with regard to these intentions, three definitions are commonly cited:

> Trust is a psychological state comprising the intention to accept vulnerability based on positive expectations of the intentions or behavior of another (Rousseau et al., 1998).
>
> Trust is a willingness to be vulnerable to another party based on both the trustor's propensity to trust others in general and on the trustor's perception that the particular trustee is trustworthy (Mayer et al. 1995)
>
> Trust is a belief in, and willingness to act on the basis of, the words, actions and deeds of another (McAllister, 1995)[73]

However, none of these approaches to defining trust is useful for the following reasons. First, these options fail to offer a practicable solution on how to approach the interpretation of the procedural requirements of Article 7(2) TEU to build trust and mitigate distrust. Second, even if there were some valuable takeaways for the present purposes, an assessment based on either of these methods would amount to a monumental research task of collecting empirical evidence in the form of cross-sectional surveys[74] on the current or future experience of (dis)trust of the governments of all 27 EU Member States and their citizens. This research effort would need to be repeatedly made at different points in time to ascertain the trusting or distrusting mindset of the subjects of the survey before and after a certain event (for example, the CJEU ruling on the interpretation of the procedural requirements of Article 7(2) TEU). Clearly, this is a methodological and practical challenge of great magnitude and complexity. More importantly, the usefulness of this approach for distrust prevention is limited by the need to measure trust *post-factum*; that is, after the CJEU has already issued its ruling. If the surveys were conducted prior to the event, based on a hypothetical future scenario, their accuracy and ability to measure trust would still be questionable. In such a case, the governments of EU Member States would be unlikely to commit themselves to a formal political stance before the event has actually happened because such diplomatic choices are typically made only when strictly necessary and in response to a set of

[72]Schwarz, *supra* note 85, at 137–38.

[73]Roy J. Lewicki and Chad Brinsfield, *Measuring Trust Beliefs and Behaviours*, *in* Handbook of Research Methods on Trust (Fergus Lyon, Guido Möllering, and Mark N. K. Saunders eds., 2012), 30–31.

[74]Lewicki and Brinsfield, *supra* note 97, 33.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

current, real, and concrete circumstances, and not in the abstract. Even if a EU citizen is prepared to commit to a response in the survey, they may very well change their mind and take a (dis) trusting stance towards the Union, depending on how their respective national government represents the situation and how that government ends up being treated by the Union and the rest of EU Member States in reality.

By contrast, the proposed understanding of trust is grounded in the rational choice theory, which allows for an assessment of trust whereby "the trustor calculates, or predicts, the trustee's level of trustworthiness."[75] These calculations require knowledge of "the potential gain, the potential loss, and the probability that the trustee is trustworthy."[76] Therefore, assessing the trustee's (the Union's) trustworthiness in these circumstances requires insight into the motivations and objectives of the Union and its institutions. This is publicly accessible information and is readily available to Member States and their citizens (the trustors) and any researchers interested in investigating this phenomenon as it has been extensively recorded in the EU Treaties and the CJEU rulings as well as in the written communications, legal instruments, and reports and other official documents issued by Union institutions.

Rational choice theory has its disadvantages: "it assumes an idealized model of human nature, resorts to reductionism, does not account for culture and identity, and neglects social embeddedness."[77] Nevertheless, it would be inaccurate to say that the rational choice theory presupposes an idealized, perfectly rational world.[78] Rather, rational choice theory aims to paint a more internally consistent and predictable picture of societal relations by enabling the objective assessment of future behavior based on the motivations and state of knowledge of *any* trustee in this position. The alternative presupposes sketching a profile of the trustee with a particular cultural background, identity, and beliefs. This impersonal approach is better suited to characterizing the Union as a trustee since it would allow us to avoid the common mistake of anthropomorphizing an international organization as a trusting actor, which will be discussed next.

This brings us to the necessity of specifying *precisely which type of trusting relationships* are engaged in constructing the proposed trust model. After all, concerns could be rightfully raised that both Hardin and Farrell's theories on trust were originally intended to be primarily applicable in the context of interpersonal relationships. This suggests that their applicability in the context of explaining the dynamics of the relationship between the Union and its Member States or among the Member States could be doubted.

In response to such criticism, it must be stressed that the proposed approach has already gained some support in the academic community of social and political sciences. The theory of trust used here has been successfully applied in international relations to describe the relationship between the Union and its Member States, albeit for exploring EU intelligence sharing.[79] Moreover, a study of international relations by Brugger, Hasenclever, and Kasten recommends the adoption of an "encompassing concept of trust," trust between collective actors (international organizations, states) and non-collective actors (individuals) subject to a handful of strict conditions: the level of analysis must be explicitly defined, the transfer of trust from the individual level to the organizational level must be clearly theorized, and the international organization must not be anthropomorphized, among others. [80] At the same time, social scientists focusing on management

[75]Cook and Santana, *supra* note 35, 255.

[76]Cook and Santana, *supra* note 35, 255.

[77]Cook and Santana citing Wittek, Snijders, and Nee, *supra* note 35, 258.

[78]Cook and Santana, *supra* note 35, 258.

[79]Farrell generally speaks of trusting relationships between individuals, but refers to Hardin's theory of encapsulated trust as the foundation of his claims. In the light of Walsh's successful application of Hardin's theory (Walsh, *supra* note 40), it stands to reason that Farrell's claims could be used to explain the trusting relationships between the Union and its Member States.

[80]Philipp Brugger, Andreas Hasenclever, and Lukas Kasten, *Trust Among International Organizations, in* Palgrave Handbook of Inter-Organizational Relations in World Politics (Joachim A. Koops and Rafael Biermann, eds. 2017), 415, 419.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

and organizational studies[81] endorsed the adoption of a *multilevel* perspective on trust rather than emphasizing the distinction between interorganizational and interpersonal trust. The primary reason for that is that "the isolation of trust at a single level of analysis, ignoring processes and factors from other levels creates non-trivial gaps in our understanding of trust" and impedes our ability to study the relationship between interpersonal and interorganizational trust.[82] Finally, it must be borne in mind that organizational structures may affect individuals' trust and, reciprocally, individuals' trust may impact organizational structures.[83] In light of these findings, the boundaries between interpersonal, interorganizational, and interstate trust are far from being set in stone.

The proposed approach considers the EU's specificities as an international organization, as Brugger, Hasenclever, and Kasten recommend.[84] In the EU legal order, trust must be viewed as a *multilevel* phenomenon for the present analysis since individuals (EU citizens), states (EU Member States), and organizations (EU institutions) are all bonded by Union values. As previously mentioned, trust in the EU is predicated on shared values, whereas distrust in the EU results from a conflict of values. Since the Union is "founded" on said values (Article 2 TEU), this fundamental ideological agenda permeates every level of the entire structure of the Union, without exception. Indeed, traces of that notion are clearly evident in the Treaty on European Union that regulates the EU's relationships on all three levels. Article 2 TEU states EU values are "common to *the Member States*"(emphasis added), and Article 13 TEU guarantees that "[t]he Union shall have an institutional framework which shall aim to promote its values . . . "(emphasis added) notably listing the CJEU among other Union institutions. Further, Article 1 TEU speaks of "an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to *the citizen*" (emphasis added), which confirms the impression that any integrationist policy within the Union, including the protection of its values based on Article 7 TEU, is ultimately intended to benefit EU citizens. Unlike other international organizations that only operate on an intergovernmental level, the Union has a unique supranational setup that ensures a direct and close relationship with the nationals of its Member States through EU citizenship. Thus, the CJEU's interpretation of the procedural requirements of Article 7(2) TEU has a holistic effect on the trusting relationships in the entire Union, so it would be unreasonable and inaccurate to focus solely on one level of its structure taken in isolation.

It could also be argued that it is methodologically imprecise to automatically assume that a Member State and its citizens will necessarily be aligned in their trusting positions in response to a Union's action or decision. However, it must be stressed that the proposed approach focuses solely on the prerequisites for a scenario where *distrust* is generated. In such a case, it is difficult to imagine that any Member State (whether law-abiding or backsliding) and its nationals would react with anything other than distrust towards the Union when they compare themselves to *other* EU Member States (and their respective citizens) that received (perceived) preferential treatment from the Union. Of course, an argument could be made that, should the EU sanction a backsliding Member State, the citizens of that Member State, who are committed to EU values, would rejoice and increase their trust in the Union because they disapprove of the way their national government treats EU values in its policies and the Union has finally taken action to sanction such objectionable conduct. However, if one accepts that the only known legal solutions by which this outcome could be achieved violate some of the general principles of EU law (as is the case with

[81]Ashley Fulmer and Kurt Dirks, *Multilevel trust: A theoretical and practical imperative*, Journal of Trust Research, 8:2, 137, 138. *See* also: Ashley Fulmer and Kurt Dirks, Multilevel trust: A theoretical and practical imperative, *in* Multilevel Trust in Organizations: Theoretical, Analytical, and Empirical Advances (Ashley Fulmer and Kurt Dirks eds., 2020), 1.

[82]Fulmer and Dirks, *supra* note 107.

[83]Fabrice Lumineau and Oliver Schilke, Trust development across levels of analysis: An embedded-agency perspective, *in* Multilevel Trust in Organizations: Theoretical, Analytical, and Empirical Advances (Ashley Fulmer and Kurt Dirks eds., 2020), 103–08.

[84]Brugger, Hasenclever and Kasten, *supra* note 106, 419–20.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

Kochenov's proposed solutions, which are demonstrated below), this would mean that these citizens endorse an approach that undermines the very values the Union is supposed to embody and protect. After all, the true spirit of EU values demands that the Union itself be held to the standard of Article 2 TEU values. If so, such a development would raise concerns about applying the logic of "militant democracy" to the interpretation of Article 7 TEU, which Tom Theuns has articulated well already.[85] However, regardless of the position an EU citizen takes on this issue, the point on the predicted result of the CJEU's interpretation of the procedural requirements of Article 7(2) TEU still stands: further distrust will ensue between EU citizens who find themselves on opposite sides of this debate. It seems that the fault lines of fragmentation, as the product of clashing visions for how the Union should tackle the rule of law crisis, run deep, affecting interpersonal relationships between EU citizens.

Nevertheless, it could be methodologically problematic to speak of trust in terms of imputing intentions to institutions or states[86] (like individuals) because of the inherently impersonal nature of institutions.[87] Indeed, Russell Hardin warned against applying his theory of trust as encapsulated interest to theorize a citizen's trust in government, save for situations where such an approach is supported by proper justification and interpretation.[88] However, Hardin allows for the possibility that *distrust*[89] towards a government could be theorized this way, "Trust and distrust of government and its agents may therefore be asymmetric. We may have knowledge and theory to distrust when it would be hard to have knowledge and theory to trust."[90]

At this point, one must consider the difference between institutional *trust* and institutional *distrust*. For the purposes of this distinction, it is important to note that when it comes to institutional distrust, it *is* possible to attribute motivations and beliefs to institutions (not just to their leaders):

> [T]he question of distrust in an institution boils down to one's belief in the unfairness of the institution – and to the ancillary belief that the unfairness works against one's interests. When an institution faces a crisis of trust, which is at the same time a crisis of legitimacy, this means that segments of the populace in need of recourse to the institution in question suspect it of operating in an unfair manner, a manner that goes against their interests.[91]

From the point of view of a backsliding Member State, a Union that is prepared to impose sanctions against it by extending the exclusion from voting under Article 7(2) TEU by interpreting EU law in a manner of questionable legitimacy and coherence will be perceived as an institution wielding power unfairly and arbitrarily. If this were to happen, the backsliding Member State (and its nationals) would surely distrust the Union more than before. Conversely, if the Union allows non-compliance with the rule of law and EU values by backsliding Member States to continue, law-abiding Member States will feel that a grave injustice has been committed against them (and their nationals) in that the opportunism of the backsliding Member States has been left

[85]Theuns, *supra* note 7.

[86]Brugger, Hasenclever, and Kasten, *supra* note 106, 413.

[87]Edna Ullmann-Margalit, Trust, Distrust, and In Between, *in* Distrust (Russell Hardin ed., 2004), 64, 77. Here Ullmann-Margalit is referring to the idea of *substitutability*: " . . . talk of trusting an institution ought to be construed in terms of our degree of confidence that the institution will continue to pursue its set goals and to achieve them regardless of who staffs the institution."

[88]Hardin, *supra* note 36, 151, 153, 156.

[89]Hardin defines "distrust" thus: "Ordinarily, I am likely to distrust you if I believe your interests strongly conflict with mine." Such a definition of distrust fits in nicely with the idea of the EU rule of law crisis being the product of a conflict of values. However, distrust in this instance is expressed in rather broad terms, so it is unhelpful when it comes to pinpointing the moment in which distrust in a trusting relationship arises. Therefore, Henry Farrell's theory of distrust serves the purposes of the present Article better. Hardin, *supra* note 36, 164.

[90]Hardin, *supra* note 36, 164.

[91]Ullmann-Margalit, *supra* note 114, at 78.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

unsanctioned. Further, the Union will show itself incapable of fulfilling the promise of Article 2 TEU – an essential condition under which the law-abiding Member States (and their nationals) have originally agreed to enter the Union and accept the application for EU membership of the now-backsliding Member States (Article 49 TEU).

Having addressed the main theoretical and methodological vulnerabilities of the proposed understanding of trust, let us now suppose that the CJEU, disregarding the considerations detailed above, finds that the *effet utile* of Article 7 TEU allows for the activation of Article 7(2) TEU against more than one Member State simultaneously. The following shows that an argument could be made that the wording of Article 7(2) TEU, in conjunction with Article 354 TFEU, speaks against such an approach. However, even if the CJEU were to interpret the provisions otherwise, the existing legal solutions proposed by Dimitry Kochenov[92] are inadequate since they contravene general principles of EU law. In other words, each of them will cause further distrust and fragmentation if implemented by the CJEU.

D. The Wording of Article 7 TEU and Article 354 TFEU

Let us begin the analysis with a close reading of the relevant provisions. After addressing Article 7(1) and (2) TEU to "a Member State," the EU legislator repeatedly and consistently refers to "the Member State in question" in each paragraph of Article 7 TEU[93] and twice more in Article 354 TFEU. A literal reading of the provisions seems to dictate that *only one* Member State – "the Member State in question" – is to be excluded from voting in the determination under Article 7(2) TEU.

At this stage, one might wonder if there could be room for ambiguity in the provisions thus formulated. Let us consider the expression "a Member State." The jurisprudence of US courts[94] shows that the indefinite article *a/an* could be interpreted as either "a single item" or "one or more items" as a matter of ambiguity, where a list of components is introduced by the transitional phrase "comprising." However, the provision at hand is not constructed or used in that way. Moreover, the provisions refer to "the Member State in question." The fixed phrase "the [noun] in question" is generally "used to indicate the specific thing that is being discussed or referred to."[95] Based on its usage in the TFEU, the fixed phrase "the [noun] in question" allows for both singular and plural forms of a (countable or uncountable) noun,[96] but the EU legislator opted for a singular form of a countable noun (that is, "the Member State"). This reinforces the impression that "the Member State in question" refers to a single Member State, thus resolving the ambiguity. Therefore, it is fair to say that any claim based on this particular example of ambiguity will be

[92]Kochenov, *supra* note 8, at 2081–82.

[93]In Article 7 TEU, the expression "the Member State in question" appears once in 7(1), once in 7(2) and twice in 7(3), with the expression "that Member State" appears once in 7(3).

[94]In the US case of *Baldwin Graphic Systems, Inc. v Siebert, Inc.,* 512 F.3d 1338, 1342 (Fed. Cir. 2008), a Federal Circuit court based its judgment on a linguistic rule, which allowed for an ambiguous reading of the indefinite Article *a/an* in open-ended claims containing the transitional phrase "comprising". In such a case, the indefinite Article *a/an* could be interpreted as either "a single item" or "one or more items". The court insisted that this is to be regarded as a general rule, and not merely a presumption or a convention, and that exceptions to this rule only arise by virtue of the language of the claims, the specification or the prosecution history. Moreover, an earlier case of *KCJ Corp. v Kinetic Concepts, Inc.,* 223 F. 3d 1351, 1356 (Fed. Cir. 2000) applied the same linguistic rule by explicitly referring to it as "ambiguity".

[95]Definition of 'in question', Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/in%20question (visited Nov. 29, 2021).

[96]This is evident from different variations of the phrase found in the Treaty on the Functioning of the European Union (TFEU): e.g. uncountable nouns: "production" (Article 43(4)(a) TFEU), "aid" (Article 108(2) TFEU), "distortion" (Articles 116 and 117 TFEU); "areas of cooperation" (Article 5(1) TFEU), "harmonisation measures" (Article 83(2) TFEU), "provisions" (Article 203 TFEU), "financial year" (Article 287(2) TFEU), "specific measures" (Article 349 TFEU), "measures" (Article 352 TFEU) etc. Countable nouns (singular): "investment" (Article 19 TFEU), "agreement" (Article 155(2) TFEU), "act" (Article 294(13) TFEU), "area" (Article 296 TFEU), "contract" (Article 340 TFEU), "draft" (Article 6 TFEU), and the "Union act" (Protocol No. 25 TFEU). The noun "goods" (Article 95 TFEU) also belongs to this list as a plural-only countable noun.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

tenuous at best (the possibility that ambiguity might be established by some other useful linguistic rule notwithstanding).

Even if an ambiguous argument were to stand, it would still be hard to justify an extension of the exclusion from voting under Article 354 TFEU on this basis. An interpretation of Article 354 TFEU changes the procedural requirements in relation to Article 7(2) TEU, a determination that leads to the imposition of sanctions under Article 7(3) TEU. This approach would lead to a violation of the general principles of EU law, which postulate that sanctions or penalties must be worded as clearly as possible to avoid ambiguity.[97] It follows that any potential ambiguity is likely to be interpreted in favor of the offending party, the backsliding Member State(s), thus prohibiting an extended exclusion from voting.

Furthermore, the drafting choices made elsewhere in the TEU and the TFEU suggest various options in the EU legislator's vocabulary to emphasize the plurality of parties concerned explicitly. The formulation "one or more" [noun in plural] appears time and again throughout the TFEU, most frequently in collocation with "Member States," "third countries," or "third States."[98] A similar pattern of usage is observable in the TEU.[99] Thus, there is an alternative to the wording used in Article 354 TFEU, which indicates the plurality of the parties concerned and is commonly used in the EU Treaties. Had the EU legislator intended to extend the exclusion from voting under Article 345 TFEU to more than one Member State, they would have had a variety of linguistic options at their disposal to do so.

Notably, one of the instances ("one or more Member States") is found in the ordinary revision procedure under Article 48(5) TEU, which regulates the amendment of EU Treaties. This finding reinforces the impression that the EU legislator's choice of wording in Article 354 TFEU is no accident but is a deliberate choice available for drafting provisions of the utmost importance for shaping the constitutional makeup of the EU, which includes the values listed in Article 2 TEU. In other words, the EU legislator opted for the formulation "the Member State in question" in Article 345 TFEU, even though the alternative ("one or more Member States") was a legitimate possibility in a comparable context. The contrast between the two options highlights the idea that the expression "the Member State in question" indicates a single Member State.

Let us now try a different strategy in interpreting the wording of Article 7(2) TEU and Article 354 TFEU, namely a comparison with a TFEU provision describing a legal mechanism similar to Article 7 TEU – Article 121(4) TFEU. There is sufficient common ground between the two to justify such a comparison since they both aim to protect the fundamental tenets of the Union – the Eurozone (Article 121(4) TFEU) and EU values (Article 7 TEU). Indeed, these mechanisms share a number of similarities,[100] but there are some notable differences.[101] However, it is the similar way in which the provisions are structured in linguistic terms that is of particular interest here.

[97]Case T-279/02, *Degussa AG v Commission of the European Communities*, E.C.R. 2006 II-00897, para. 66.

[98]For example: "one or more Member States" (Articles 78(3) and Article 91 TFEU; Article 3 of Protocol No 31 TFEU), "one or more third States" (Protocol No 20 TFEU), "one or more third countries" (Articles 65, 207, 215–17 TFEU), "one or more non-member States" (Article 23 TFEU), "one or more countries becoming Member States" (Articles 43 and 48 TFEU).

[99]For example: "one or more non-Member States" (Article 23 TEU), "one or more Member States" (Article 43 TEU, Article 3(1) of Protocol No 31 TEU), "one or more States or international organisations" (Article 37 TEU), "one or more third States" (Article 1 of Protocol No 20 TEU), "one or more countries becoming Member States" (Annex, Article 48 TEU).

[100]Both provisions are initially triggered at the mere presence of a risk (or a threat) of undermining the values shared by the EU community (Article 7 TEU) or the economic policies of the Union as a whole (Article 121 TFEU). Further, both mechanisms are designed to open up a channel of communication with the Member State, either by means of issuing a warning by the Commission (Article 121(4) TFEU) or by means of giving them an opportunity to present their position in front of the Council before a determination is made (Article 7(1) TEU). Both mechanisms may result in recommendations issued by the Council, with Article 121(4) TFEU allowing for the possibility that the recommendations may be made public by the Council on a proposal from the Commission. Thus, each of these mechanisms contain preventive measures that emphasize monitoring, dialogue, and continuous assessment. These features of Article 121(4) TFEU are made evident in Article 121(3) TFEU.

[101]There is a clear and distinct separation in Article 7 TEU between the stages preventing the breach from occurring, establishing the breach, and sanctioning the breach. Article 121 TFEU merges the first two stages and makes no arrangements

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

For voting to activate Article 121(4) TFEU, the member of the Council representing "the Member State concerned" is excluded. The fixed phrase "the Member State concerned" is sufficiently close to "the Member State in question"[102] to justify comparing these provisions. Furthermore, the procedural requirement regarding voting for Article 121(4) TFEU refers to "a qualified majority of the other members of the Council" as the relevant voting threshold. The use of the determiner "the other" implies that the provision is referring to *the rest* of the Council, meaning no other member of the Council is excluded from the voting under Article 121(4) TFEU but the offending Member State ("the Member State concerned").[103] Based on all the similarities between Article 7 TEU, in conjunction with Article 354 TFEU and Article 121(4) TFEU, it is safe to conclude that Article 354 TFEU is likely to be interpreted as applying to only one Member State at a time, without the possibility of extending the exclusion from voting to any other Member State currently undergoing scrutiny under the same provision.

Ultimately, a detailed analysis of the wording of Article 354 TFEU suggests that exclusion from voting for the purposes of Article 7(2) TEU cannot be extended to more than one Member State at a time; that is, "the Member State in question." Nevertheless, the conclusions drawn based on this evidence could be overridden by the general purpose and context of the provision, which could result in the CJEU authorizing an extension of the exclusion from voting for the purposes of Article 7(2) TEU in principle. Now, let us consider the two legal solutions proposed by Dimitry Kochenov, which the CJEU will likely adopt to achieve this goal.

E. The Existing Legal Solutions

The legal solutions proposed by Dimitry Kochenov[104] – "requiring the application of Article 7(2) TEU to several backsliding [Member States] already subject to Article 7(1) TEU procedure simultaneously" (*Simultaneous consideration*) and "the default exclusion from the vote in the context of Article 7 TEU of any state subjected to Article 7(1) TEU in the context of any proceedings arising under Article 7 TEU without necessarily making the consideration of the value situation in several [Member States] simultaneous" (*Default exclusion*) – appear, at first

for concrete sanctions in the Treaty text but has given birth to a set of six legal instruments for corrective and enforcement measures against the Member State in question. These six legal instruments are also known as "six pack" and include: Regulation (EC) No 1467/97, Regulation (EU) No 1176/2011, Regulation (EC) No 1466/97, Regulation (EU) No 1174/2011, Regulation (EU) No 1173/2011, Directive 2011/85/EU. *See* Leo Flynn, "Article 121 TFEU", *in* The EU Treaties and the Charter of Fundamental Rights: A Commentary, 1277, 1277–78 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin eds., 2019). Furthermore, Article 121 TFEU is not designed to respond to a breach but to a mere *inconsistency* found between a Member State's economic policy and the broad guidelines adopted by the Union in the field at hand. This milder language foreshadows a much more lenient approach to defining a violation and sanctioning a Member State's misconduct. At most, under Article 121(4) TFEU, the Member State in question will simply be called out for their unacceptable behavior in recommendations made by the Council publicly. Article 121(4) TFEU offers no further remedies, which suggests it essentially lacks a real sanction-imposing function. It is no surprise then that the voting threshold (qualified majority voting in the Council) is much lower than that for the activation of Article 7(2) TFEU (unanimity in the European Council).

[102]This conclusion is supported by a brief multilingual analysis of the relevant expressions in different language versions of Article 121(4) TFEU and Article 354 TFEU. The German and Danish versions use the same term in both cases. The Bulgarian version uses slightly different expressions with the same meaning (which translate in English to "this" and "the corresponding"). In a manner similar to the English version, the French version uses two different terms, but this effect is offset by the fact that two other Romantic languages – Spanish and Italian – use the same term in both cases. Therefore, it is safe to conclude that the phrases "the Member State concerned" (Article 121(4) TFEU) and "the Member State in question" (Article 354 TFEU) are sufficiently close in meaning as to justify the comparison between these provisions.

[103]This conclusion is supported by a multilingual analysis of the relevant expression ("the other members of the Council") in different language versions of Article 121(4) TFEU. The meaning "the rest, the other, the remaining" is consistent across the board: e.g. "die übrige Mitglieder des Rates" (German), „de øvrige medlemmer af Rådet" (Danish), „останалите членове на Съвета" (Bulgarian), "los demás miembros del Consejo" (Spanish), "altri membri del Consiglio" (Italian), "des autres membres du Conseil" (French).

[104]Kochenov, *supra* note 8, at 2081–82.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

glance, to offer two acceptable options that would enable the CJEU to authorize the extension from the exclusion from voting beyond the "Member State in question" for determination under Article 7(2) TEU. However, upon closer scrutiny, it will be shown that both of these solutions contravene some of the general principles of EU law, which means that the legitimacy of the CJEU's decision-making will be severely undermined should the Court adopt either of these approaches. Since the result will be further distrust and fragmentation in the Union, such an unacceptable outcome must be avoided.

I. Simultaneous Consideration

In the *Simultaneous Consideration* scenario, the scope of the exclusion applicable to "the Member State in question" is voting, not only in respect of their own determination but also in respect of the determination of any other Member State, which is subjected to scrutiny under Article 7(2) TEU simultaneously. For this solution to work, Article 354 TFEU must authorize an extension of the exclusion not only to the present determination of the breach potentially committed by "the Member State in question" but also to its voting rights with regard to any other parallel determinations under Article 7(2) TEU happening at the same time to a fellow backsliding Member State.

The problem is that such an interpretation would violate the principle of legal certainty and equality between Member States enshrined in Article 4(2) TEU: "The Union shall respect the equality of Member States before the Treaties . . . " The principle of equality between the members of a political and legal entity is integral to the constitutional makeup of federal states and that of international organizations governed by public international law.[105] The equality between EU Member States is a cornerstone of integration and supplements the prohibition against discrimination on grounds of nationality under Article 18 TFEU.[106] Furthermore, the equality principle enshrined in Article 4(2) TEU is integral to the primacy of EU law since it guarantees the uniform application of EU law in every Member State.[107] The drafting history of Article 4(2) TEU demonstrates that, above all, the provision was designed to guarantee the smaller Member State's ability to protect their interests in the context of the unanimity requirement as part of the voting procedure in the Council.[108] However, it must be noted that the Treaty seems to impose no strict obligation to ensure equality; it directs the Union constitutional organs to apply EU law in a non-discriminatory manner.[109]

The *Simultaneous Consideration* solution also offends the principle of equal treatment and non-discrimination in EU law, which states that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[110] Indeed, "the Member State in question" would be treated less favorably

[105]Claudio Franzius, *Artikel 4 EUV: Federal Principles [Föderative Grundsätze], in Frankfurter Kommentar zu EUV, GRC und AEUV* and TFEU [Frankfurt Commentary on the TEU, CFREU] (Matthias Pechstein, Carsten Nowak & Ulrich Häde eds., 2017), para. 21, 132; Stephan Schill & Christoph Krenn, *Art. 4 EUV* (2018), in *European Union Law. Commentary I [Das Recht Der Europäischen Union. Kommentar I].* (Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2021), para. 8, 6.

[106]Franzius, *supra* note 132, at 132, para. 20.

[107]Franzius, *supra* note 132, at 132, para. 20. *See also*: Federico Fabbrini, *States' Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination* 17 *Camb. Year. Eur. Leg. Stud.* (2015), 3; Koen Lenaerts, *No Member State is More Equal than Others*, VerfBlog (Oct. 8, 2020) https://verfassungsblog.de/no-member-state-is-more-equal-than-others/; Justin Lindeboom, *Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the* PSPP *Judgment*, 21 *Ger. Law J.* (2020), 1032.

[108]Franzius, *supra* note 132, at 132, para. 20. Franzius specifically refers to the discussions on Articles I–5, para. 1 Treaty Establishing a Constitution for Europe at the Intergovernmental Conference 2004.

[109]Franzius, *supra* note 132, para. 21. Franzius distinguishes between "eine strikte Gleichheit der Mitgliedstaaten" and "ein Achtungsgebot," the latter lacking an exact equivalent in English, but being closely aligned with „principle" or a "precept".

[110]Joined cases C-267/88 to C-285/88, *Gustave Wuidart and others v Laiterie coopérative eupenoise société coopérative and others*, E.C.R. 1990 I-00435, para. 13; Case C-280/93, *Federal Republic of Germany v Council of the European Union*, E.C.R. 1994 I-04973, para. 67; Joined cases 201 and 202/85, *Marthe Klensch and others v Secrétaire d'État à l'Agriculture et à la Viticulture*, E.C.R. 1986 -03477, para. 9.

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

than a Member State subjected to a determination under Article 7(2) TEU alone (that is, at a time other than the time another backsliding Member State undergoes the determination process).

The difference between these comparable situations is significant since "the Member State in question" would suffer a double deprivation of voting rights – once as a Member State for whom votes are cast and then again as a Member State that is entitled to cast a vote for a fellow backsliding Member State. On top of that, its chances of prevailing in a unanimous vote are crucially reduced in comparison to the Member State undergoing scrutiny alone, since its most likely potential ally – the other backsliding Member State – will be excluded from voting under Article 7 TEU, which was the whole point of implementing this solution in the first place. Indeed, the cumulative effect of these limitations on the backsliding Member State's rights is significant, which means it will be exceedingly difficult for the Court to justify such unequal treatment.

II. Default Exclusion

In the *Default Exclusion* scenario, "the Member State in question" is automatically deprived of the right to vote in respect of another Member State's potential breach under Article 7(2) TEU. This interpretation is challenging to defend since the motivation behind the exclusion is a specific predicted outcome of a Member State exercising its right to vote under Article 7 TEU. A backsliding Member State would be excluded from voting to prevent them from voting for another backsliding Member State. Although admittedly slim, the possibility still exists that this backsliding Member State might vote differently, so its voting rights must be respected.

Furthermore, the legal basis for the default exclusion could only be the determination already made in respect of the backsliding Member States under Article 7(1) TEU – that is, there is a "clear risk of a serious breach" of the values in Article 2 TEU. However, the problem is that Article 7(1) TEU is a mere preventive mechanism. It was designed to invite dialogue and produce recommendations, not produce penalties of any kind in and of itself. Such an interpretation would also offend the principle of legal certainty and the presumption against retroactivity since the votes cast in relation to the determination under Article 7(1) were not cast in the full knowledge that the determination would bring about grave consequences for the Member State under scrutiny, of which the Treaty makes no such mention.

F. Conclusion

Ultimately, trust theory advises against excluding more than one backsliding Member State from voting under Article 354 TFEU in a hypothetical situation where Article 7(2) is activated against several Member States simultaneously, as this is bound to produce further distrust between them and the rest of the EU community. This result would be incompatible with a trust-based understanding of the *effet utile* of Article 7 TEU. Such an interpretation of Article 354 TFEU would also be problematic in legal terms since both proposed solutions would offend some of the key general principles of EU law, thus threatening to undermine the legitimacy and coherence of the CJEU's decision-making.

While this study could be used as an example that "any approach requiring unanimity is bound to fail once one or more Member States have gone rogue,"[111] one must remain hopeful that the EU legal community could successfully counteract the EU rule of law crisis by placing its faith in alternative legal mechanisms. These could be the Conditionality Regulation (Regulation 2020/2092)[112] or infringement proceedings with regard to single or systemic

[111]Kim Lane Scheppele and R. Daniel Kelemen, *Defending Democracy in EU Member States: Beyond Article 7 TEU*, *in* EU Law in Populist Times: Crises and Prospects (Francesca Bignami, ed., 2020), 416.

[112]See *generally*, Gábor Halmai, *The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements against Illiberal EU Member States*, EUI Working Article LAW, 2018/06; Michael Blauberger & Vera van

https://doi.org/10.1017/glj.2023.118 Published online by Cambridge University Press

violations.[113] The possibility of finding a more effective legal solution to prevent two or more backsliding Member States from blocking Article 7(2) TEU is still open. It certainly remains true that, as Kim Lane Scheppele and R. Daniel Kelemen observe, "EU leaders have a rich arsenal of tools at their disposal with which to defend democracy; the problem to date has been that they have lacked the political will to act."[114] However, the present study demonstrates that, even where there is (or very likely that there will be) a political will to act, the available legal tools must be wielded with full respect for EU values and the legal principles upon which the EU legal order was founded. If the EU community of lawyers, politicians, and officials fail in this duty, the Union will be exposed to the dangers of *even further* distrust affecting trusting relationships on all levels – among EU Member States, between EU Member States and the Union, among the EU citizens, and between the EU citizens and the Union. The result will be severe fragmentation with far-reaching and unpredictable consequences. This outcome must be avoided at all costs, regardless of the preferred legal method employed to achieve this goal. Until then, where there is more than one bad apple, the Article 7 TEU mechanism must only be used to save the entire barrel *one bad apple at a time*.

Acknowledgments. I completed the research, writing, and revision process for this Article while working as a Postdoc at the Department of Public Law at the Max Planck Institute for the Study of Crime, Security and Law in Freiburg im Breisgau, Germany. I would like to thank Prof Dr Ralf Poscher for his support and helpful advice and Prof Dr Armin von Bogdandy for his valuable and insightful comments. I am also grateful for the thought-provoking comments I received when presenting earlier versions of this Article at the "*Geschichte-Methode-Dogmatik des Öffentlichen Rechts*" conference, organized by the Department of Public Law of the Max Planck Institute for the Study of Crime, Security, and Law in Freiburg im Breisgau in November 2021, as well as at a *Werkstattgespräch* at the Max Planck Institute for the Study of Crime, Security and Law in April 2022. Furthermore, I am grateful to Prof. Dr. Christoph Burchard and the team of researchers of the Research Initiative "ConTrust: Trust in Conflict - Political Life under Conditions of Uncertainty" for the useful feedback I received when I presented an earlier version of this Article at the "Criminal Justice in light of Trust in/by Conflict" workshop at the Goethe University Frankfurt am Main in June 2022 in Germany. I am grateful for the useful and detailed comments by the anonymous reviewer at the German Law Journal, which helped me improve my work. I am also thankful to the editorial and proofreading team at German Law Journal for their professional assistance. Finally, I would like to thank the School of Law at the University of Nottingham, the United Kingdom, where I am currently employed as a Teaching Associate. All errors remain my own.

Competing Interests. None.

Declaration. My contribution is not under consideration elsewhere.

Funding Statement. No funding to declare. I conducted this research during my employment as a Postdoc at the Department of Public Law at the Max Planck Institute for the Study of Crime, Security and Law, Freiburg im Breisgau, Germany, as part of my postdoctoral research project "Intelligence Information Sharing: The Relevance of Trust for the EU Rule of Law Crisis".

Hüllen, *Conditionality of EU Funds: an Instrument to Enforce EU Fundamental Values?*, 43(1) Journal of European Integration 1 (2021).

[113]See *generally*, Matthias Schmidt and Piotr Bogdanowicz, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU*, 55 CMLR 1061 (2018); Kim Lane Scheppele, *Enforcing the Basic Principles of EU Law Through Systemic Infringement Actions*, *in* Reinforcing Rule of Law Oversight in the European Union (Carlos Closa and Dimitry Kochenov, eds., 2016), 105.

[114]Scheppele and Kelemen, *supra* note 138, 415–16.

Cite this article: Kartalova S (2024). Trust and the Procedural Requirements of Article 7(2) TEU: When More than One Bad Apple Spoils the Barrel. *German Law Journal* **25**, 128–151. https://doi.org/10.1017/glj.2023.118