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The Commission's proposed institutional safeguard clause in future enlargement and its compatibility with Articles 7 and 4(2) TEU

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On 6 October 2026, the European Commission published its Communication 'Preparing for a wider Union', presenting its recommendations to facilitate the EU's enlargement. Post-accession, the Commission Communication foresees several safeguard clauses, allowing the Union to address any forms of backsliding in the newest acceded members and to safeguard the integrity of the EU. Next to the sectoral safeguard clauses developed throughout previous enlargement rounds relating to serious economic difficulties, the internal market and the area of justice and home affairs (see e.g. here), the Communication also introduces an 'institutional safeguard clause'.

In essence, the safeguard clause would apply for 15 years from the moment of accession and is intended to address serious breaches of the values in Article 2 TEU or of the principle of sincere cooperation in Article 4(3) TEU. Actions taken under the safeguard clause in relation to such serious breaches must reflect their nature, gravity and effects, and could amount to the suspension of voting rights in the Council. Any such measures would follow from a proposal by the Commission or a reasoned request by a (thus far undefined) number of Member States, and must be considered adopted unless rejected by the Council with a qualified majority within a certain timeframe. However laudable the rationale behind the safeguard clause may be, its introduction raises important questions as to its compatibility with Article 7 TEU, the rules laid down in Article 49 TEU, and the principle of equality of Member States before the Treaties enshrined in Article 4(2) TEU.

The institutional safeguard clause and Article 7 TEU: Different but the same?

The Commission insists in its Communication that '[t]he safeguard would complement, not replace, Article 7 TEU' and that 'Article 7 would retain its central role in protecting the Union's values.' While Article 7's 'central role' in the enforcement of EU values is rather questionable in the first place, the institutional safeguard clause is essentially co-extensive with Article 7 TEU – the principal difference lying in the decision-making procedure. Given the difficulties surrounding the application of Article 7 TEU, precisely due to its cumbersome decision-making rules, there is a clear benefit in the greater ease of activating the safeguard clause. Whereas Article 7 TEU requires unanimity in the European Council to establish a serious and persistent breach of the values in Article 2 TEU first and a qualified majority to adopt any subsequent measures, the safeguard clause foresees reversed qualified majority voting: a proposal by the Commission or by a number of Member States is considered adopted unless reversed by a qualified majority in the Council.

Most importantly, the Commission's Communication raises the question of how the introduction of the institutional safeguard clause may be reconciled with the CJEU's finding regarding the Conditionality Regulation in Cases C-156/21 and C-157/21 that,

> *'the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision' (see Hungary v Parliament and Council, para 167; Poland v Parliament and Council, para 206).*

It is thus appropriate to make the comparison between Article 7 TEU and the institutional safeguard clause along the same four criteria used by the CJEU in Cases C-156/21 and C-157/21, i.e. the objectives pursued, the scope of the mechanisms, the measures available for adoption and the conditions tied to their variation or revocation.

The first criterion to be assessed is the objective pursued by the measures. Article 7 TEU is intended to 'penalise serious and persistent breaches of the values contained in Article 2 TEU, in particular with a view to compelling the Member State concerned to put an end to those breaches' (paras 170 and 209, respectively). According to the Commission, the safeguard

clause ‘would address serious breaches of Article 2 TEU values’ and measures taken under the safeguard clause should be amended or lifted when the issues justifying them have been remedied by the relevant Member State. Hence, both mechanisms aim to tackle serious breaches of the values in Article 2 TEU and to bring, through the adoption of appropriate measures, the relevant practices to an end.

Secondly, the scope of the two mechanisms must be compared. Unlike the Conditionality Regulation at issue in the CJEU’s judgments in C-156/21 and C-157/21, which is limited to the value of the rule of law, both Article 7 TEU and the institutional safeguard clause cover all values enumerated in Article 2 TEU. The Conditionality Regulation is moreover not intended to address all breaches of the rule of law, but only those with implications for the Union budget. By contrast, neither Article 7 TEU nor the institutional safeguard clause include a similar limitation, and both may be activated in regard to *all* serious breaches of *any* value in Article 2 TEU.

Thirdly, turning to the measures available for adoption, the Conditionality Regulation only allows for the adoption of certain budgetary measures, such as the suspension of funds. In comparison, triggering Article 7 TEU may relate to any of the rights a Member State derives from the Treaties, including the suspension of its voting rights in the Council. Similarly, the Commission’s Communication provides that the measures adopted on the basis of the institutional safeguard clause must reflect the nature, gravity and effects of the relevant breaches of the values, and ‘could’ extend to the suspension of voting rights in the Council. Suspension of voting rights is thus one out of various options, reflecting a similar spectrum of potential measures as in Article 7 TEU.

Finally, under the Conditionality Regulation, any measures adopted may be amended or revoked in case the rule of law issues cease to have an effect on the EU budget, even if the relevant rule of law breaches continue to persist. Conversely, under both Article 7 TEU and the institutional safeguard clause, variation or revocation is only possible when the underlying violations of one or more of the values in Article 2 TEU are remedied.

Based on the foregoing comparison, it must be concluded that Article 7 TEU and the institutional safeguard clause have the same subject matter, pursue the same objective and allow for the adoption of identical measures, while at the same time providing different

procedural conditions for the adoption of measures. At first sight, this seems difficult to reconcile with the above-cited CJEU statement in Cases C-156/21 and C-157/21 that the establishment of a parallel mechanism would infringe Article 7 TEU.

Yet, different from the Conditionality Regulation, the institutional safeguard clause is not an act of secondary legislation adopted by the EU legislator but would form an integral part of the accession treaties concluded with the acceding countries. Accession treaties form part of primary EU law (see e.g. Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia 'Forumul Judecătorilor din România'*, para 149), and may make adjustments to the EU Treaties pursuant to Article 49(2) TEU. Arguably, insofar as Article 49(2) TEU provides that 'the adjustments to the Treaties on which the Union is founded, *which such admission entails*' shall be laid down in an accession treaty, such adjustments are limited to those essential for facilitating the enlargement in question and may not be used for other treaty amendments that may be desirable but not inherently linked to the specific enlargement of the Union (as also suggested in a Franco-German report on EU institutional reform, p. 31). For that purpose, the revision procedures in Article 48 TEU should be employed.

The crucial question is thus: does the institutional safeguard clause tackle issues specifically relating to enlargement, or does it, in practice, merely aim to work around the inherent limitations of Article 7 TEU – limitations that are relevant for *all* Member States and not only the newest acceded countries, as the recent past has demonstrated? It is rather telling of the circumventive nature of the safeguard clause that in its Communication, the Commission highlighted the safeguard clause as 'additional' when addressing the inherent limitations of Article 7 TEU and arguing that '[a] more effective handling of Article 7 procedures, including possible timeframes, could be explored with the Parliament and the Council.'

Variable geometry in respect of the values in Article 2 TEU?

The institutional safeguard clause raises another important question: how may such differentiation between 'old' and 'new' Member States be reconciled with the equality of the Member States before the Treaties, protected by Article 4(2) TEU? This is important, particularly since the past has taught us that some of the current Member States are not textbook examples of proper compliance with the Article 2 TEU values either. While the same

difficulties in sanctioning current Member States will likely remain under Article 7 TEU (due to its cumbersome voting rules), newly acceded countries may be sanctioned more easily in light of the relaxed procedural rules in the institutional safeguard clause, creating at least the impression of double standards.

The CJEU has held before that acts of accession may provide initial differences in the law applicable to acceding Member States on the basis of transitional arrangements, yet 'it would be contrary to the principle of the equality of the Member States before Community law to accept that such inequalities could continue indefinitely' (Case C-231/78 *Commission v United Kingdom*, para 17). In this regard, the institutional safeguard clause proposed by the Commission would only remain in place for 15 years. However, as the CJEU observed in the aforementioned judgment, 'the provisions of the Act of Accession must be interpreted' – and designed, arguably, 'having regard to the foundations and the system of the Community, as established by the Treaty' (para 12). As has been argued by Spieker, there might therefore be a core of fundamental principles – forming part of the EU's very foundations – that may not be altered through a mere accession treaty. Interestingly, in respect of those foundations, the Court held in *Poland v Commission* (C-335/09 P and C-336/09 P) that the European Union is based on the principles stemming from the rule of law, which

> *'are the very foundation of that union and compliance with them means, as is now provided for expressly in Article 4(2) EU, that the new Member States are to be treated on the basis of equality with the old Member States.' (para 49 and 37, respectively, emphases added)*

Accordingly, the Court decided, for EU acts adopted between the signing of the act of accession and the accession itself, the time limit for the acceding Member State to bring an action under Article 263 TFEU begins to run only from the moment of that Member State's accession, even if that time limit would otherwise have expired. If not, by contrast to the old Member States, the new Member States would be unable to bring proceedings against acts that were not part of the *acquis* at the time of signing the accession treaty but will nonetheless bind them upon their accession. Whereas *Commission v United Kingdom* involved transitional arrangements and differences in treatment in a substantive field of EU law (i.e. the provisions on quantitative restrictions), *Poland v Commission* concerned the enforcement of EU law and that, in respect of

their procedural and sovereign prerogatives, both old and new Member States must be treated equally, however unsatisfactory that distinction may be (see, in this vein, Díez Sánchez). That is of course not the case if one group of Member States may be sanctioned more easily for not respecting the values in Article 2 TEU than another, particularly if this may ultimately lead to the suspension of voting rights in the Council.

In essence, this somehow reflects the reality of the EU system. Whereas the EU Treaties foresee in possibilities for a multi-speed Union, for instance through the use of enhanced cooperation (Article 20 TEU), the rules of EU law binding the Member States concerned must still be interpreted, applied and enforced uniformly throughout the (participating) Member States. And this, as the Court has emphasised before, is necessary to ensure respect for the equality of Member States before the Treaties and to ensure the equal treatment of EU citizens (see e.g. Case C-448/23 *Commission v Poland*, paras 168 and 173). While those observations were made in relation to the enforcement of EU law at Member State level, they equally extend to enforcement at the EU level. That is all the more so, insofar as no variable geometry is permitted when it concerns respect for the values in Article 2 TEU. After all, the principle of mutual trust underpinning EU law is based 'on the commitment of *each* Member State to comply with its obligations under EU law and to continue to comply (…) with the values contained in Article 2 TEU' (Case C-156/21 *Hungary v Parliament and Council*, para 129, emphasis added), and Article 2 TEU contains values 'which are given concrete expression in principles containing legally binding obligations for the Member States' (*ibid.*, para 232). Formalising differences in the ease of enforcing those values through the introduction of a mechanism parallel to the one in Article 7 TEU, applicable only to newly acceding countries, sits uneasily with that premise.

Admittedly, previous accession treaties have also introduced country-specific safeguard measures, such as the Cooperation and Verification Mechanism introduced to guarantee further progress on judicial reform, anti-corruption and organised crime in Romania and Bulgaria after their accession. Yet, creating new mechanisms is one thing, creating new mechanisms with essentially the same subject matter, purpose and tools as an already existing one (i.e. the one in Article 7 TEU), primarily to circumvent the ineffectiveness of the latter, is another. This is particularly true, where this creates two parallel sanctioning mechanisms and

may result in two-tiered enforcement of the values in Article 2 TEU. In this respect, it must be recalled that the CJEU upheld the validity of the Conditionality Regulation by finding, inter alia, that it did not breach the principle of the equality of the Member States *precisely* because the Commission is required to apply the relevant substantive and procedural conditions 'equally with regard to every Member State' (Case C-156/21 *Hungary v Parliament and Council*, paras 316-317).

Long live the institutional safeguard clause?

Despite the foregoing legal objections to the inclusion of the institutional safeguard clause, as it stands, in the accession treaties to be concluded with new Member States, the ultimate decision will be taken by the Member States, and not, as in the case of the Conditionality Regulation, by the CJEU. After all, the CJEU is not competent to rule on the validity of primary EU law, including the accession treaties. It will therefore be crucial to see whether and how the Member States will welcome the Commission's proposal and deal with the objections raised in this contribution. For now, the European Council only 'takes note' of the Commission's Communication and leaves any further analysis and work to the Council.

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