**TO EVERYTHING THERE IS A SEASON: INSTRUMENTALISING ARTICLE 10 TEU TO EXCLUDE UNDEMOCRATIC MEMBER STATE REPRESENTATIVES FROM THE EUROPEAN COUNCIL AND THE COUNCIL**

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**Abstract**

This paper presents the argument that art. 10 TEU could be utilised to confront the problem of undemocratic Member State representatives in the European Council and the Council. First, it is contended that art. 10(2) TEU, read with the principle of representative democracy in art. 10(1) TEU, should be interpreted operatively to mean that a Member State is not entitled to representation in the European Council or the Council where its Head of State/Government or its government are not “democratically accountable either to their national Parliaments, or their citizens”. Secondly, it is argued that art. 10 TEU can be instrumentalised using several procedural mechanisms, some of which could be engaged by way of citizen action, thereby bypassing the decisional traps and lack of political will that afflict art. 7 TEU, to contribute to the defence of the principle of representative democracy.

**Introduction**

In the past decade, a new dimension has opened in the EU democratic legitimacy enquiry. Whereas scholars once focussed primarily on the EU’s democracy at the international or supranational level,[[2]](#footnote-2) the post-Lisbon era has seen a different source of concern emerge: the systematic dismantling of democracy in individual Member States.[[3]](#footnote-3) Article 2 TEU provides that democracy is one of the EU’s founding values. Article 10(1) TEU asserts that the “[t]he functioning of the Union shall be founded on representative democracy.” Article 10(2) TEU provides a dual institutional basis for the EU’s representative democracy: at Union level, citizens are directly represented in the European Parliament, while the Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments.

The multi-level[[4]](#footnote-4) or intertwined[[5]](#footnote-5) nature of the EU’s democratic design means that the democratic legitimacy of the European Council and the Council is linked inextricably to the health of Member State democracies. This much is evident from the second sentence of art. 10(2) TEU, which provides that Member States’ representatives in the European Council or the Council are “themselves democratically accountable either to their national Parliaments, or to their citizens”.[[6]](#footnote-6) An undemocratic EU Member State government is not, therefore, a purely national matter; the presence of such a government in the EU’s institutions has profound consequences for the EU’s democracy. Given that the default voting rule in the Council, one of the EU’s two co-legislators, is qualified majority voting and a blocking minority can, in some cases, consist of only four Member States,[[7]](#footnote-7) there is the potential for just one undemocratic Member State government to hold a deciding vote on laws with application to hundreds of millions of people. This observation obviously applies *a fortiori* to policy areas in which unanimity is the voting rule in Council, and to the European Council, in which consensus in the default voting rule.[[8]](#footnote-8) There may even be scope to argue that the democratic legitimacy of the Council is of more consequence than the contribution made by the European Parliament.[[9]](#footnote-9)

This paper focuses on how the EU’s legal system can respond when a Member States government is no longer democratically accountable to its national parliament or its citizens within the meaning of art. 10(2) TEU. The focus is not Member State ‘democratic backsliding’ or what can be done to arrest it while it is in train. Moreover, this paper does not seek to define precisely what democratic accountability in the context of art. 10(2) TEU means. However, it should also be understood that this paper is written in a contemporary context in which Hungary is no longer regarded by either Freedom House[[10]](#footnote-10) or the V-Dem Institute[[11]](#footnote-11) as a democracy, and the former organisation categorises Bulgaria, Croatia, Poland, and Romania as semi-consolidated democracies.[[12]](#footnote-12) The primary purpose of this paper is to articulate avenues, other than art. 7 TEU, that could assist in the insulation of representative democracy at EU level against the effects of democratic dismantlement at national level. In this connection, an argument is advanced for an interpretation of art. 10 TEU that would result in the exclusion of an undemocratic Member State’s representatives from the European Council and the Council.

The paper commences with a brief textual analysis, identifying two competing interpretations of art. 10(2) TEU: (a) as a descriptive provision; and (b) as an operative provision. Thereafter, the paper sets out how the operative reading of art. 10(2) TEU would allow art. 10 TEU to be instrumentalised to assist in the protection of the EU principle of representative democracy. The paper then considers both the doctrinal cases for adopting a descriptive or operative interpretation of art. 10(2) TEU, before reflecting on the practical issues that might arise from its interpretation and instrumentalisation as an operative provision. It is concluded that while there would be significant risks associated with the suggested instrumentalisation of art. 10 TEU, the provision does provide mechanisms that could be engaged by way of citizen action, thereby bypassing decisional traps and insufficient political will in EU institutions which might prevent utilisation of art. 7 TEU, to contribute to the defence of the principle of representative democracy.

**An Initial Textual Analysis of Article 10 TEU**

Article 10(1) TEU provides: “The functioning of the Union shall be founded on representative democracy.” Article 10(2) TEU contains two sentences, the first of which relates to representation of citizens: “Citizens are directly represented at Union level in the European Parliament.” The second sentence, of more relevance in this paper, provides for the representation of Member States:

“Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”

There are, it is suggested, two possible readings of art.10(2) TEU in conjunction with art. 10(1) TEU. The first reading is that the two sentences in art. 10(2) TEU are merely descriptive: art. 10(1) TEU establishes the principle of representative democracy, and art. 10(2) TEU merely describes the manner in which the design of the EU’s institutions contributes to the functioning of that principle. Seen thusly, to focus on the second sentence specifically, art. 10(2) TEU is merely a non-justiciable affirmation of an assumed state of affairs: Member States’ Heads of State or Government and their governments *are* “democratically accountable either to their national parliaments, or to their citizens.” There is much to support such an interpretation, both in the descriptive, rather than normative, language utilised in art. 10(2) TEU, and when the provision is understood teleologically.[[13]](#footnote-13)

The second possible reading of art. 10(2) TEU is that it is an operative provision, containing qualifying norms for the EU’s representative democracy, which are capable of judicial enforcement. In accordance with this understanding of the provision, the concrete principle of representative democracy at EU level relies on the fulfilment in practice of the two sentences in art. 10(2) TEU. Turning again to the second sentence, an operative reading of the provision would mean that a Member State, the Head of State or Government or government of which are not democratically accountable to their national parliament or their citizens, is not entitled to representation in the European Council or the Council. Furthermore, by extension, it is arguable that any act adopted by the European Council or the Council while containing a representative of such a Member State government is either automatically a nullity or at the very least subject (if reviewable) on a case-by-case basis to annulment.[[14]](#footnote-14) As with the descriptive interpretation, this operative understanding of art. 10(2) TEU has much to recommend it.[[15]](#footnote-15)

**Instrumentalising the Operative Interpretation of Article 10 TEU to Protect the Principle of Representative Democracy at EU Level**

*Setting the Scene*

Consider the following scenario. Following a period of instability, the democratic government of Member State X is deposed in a coup. The military imposes a president for life, who acquires ultimate legislative, executive, and judicial power. All elections are abolished; all appointments are made by the president. The president decides to attend the European Council and sends deputies to attend Council meetings. The situation in Member State X is widely condemned internationally and the Commission, after obtaining the consent of the European Parliament, makes a proposal under art. 7(2) TEU seeking a determination from the European Council that there exists a serious and persistent breach of art. 2 TEU values. Such a determination will of course be necessary before the Council can, under art. 7(3) TEU, suspend (among other rights) the voting rights of Member State X in the Council. Moreover, under art. 7(2) TEU, the European Council will have to vote unanimously before a determination can be made. In the European Council, the governments of two Member States are opposed to the making of such a determination. The government of Member State Y believes that the internal affairs of Member State X are purely a matter for Member State X. The Government of Member State Z has been criticised for its record on the rule of law in the past decade and, concerned about the possibility of art. 7 TEU being utilised against it, would like to retain Member State X as an ally. There is, therefore, no prospect of representatives of Member State X being excluded from the Council, and certainly not ahead of its next meetings, in which acts requiring unanimity for adoption will be discussed. The president of Member State X indicates that Member State X will not comply with any judgment made under arts 258-260 TFEU. The President of Member State X is also unperturbed by any threats to make EU funding conditional on compliance with art. 2 TEU values, since Member State X has become closely allied with wealthy non-EU states that are prepared to support Member State X financially. The President of Member State X also has no intention of invoking art. 50 TEU, since membership of the EU’s internal market benefits Member State X’s economy. The President also sees the possibility of leveraging Member State X’s position within the EU and of causing disruption, where beneficial to Member State X’s interests and those of its non-EU benefactors.

The scenario presented above is a stark one. It is also one that might be said not to represent the realities of the twenty-first century globally or in the EU specifically. In recent times, the phenomenon of democratic backsliding has replaced the sudden jolt of the coup.[[16]](#footnote-16) The decline of a democracy is most often gradual and pursued using what are, at least at surface level, legal means.[[17]](#footnote-17) It has been the utilisation of such means that has caused Poland and Hungary to be listed by the V-Dem Institute as the top two autocratising countries in the world respectively between 2010 and 2020 in its 2021 report.[[18]](#footnote-18) The result of incrementalism is that democratic dismantlement is often missed by those who are not informed and interested observers.[[19]](#footnote-19) There is also the problem that it is difficult to ascertain when precisely a government becomes democratically unaccountable to a national parliament or to citizens, and any such assertion may be contestable.[[20]](#footnote-20) Moreover, emergency powers may be used by a government in a manner whereby a state can disorientate observers, and take advantage of short attention spans by repealing certain emergency measures and enacting others in their place or frequently oscillating between autocracy and imperfect democracy.[[21]](#footnote-21)

The coup scenario presented above was chosen to illustrate in the starkest possible terms a situation in which the European Council and the Council might play host to the representatives of an undemocratic Member State and, owing to political unwillingness to confront the problem, that situation would persist. It is accepted that in such circumstances, a more robust response would be expected by the EU’s political actors than has been the case when dealing with democratic and rule of law backsliding in the past decade. In fact, as Kelemen’s ‘authoritarian equilibrium’ thesis would tend to suggest, a gradual decline of a Member State’s democracy to the point where its government would no longer be considered democratically accountable would not be as likely to engender as strong a response from EU institutions as a sudden coup.[[22]](#footnote-22) These differences between the coup and backsliding scenarios notwithstanding, circumstances whereby democracy in a Member State is dismantled over a period of time to the extent that a government is no longer democratically accountable present, at the moment the Member State crosses that line, precisely the same challenge as the coup: art. 7 TEU may be of no assistance, and other implements in the EU’s toolbox may be either ineffective or too cumbersome to respond to the immediate presence of representatives of an undemocratic Member State government in the European Council and the Council.[[23]](#footnote-23) The paragraphs that follow describe how the operative interpretation of art. 10 TEU could be instrumentalised procedurally to result in the exclusion of the representatives of an undemocratic Member State from the European Council and the Council in such circumstances.

*Instrumentalising Article 10 TEU*

There are a number of procedural avenues through which the operative reading of art. 10 TEU could be instrumentalised to ensure that an undemocratic Member State is not represented in the European Council or the Council. The first, and most obvious, procedural avenue would be for the European Council or the Council to vote to confirm the exclusion of the representatives of the undemocratic government from the institution in question. Such a move would inevitably run into legal and pragmatic objections.[[24]](#footnote-24) It suffices to say at this stage that any such act would be open to challenge before the Court of Justice of the European Union (CJEU) under art. 263 TFEU. The second possibility, which would arise if the European Council or the Council, having been first called upon to do so, did not take pragmatic steps to exclude representatives or to define its position, would be an action under art. 265 TFEU for a failure to act amounting to an infringement of the Treaties, specifically the principle of representative democracy.[[25]](#footnote-25) In the circumstances, such an action could be instituted by the European Parliament, the Commission, the European Central or a Member State.[[26]](#footnote-26) While the CJEU could not in art. 265 TFEU proceedings issue directions to the European Council or the Council or indicate to it precisely what steps it ought to take,[[27]](#footnote-27) a successful action would nevertheless make it clear that an undemocratic Member State was being represented unlawfully in the European Council or the Council, and that the relevant institution would have a duty to take steps to exclude those representatives. Those institutions would then be obliged to take any measures necessary to comply with the judgment of the CJEU pursuant to art. 266(1) TFEU.[[28]](#footnote-28)

What is notable about the procedural instrumentalisations suggested above is that all of them may only be initiated by EU institutions or Member State governments. There is no facility whereby citizens of the undemocratic Member State or of other Member States could seek to have the art. 10(2) TEU requirement enforced judicially, especially if EU institutions and Member States proved unwilling to act. However, there are other possibilities that might be availed of by natural or legal persons in any Member State.[[29]](#footnote-29) One such possibility would be a direct action under art. 263 TFEU to challenge the validity of a reviewable act adopted by the European Council or Council while a democratically unaccountable Member State government was represented in the relevant institution. Another possibility, given the notoriously restrictive standing rules applicable to natural and legal persons under art. 263 TFEU, would be an indirect challenge via the art. 267 TFEU procedure, in which - pursuant to the *Foto-Frost* doctrine[[30]](#footnote-30) - a reference to the ECJ from a national court could be compelled if a ruling on the validity of the impugned act were necessary for the resolution of the main proceedings.[[31]](#footnote-31) The ground for a challenge to the validity of an act, whether under art. 263 TFEU or 267 TFEU, would be that the impugned act was adopted in violation of the Treaties, specifically the principle of representative democracy, due to the involvement of a representative of a democratically unaccountable Member State government in the adoption of the act, contrary to art. 10(2) TEU in conjunction with art. 10(1) TEU.[[32]](#footnote-32)

If the plaintiff’s submission described above in art. 263 TFEU annulment proceedings were accepted, the Court would, pursuant to art. 264 TFEU, declare the impugned act to be void.[[33]](#footnote-33) This would obviously have significant *ex-ante* and *ex-post* consequences beyond the case at bar. While a declaration of nullity applies to the contested act only,[[34]](#footnote-34) such a judgment would imply that all past reviewable acts adopted by the same configuration of the relevant institution during the period in which the undemocratic Member State government was represented in the institution were also a nullity. Moreover, such a judgment would suggest that all future acts of the same institution sitting in the same configuration would be invalid, while the Member State government in question remained democratically unaccountable. The profoundly negative effects of such a judicial finding in terms of legal certainty and in terms of the ability of the institution to act into the future should be obvious. There would be little room for judicial economy in such a judgment. To try to circumvent many of the practical issues that would arise, the Court would, in its judgment, have to be clear about when precisely the European Council or the Council ceased to be compliant with art. 10 TEU, which in turn would require a clear exposition of what democratic accountability in art. 10 TEU means. The Court might also avail of the second paragraph of art. 264 TFEU to limit the effects of the declaration of invalidity on the specific impugned act.[[35]](#footnote-35)

As is the case in an art. 265 TFEU proceeding, the defendant institution has a duty under art. 266(1) TFEU to take the necessary measures to comply with an art. 264 declaration of nullity. However, again, the CJEU cannot in annulment proceedings indicate which measures should be taken in order for the defendant institution to comply with its judgment.[[36]](#footnote-36) Nevertheless, as Lenaerts et al have pointed out, this limitation in the CJEU’s jurisdiction would not preclude the Court from “provid[ing] additional guidance so as to enable the defendant institution… to draw all useful consequences from its judgment”.[[37]](#footnote-37) The Court could identify precisely what the European Council or the Council should have done to avoid the declaration of nullity. It is suggested that such guidance could extend to a statement that the European Council or the Council would only be considered as constituted validly within the meaning of the Treaties if they contain only representatives of Member State governments that are democratically accountable. In doing so, the Court could also render it explicit that the nature of the requirement in art. 10(2) TEU makes it so that exclusion of a representative of an undemocratic Member State government is deemed to be automatic, and therefore not requiring a specific decision or act of the European Council or the Council to exclude, though the said institutions would be under a duty to ensure that exclusion in practice.[[38]](#footnote-38)

**Article 10(2) TEU: Descriptive or Operative? The Doctrinal Arguments**

*Article 10(2) TEU as Descriptive*

There are at least three interconnected sets of doctrinal arguments in favour of art. 10(2) TEU being a purely descriptive, non-justiciable provision: (1) textual; (2) national constitutional identity; and (3) art. 7 TEU as *lex specialis*.

The first argument for the descriptive understanding of art. 10(2) TEU is based on a literal interpretation of the provision. Unlike art. 10(1) TEU, where it is stated that “[t[he functioning of the Union *shall* be founded on representative democracy” and art. 10(3) TEU, where it is provided that “[e]very citizen of the Union *shall* have the right to participate in the democratic life of the Union”, both sentences in art. 10(2) TEU are framed in descriptive terms: “Member States *are* presented … by their Heads of State or Government, themselves *democratically accountable*…” Likewise, art. 10(4) TEU, relating to the role of political parties at European level is framed in descriptive language. This might imply that art. 10(1) and (3) TEU, expressed normatively, establish legal duties, whereas art. 10(2) TEU and (4) are merely assumed, inoperative statements of fact. This interpretation is supported by other TEU provisions. Article 15(2) TEU provides that “[t]he European Council shall consist of the Heads of State or Government of the Member States…” and art. 16(2) TEU provides that “[t]he Council shall consist of a representative of each Member State at ministerial level…”, without reference to any further qualifying norms. Moreover, while the similarly descriptive first sentence of art. 10(2) TEU, relating to the composition of European Parliament,[[39]](#footnote-39) is supported by a specific, operative provision in art. 14(4) TEU, as well as arts 39 and 40 CFREU,[[40]](#footnote-40) there is no such provision that expands upon the second sentence of art. 10(2) TEU. This suggests that while EU law can establish basic ground rules as to how Members of the European Parliament are to be elected,[[41]](#footnote-41) the question of democratic accountability at national level in the context of the European Council and the Council, and whether or how it is achieved, is purely a matter for national constitutional law.[[42]](#footnote-42) Article 10(2) TEU may also be distinguished from the second subparagraph of art. 19(1) TEU, which the ECJ has utilised to impose enforce the art. 2 TEU rule of law value and judicial independence at national level.[[43]](#footnote-43) That provision is also expressed normatively: “Member States *shall* provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

The second argument, which builds upon the first, is that the descriptive language chosen in art. 10(2) TEU reflects a respect in the EU legal order for the “equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional…”[[44]](#footnote-44) This respect for national constitutional identity might imply an assumption that the Heads of State or Government represented in the European Council and the governments in the Council are democratically accountable, with the question of that accountability being purely a matter for national constitutional law.[[45]](#footnote-45) As such, art. 10 TEU may be seen as establishing a vertical and horizontal division of responsibility between the EU institutions and the Member States, with the latter charged with ensuring democratic accountability at national level.[[46]](#footnote-46)

The third argument builds in turn on the second. Recognising the respect for national constitutional identity and the general political sensitivity around the issue, the Treaties established in art. 7 TEU a clear, explicit, specific, and ultimately political, procedure to censure Member States for breaches of art. 2 TEU values. In the specific context of a debate as to whether art. 10(2) TEU should be read operatively and instrumentalised as such, art. 7(3) TEU provides a specific procedural mechanism for the suspension of a Member State’s voting rights in the Council. It may be argued that the exclusion of a Member State’s representatives from the Council via art. 10 TEU would have the same result in real terms as suspending that Member State’s voting rights in Council, a sanction envisaged in art. 7(3) TEU specifically.[[47]](#footnote-47) In other words, art. 7 TEU is *lex specialis*; it provides the exclusive procedural means through which a Member State’s rights in the Council can be suspended for a serious and persistent breach of art. 2 TEU values. Moreover, art. 7(2) and (3) TEU recognise the sensitivities around sovereignty and national constitutional identity by excluding the involvement of the CJEU, and instead subjecting the accused Member State government to the judgment of its Member State peers. This argument is strengthened by the rights of defence granted to the accused Member State, as well as the voting thresholds stipulated in art. 7 TEU: unanimity in the European Council when determining the existence of a serious and persistent breach of art. 2 values (art. 7(2) TEU), and a qualified majority in the Council when determining whether to suspend voting rights in the Council (art. 7(3) TEU). Outside of the context of art. 50 TEU, there is no mechanism in the Treaties for the representatives of a Member State to be excluded from the European Council or the Council; art. 7 TEU provides the sole procedural means through which a Member State can be deprived of any of the benefits of its representation in the Council. As such, art. 10(2) TEU cannot be interpreted as allowing for the automatic exclusion of representatives of a Member State in the European Council or the Council, since such a reading would circumvent art. 7 TEU processes, and the rights of defence built into art. 7 TEU for the accused Member State.[[48]](#footnote-48)

*Article 10(2) TEU as Operative*

Mirroring somewhat the arguments in favour of a descriptive interpretation, that there are three categories of doctrinal argument that support an operative interpretation of art. 10(2) TEU: (1) textual; (2) primacy of EU law; and (3) distinguishing of art. 7 TEU.[[49]](#footnote-49)

The first set of arguments are based on textual analysis of art. 10(2) TEU, both in isolation and in context. At the outset, it should be established that the use of the apparently descriptive language in art. 10(2) TEU should not automatically deprive the provision of normative effect. It would, for instance, be inconceivable that art. 5(1) TEU (the principle of conferral) would be interpreted as lacking binding legal effect because it is provided that “[t]he limits of Union competences *are* governed by the principle of conferral.” The failure by the drafters to utilise non-normative grammar should not, therefore, be determinative. Moreover, not all language versions of the Treaties use the descriptive grammar of the English-language version: the German-language version in contrast to other versions expresses the matter of democratic accountability to national parliaments or citizens normatively.[[50]](#footnote-50) Furthermore, art. 10(2)-(4) TEU cannot be read in isolation from art. 10(1) TEU; rather, those provisions should be read as establishing the institutional design of the EU that ensures that the EU *functions* as a representative democracy, and that art. 10(1) TEU is not merely an empty formula. In short, the second sentence of art. 10(2) TEU imposes an obligation on the Member States and the EU to ensure that the European Council and the Council are composed in accordance with the principle of representative democracy. Moreover, it is evident from other provisions in the Treaties that, just as national courts have come to form part of an EU judicial network, national democratic institutions also form part of an EU democratic network. Article 10(2) TEU establishes intertwined democratic design and art. 12 TEU confers upon national parliaments several important roles in the EU’s democracy; in particular, in ensuring respect for the principle of subsidiarity.[[51]](#footnote-51)

The second set of arguments for the operative reading of art. 10(2) TEU relates to the primacy and effectiveness of EU law, as well as the protection of the functioning of the EU’s democracy. While it is evident from the Treaties that deference ought to be shown for national constitutional identity, such an idea also has its limits.[[52]](#footnote-52) While, as Lenaerts has stated, “[d]emocracy in a multilevel system of governance must be driven by a mutually reinforcing relationship, whereby both sources of democratic legitimacy complement each other”,[[53]](#footnote-53) there may also be a point where it becomes impossible to reconcile a Member State’s manifestation of its constitutional identity with the primacy and effectiveness of EU law, and with the principle of representative democracy particularly.[[54]](#footnote-54) An interpretation of art. 10(2) TEU that holds that the second sentence of that provision is a purely descriptive, inoperative provision, which assumes in all cases democratic accountability at national level, is difficult to reconcile with the primacy of EU law and of art. 10(1) TEU. It is long established as a matter of EU law that immovable assumptions are not made in respect of national courts: in the context of the preliminary ruling procedure, the ECJ has long asserted its jurisdiction to determine whether a referring body, notwithstanding its designation in national law, is a “court or tribunal”, an enquiry that has allowed the ECJ to consider the independence of such bodies.[[55]](#footnote-55) Moreover, the recent art. 19 TEU case law of the ECJ on national judicial independence has demonstrated the jurisdiction of the Court to consider the compatibility of aspects of national judicial systems with EU law.[[56]](#footnote-56) In its *Repubblika* judgment, the ECJ drew a direct line between art. 49 TEU, art. 2 TEU, and art. 19 TEU to suggest that Member States who join the EU pursuant to art. 49 TEU have a duty not to regress in terms of the level of protection afforded to judicial independence at the time of accession.[[57]](#footnote-57) Furthermore, the Court stated that “compliance by a Member State with the values enshrined in art. 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State.”[[58]](#footnote-58) There are no compelling reasons why the democratic credentials of Heads of State or Governments in the European Council and governments in the Council could not, with due regard to respect for national constitutional identity, be subject to review in the way national courts have been. Indeed, the reasoning applied by the Court of Justice in the *Portuguese Judges* ruling to allow for the EU judiciary to monitor national compliance with the art. 2 TEU rule of law value via the concrete requirement of effective legal protection in art. 19 TEU may readily be applied by analogy to art. 10 TEU, which the Court has described as giving “concrete form to the value of democracy referred to in art. 2 TEU”.[[59]](#footnote-59)

The third set of arguments addresses the assertion that the *lex specialis* nature of art. 7(3) TEU precludes an operative reading and instrumentalisation of art. 10(2) TEU.In this context, there are two further subsets of argument.

First, the automatic exclusion of representatives of a democratically unaccountable Member State from the Council under art. 10(2) TEU must be distinguished from a decision by the Council pursuant to art. 7(3) TEU to suspend a Member State’s voting rights in Council. Suspension of voting rights is a sanction, one which is within the discretion of the Council to wield following a determination by the European Council under art. 7(2) TEU of a “serious and persistent breach” of art. 2 TEU values. Exclusion, owing to failure to meet the requirement of democratic accountability in art. 10(2) TEU, is not a sanction in this sense and it is not discretionary; rather, it arises by automatic operation of law; that is, when a Member State’s Head of State or Head of Government or government ceases to be democratically accountable at national level to parliament or citizens. In any case, exclusion from the Council, which precludes all participation in that institution, is not analogous to merely suspending a Member State representatives’ voting rights in Council. It should also be noted that art. 7 TEU provides no mechanism (explicitly at least) through which a Member State, against which an art. 7(2) TEU determination has been made, can have its participation or voting rights in the European Council suspended. In contrast, art. 10(2) TEU refers to democratic accountability at national level in respect of both the Council and the European Council.

Second, even if it were accepted that art. 7(3) TEU allows for sanctions that are analogous to exclusion from the European Council and the Council, it is well established in the case law of the ECJ that art. 7 TEU is not the sole means of protecting art. 2 TEU values or other Treaty provisions giving them concrete expression. Like the rule of law value and judicial independence, given concrete expression in the form of the second subparagraph of art. 19(1) TEU, the value of democracy is given such expression in art. 10 TEU.[[60]](#footnote-60) Moreover, the idea that art. 7 TEU should be the exclusive means of ensuring the functioning of EU institutions in accordance with the principle of representative democracy, thereby excluding altogether the jurisdiction of the CJEU, would appear inconsistent the role of the CJEU under art. 19(1) TEU in “ensur[ing] that in the interpretation and application of the Treaties that the law is observed”, and with the idea that the EU is a union based on the rule of law.[[61]](#footnote-61) Additionally, such an interpretation, which would effectively make the European Council and the Council the sole custodians over the question of their own compositional compliance with art. 10(2) TEU, would also exclude any direct right of participation by EU citizens in the protection of the democratic legitimacy of the EU’s institutions, something that is difficult to square with the spirit of arts 2 and 10(3) TEU, as well as art. 20 TEU.[[62]](#footnote-62) Furthermore, if the art. 7 TEU as *lex specialis* argument were accepted as preventing the instrumentalisation of art 10 TEU, the consequence - in the event that the European Council and the Council were unwilling to utilise art. 7 TEU - would be that there would be no way of ensuring any form of what Müller has referred to as a “moral quarantine” in either the European Council or the Council.[[63]](#footnote-63) Indeed, it should be recalled that art. 7 TEU provides no express means of protecting the democratic legitimacy of the European Council, in which consensus in the default voting rule. That the suggested instrumentalisation of art. 10 TEU would not provide the same rights of defence to a Member State as the art. 7 TEU process is a valid point. However, the interpretation of art. 10(2) TEU suggested in this paper gives rise to automatic exclusion of the representatives of a Member State when the qualifying criterion of democratic accountability at national level is no longer satisfied. This, again, must be distinguished from the discretionary context of any decision taken under art. 7(3) TEU. Moreover, any of the procedural instrumentalisations of art. 10 TEU suggested in this paper would ultimately and almost inevitably require determination by the CJEU. The excluded Member State government would in all cases have access to the CJEU, whether by way of art. 263 TFEU or as an intervenor, pursuant to art. 40(1) of the Statute of the ECJ, in any other judicial proceeding.

**Practical Issues with the Operative Interpretation and Instrumentalisation of Article 10 TEU**

There are several practical issues that could conceivably arise from the instrumentalisation of art. 10 TEU which might militate against the adoption of an operative interpretation. These issues may be categorised as: (1) determining and monitoring democratic accountability; (2) legal certainty; and (3) effectiveness.

*Determining and Monitoring Democratic Accountability*

The key element of the operative interpretation of art. 10(2) TEU is that it introduces a qualifying criterion for Member State represention in the European Council and the Council: democratic accountability to national parliaments or citizens. The procedural instrumentalisations suggested in this paper all involve *de facto* determinations being made as to whether a Member State’s Head of State or Government, or its government, fulfil this criterion. The European Council or the Council may take the view that a Member State is no longer entitled to representation and take practical measures to exclude its representatives (which will open those institutions to judicial review). Failing this, the CJEU will have to determine the question. These EU institutions are therefore placed in the invidious position of having to determine whether this democratic accountability standard is being fulfilled. While it is beyond the scope of this paper to seek to define with precision what democratic accountability means in this context, it must be acknowledged that the task of defining it judicially or of measuring the conditions in a Member State against any such definition would be a difficult task. The CJEU if confronted with these questions in the contemporary context would have to consider the problem of ‘hybrid’ or ‘electoral authoritarian’ regimes. While the definitional issue might not be so problematic in the case of a coup, the now more typical gradual slide into autocracy presents more room for contestation and uncertainty.

However problematic an initial assessment of whether a Member State fulfils the democratic accountability criterion would be, the ongoing monitoring of this question would present even greater challenges for both the Commission and the CJEU. Ongoing assessment would be especially tricky were a judicial determination to be made that a Member State did not fulfil the criterion, giving rise to automatic exclusion of its representatives from the European Council and the Council. In this event, the exclusion would have to remain in place until the condition of democratic accountability were fulfilled, requiring ongoing monitoring by EU institutions and involvement of the CJEU. Moreover, if the CJEU were to accept the operative interpretation and instrumentisation of art. 10(2) TEU, a determination that the democratic accountability criterion had not been violated would not preclude subsequent and frequent attempts at such challenges. Furthermore, the CJEU could become involved in a ‘cat and mouse’ game with a Member State government if that government were to repeal and re-enact problematic national measures.[[64]](#footnote-64)

The seriousness of the above objections should not be underestimated. However, establishing a set of minimal criteria that would have to be satisfied for the second sentence of art. 10(2) TEU to be fulfilled is not insurmountable. With regards to European Parliament elections, EU law already establishes some basic ground rules with which Member States must comply. Moreover, in the context of art. 49 TEU, the EU has established the Copenhagen criteria to adjudge a candidate state’s compliance with art. 2 TEU values. It should be recalled that the ECJ has recently utilised art. 49 TEU along with art. 2 TEU to establish, in the context of judicial independence, a non-regression doctrine.[[65]](#footnote-65) The Court has also enumerated a number of conditions that must be fulfilled in order for national judicial appointments to be in accordance with art. 19 TEU.[[66]](#footnote-66) Although the Copenhagen criteria, or their application, have been subjected to criticism as a means of ensuring quality of democracy,[[67]](#footnote-67) they nevertheless suggest that if ascertaining the quality of a state’s democratic structures and monitoring same on an ongoing basis is possible prior to assession, there should be little practical reason as to why such an exercise is not possible post accession.[[68]](#footnote-68) Moreover, the problem of assessing judicial independence at national level, and possibly being called upon to adjudicate upon it on an ongoing basis, did not dissuade the ECJ from taking upon itself this task in the *Portuguese Judges* ruling.[[69]](#footnote-69) Furthermore, while the problems of defining democratic accountability and monitoring it are considerable, they are not so significant that they should deter entirely the instrumentalisation of art. 10 TEU. Indeed, to accept such reasoning in a context where there were no prospect of art. 7 TEU being invoked or of any other mechanism in the EU’s rule-of-law toolkit being successful, would ultimately be constitutionally defeatist, and amount to an admission that EU law permits representatives of undemocratic Member States to take their place in the EU’s most powerful institutions. It is suggested that such a reading be reconciled with the art. 2 TEU democratic value or with art. 10 TEU, that value’s concrete form.

*Legal Certainty*

A successful instrumentalisation of the operative interpretation of art. 10(2) TEU would have obvious consequences in terms of legal certainty.[[70]](#footnote-70) In the event that art. 10 TEU were to be used by the European Council or the Council to take practical measures to exclude Member State representatives, the legality of measures adopted by that composition of the relevant institution would be unclear until judicial determination of the question. In circumstances where the European Council or the Council failed to take measures to exclude a Member State’s representatives, there would again be uncertainty as to the validity of acts adopted by the relevant institution. Legal uncertainty would also be heightened if it were determined that a Member State government were no longer democratically accountable, as a determination would be required as to when that state of affairs began and at what point it would end. This problem would be exacerbated if a Member State played a ‘cat and mouse’ game with whatever definition of democratic accountability the CJEU settled upon. As with the problem of defining and monitoring democratic accountability discussed above, this is a significant drawback of instrumentalising art. 10(2) TEU.

The problem of legal uncertainty is not one that can be avoided completely, though the CJEU could mitigate some if its impact by limiting the retrospective effect of its judgment, as well as through art. 278 TFEU and interim measures under art. 279 TFEU. Moreover, as argued previously, the issue of potential legal uncertainty is not one that should displace the principle that the EU must function as a representative democracy.

*Effectiveness*

There are several arguments that may be advanced to assert that an operative interpretation and instrumentalisation of art. 10 TEU would be ineffective or even counterproductive.

First, it could be argued that it is difficult to see how the exclusion of a Member State’s representatives from the European Council or the Council would bring about change in the conditions in the Member State. Indeed, one could go further and argue that such exclusion would lend credence to a victimisation trope being inculcated by the excluded Member State government, and could even lead to a diminution in the authority of EU law in that Member State.[[71]](#footnote-71) It has even been suggested that utilisation of art. 10 TEU advocated in this paper would harm the EU’s credentials as a rule-of-law actor.[[72]](#footnote-72) These appear at first glance to be compelling arguments. However, in response, it must be emphasised again that the exclusion of Member State representatives from the European Council and the Council would be to ensure compliance with the principle that the EU functions as a representative democracy. Such an exclusion might or might not lead to a short-term or long-term improvement in the state of that Member State’s democracy. That is, however, not the primary purpose of exclusion, which is to prevent that Member State presence in the European Council or the Council from jeopardising the EU’s democracy.[[73]](#footnote-73) That exclusion of a Member State’s representatives might feed certain narratives should not take precedence over protection of the EU’s representative democracy. Concerns about the authority of EU law being diminished in the Member State concerned would seem overstated, since if a Member State government has already reached the milestone of democratic unaccountability, the authority of EU law will very likely either by definition or in effect have been compromised. Moreover, the assertion that instrumentalising art. 10 TEU to exclude national representatives would harm the EU’s claims to be a rule-of-law actor also seems unfounded. If an operative interpretation of art. 10(2) TEU is accepted, then that provision contains a legal condition that must be fulfilled for entitlement of a Member State to representation. In other words, it is a rule of law, and one which can ultimately be interpreted by the CJEU. Indeed, any exclusion based on art. 10 TEU would be open to judicial review.

Secondly, it could be contended that all instrumentalisations of art. 10 TEU suggested in this paper will ultimately require judicial intervention, and that this carries with it significant risks. The weaknesses of judicial mechanisms in combatting democratic backsliding and rule-of-law violations have been identified elsewhere.[[74]](#footnote-74) It has been suggested by Blauberger and Kelemen that judicial approaches to confronting violations of art. 2 TEU values are likely to be frustrated by restricted access to justice in Member States flouting these values, even in the context of art. 267 TFEU.[[75]](#footnote-75) The risk of politicising the judiciary by requiring the CJEU to make such politically sensitive decisions must be taken seriously as a threat to the legitimacy of the CJEU.[[76]](#footnote-76) It may be added also that judicial intervention has the unfortunate consequence of allowing political institutions to avoid their responsibilities.[[77]](#footnote-77) In response to these concerns, it should first be emphasised that they appear more relevant to judicial intervention as a means to counter incremental dismantling of democratic structures at national level. The judicial intervention suggested in this paper is more in the nature of a last-resort means of ensuring the European Council and the Council function in accordance with the principle of representative democracy. While one would hope such intervention would be unnecessary, it is suggested that it is preferable to the alternative of allowing an undemocratic Member State to retain representation in the European Council and the Council. The suggested instrumentalisation of art. 10 TEU via an art. 267 TFEU to test the validity of acts adopted by the European Council or the Council also has the potential to sidestep many of the access-to-justice issues identified by Blauberger and Kelemen. Such an action would also avoid the restrictive standing requirements of arts 263 and 265 TFEU, if an applicant could not fulfil those requirements.[[78]](#footnote-78) Further, such an indirect action could also, crucially, be commenced in any EU Member State, not just the problematic Member State, where the lack of an independent judiciary might prevent or restrict references coming from that Member State.[[79]](#footnote-79) The operative interpretation of art. 10(2) TEU would also confer direct effect upon the art. 2 TEU democracy value, just as art. 19(1) TEU has enlivened the rule of law value.

Thirdly, it may be observed that the various procedural mechanisms identified in this paper would encounter various obstacles that could undermine their effectiveness. Due to the default rule in the European Council being consensus, it is difficult to conceive of how that institution could make any practical moves to exclude representatives.[[80]](#footnote-80) In the event of a failure by the European Council or the Council to act in such circumstances, any plaintiff in an art. 265 TFEU action would have to wait two months from the date of first calling upon the defendant institution to act before commencing proceedings, during which time representatives of a democratically unaccountable Member State government would continue to participate in the European Council and the Council. Article 263 TFEU would, of course, present the usual issues of standing for non-privileged applicants, a point which applies *a fortiori* to art. 265 TFEU proceedings, in which natural or legal persons may only challenge a failure to address an act to them individually. These restrictive standing rules would certainly affect the utility of these judicial review procedures to non-institutional or Member State actors. These are certainly obstacles, but they are not necessarily insurmountable. As mentioned in the previous paragraph, these issues could be circumvented by the utilisation of the preliminary reference procedure by the courts of any Member State to enquire into the validity of acts of the European Council or the Council, while not constituted in compliance with the operative interpretation of art. 10 TEU.

**Concluding Remarks**

This paper has presented the argument that the second sentence of art. 10(2) TEU, when read in conjunction with the principle of representative democracy in art. 10(1) TEU, contains a legally enforceable norm, which requires Member State Heads of State or Government, in the case of the European Council, or governments, in context of the Council, to be democratically accountable at national level in order to be represented in those institutions. It has been contended that such an operative interpretation of art. 10 TEU is justified (1) textually, (2) due to the primacy and effectiveness of EU law, as well as the concrete protection afforded by art. 10 TEU to the art. 2 TEU value of democracy, and (3) in contradiction to any assertion that art. 7 TEU precludes the use of art. 10 TEU to exclude national representatives from the European Council and the Council. Moreover, this paper has demonstrated how, via several procedural mechanisms, including direct and indirect actions before the CJEU, the automatic exclusionary effect of art. 10(2) TEU could be operationalised if a Member State ceased to fulfil the democratic accountability criterion. Furthermore, it has been shown that some of these procedural mechanisms would be capable of utilisation by EU citizens in any Member State, especially via art. 267 TFEU indirect actions to test the validity of acts adopted by the European Council or the Council while unlawfully constituted. These mechanisms would have the potential of sidestepping many of the issues, such as political unwillingness, that have bedevilled art. 7 TEU as a means of responding to democratic and rule of law backsliding. While it has been acknowledged in this paper that the operative interpretation and instrumentalisation of art. 10 TEU advocated would give rise to significant practical issues, such as legal uncertainty, it is concluded that the imperative of protecting of the EU’s institutions against infiltration by undemocratic Member States in violation of art. 10(1) TEU must take precedence over these competing concerns if the EU is truly to function as a fully representative democracy.

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2. J.H.H. Weiler, U. Haltern, and F. Mayer, “European Democracy and Its Critique” (1995) 18 W. Eur. Pol. 4; A. Moravcsik, “Reassessing Legitimacy in the European Union” (2002) 40 JCMS 603; A. Føllesdal and S. Hix, “Why There is a Democratic Deficit in the EU: A Response to Majone and Moravczik” (2006) 44 J.C.M.S. 533. [↑](#footnote-ref-2)
3. M. Bánkuti, G. Halmai, and K.L. Scheppele, “Hungary’s Illiberal Turn: Disabling the Constitution” (2012) 23 *Journal of Democracy* 138; J.W. Müller, “Europe’s Other Democracy Problem” (2014) 21 *Juncture* 151; R.D. Kelemen, “Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union” (2017) 52 Gov’t & Oppos. 211; P. Bárd and L. Pech, “How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The ‘Hungarian’ Model”, RECONNECT Working Paper No. 4, October 2019, https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf, (last visited 2 August 2021). [↑](#footnote-ref-3)
4. R. Geiger in R. Geiger, D.E. Khan, and M. Kotzur (eds), *European Union Treaties: A Commentary* (Oxford: Hart, 2015), pp.66-67. [↑](#footnote-ref-4)
5. J. Porras Ramirez in H.J. Blanke and S. Mangiameli (eds), *The Treaty on European Union (TEU)* (Heidelberg: Springer, 2013), pp.421-426. [↑](#footnote-ref-5)
6. In this regard, the role of national parliaments in “contributing actively to the good functioning of the Union” should be noted: Art. 12 TEU, Protocol (No1) on the Role of National Parliaments in the European Union, and Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality. [↑](#footnote-ref-6)
7. Article 16(4) TEU. [↑](#footnote-ref-7)
8. Article 15(4) TEU. [↑](#footnote-ref-8)
9. This was recognised by the German Federal Constitutional Court in its judgment on the Lisbon Treaty, in which the Court, according to Geiger, appeared to “consider[] the path from national parliament to the Council via the national governments as the decisive element for democratically legitimating … EU activities” (Geiger in Geiger in Geiger, Khan, and Kotzur (eds), *European Union Treaties: A Commentary*, p.69); Judgment of 30 June 2009, 2 BvE 2/08, *Lisbon Judgment*, at [262]. [↑](#footnote-ref-9)
10. Freedom House, *Nations in Transit 2021: The Anti-Democratic Turn*,https://freedomhouse.org/sites/default/files/2021-04/NIT\_2021\_final\_042321.pdf, pp. 12-13, (last visited 2 August 2021). Freedom House categorises Hungary as a Transitional Government or Hybrid Regime (T/H). [↑](#footnote-ref-10)
11. V-Dem Institute, *Autocratization Turns Viral: Democracy Report 2021*, https://www.v-dem.net/media/filer\_public/74/8c/748c68ad-f224-4cd7-87f9-8794add5c60f/dr\_2021\_updated.pdf, p. 31 (last visited 2 August. 2021). [↑](#footnote-ref-11)
12. Freedom House, *Nations in Transit 2021*, pp.12-13. [↑](#footnote-ref-12)
13. These arguments are considered further below. [↑](#footnote-ref-13)
14. The question of whether an act in such circumstances would automatically be a nullity or subject to nullification on a case-by-case basis is not resolved in this paper. The author’s preference would be for automatic nullification, though the consequences of such an approach for legal certainty must be acknowledged. [↑](#footnote-ref-14)
15. Again, these arguments are considered further below. [↑](#footnote-ref-15)
16. N. Bermeo, “On Democratic Backsliding” (2016) 27 *Journal of Democracy* 5. [↑](#footnote-ref-16)
17. Scheppele has called this phenomenon “autocratic legalism” (K.L. Scheppele, “Autocratic Legalism” (2018) 85 U. Chi. L. Rev. 545). [↑](#footnote-ref-17)
18. V-Dem Institute, *Autocratization Turns Viral*, p.19. [↑](#footnote-ref-18)
19. Scheppele, “Autocratic Legalism”, at 582. [↑](#footnote-ref-19)
20. This was demonstrated in March 2020 during the Covid-19 pandemic, when the Hungarian Parliament enacted what became known as an “Enabling Act”, which allowed the Prime Minister to rule by decree, suspend all elections and referendums during the period of the declared emergency, and provided that the Prime Minister would determine when that emergency would end (see K. Kovács, “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”, VerfBlog, 6 April 2020, https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/, (last visited 2 August 2021)). A debate followed between Halmai and Scheppele, on one side, who asserted that the law gave Prime Minister Orbán unlimited legal power for as long as he wanted it, and Karsai, on the other, who countered some of Scheppele and Halmai’s claims as to the gravity of the situation (G. Halmai and K.L. Scheppele, “Don’t be fooled by Autocrats: Why Hungary’s Emergency Violates Rule of Law”, VerfBlog, 4 April 2020, https://verfassungsblog.de/dont-be-fooled-by-autocrats/, (last visited 2 August 2021; D. Karsai, “Let’s not fool ourselves either!”, VerfBlog, 27 April 2020, https://verfassungsblog.de/lets-not-fool-ourselves-either/, (last visited 2 August 2021); G. Halmai and K.L. Scheppele, “Orbán is Still the Sole Judge of his Own Law”, VerfBlog, 30 April 2020, https://verfassungsblog.de/orban-is-still-the-sole-judge-of-his-own-law/, (last visited 2 August 2021)). [↑](#footnote-ref-20)
21. Again, the Hungarian response to the Covid-19 pandemic in 2020 illustrates the difficulties of observing a fluid emergency regulatory regime. See G. Halmai, G. Mészáros, and K.L. Scheppele, “From Emergency to Disaster: How Hungary’s Second Pandemic Emergency will Further Destroy the Rule of Law”, VerfBlog, 30 May 2020, https://verfassungsblog.de/from-emergency-to-disaster/, (last visited on 2 August 2021), which details the arguably more problematic measures enacted in Hungary subsequent to the repeal of the “Enabling Act”. [↑](#footnote-ref-21)
22. R.D. Kelemen, “The European Union’s Authoritarian Equilibrium” (2020) 27 J.E.P.P. 481. [↑](#footnote-ref-22)
23. Article 7 TEU and the other implements in the EU legal toolbox to combat contraventions of the EU’s art. 2 TEU values have proven ineffective as a means of arresting democratic backsliding in Member States, even if the fault for that lies arguably more with EU institutions and Member States than the unavailability of tools. See, for instance, L. Pech, “The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox”, RECONNECT Working Paper No. 7, March 2020, file:///C:/Users/user/Downloads/SSRN-id3608661.pdf, (last visited 2 August 2021); K.L. Scheppele, D.V. Kochenov, and B. Grabowska-Moroz, “EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union” (2020) 39 Y.E.L. 3. [↑](#footnote-ref-23)
24. These objections are discussed further below. [↑](#footnote-ref-24)
25. See generally, K. Lenaerts, I. Maselis, and K. Gutman, *EU Procedural Law* (Oxford: OUP, 2014), pp.419-440. [↑](#footnote-ref-25)
26. Article 265(1) TFEU. Natural or legal persons would be unable to avail of an action for failure to act in these circumstances, since any failure to act would not relate to a failure to address an act other than a recommendation or an opinion to any individual (art. 265(3) TFEU). [↑](#footnote-ref-26)
27. *Air One v Commission* (T-395/04) ECLI:EU:T:2006:123, at [24]. [↑](#footnote-ref-27)
28. *Air One v Commission*, at [24]. [↑](#footnote-ref-28)
29. It should be emphasised here that art. 263 TFEU proceedings would also be available to privileged applicants under art. 263(2) TFEU (a Member State, the European Parliament, the Council or the Commission) or semi-privileged applicants (the European Central Bank or the Committee of the Regions for the purpose of protecting their prerogatives) under art. 263(3) TFEU. [↑](#footnote-ref-29)
30. *Foto-Frost v Hauptzollamt Lübeck-Ost* (C-314/85) ECLI:EU:C:1987:452. [↑](#footnote-ref-30)
31. Art. 267(2) TFEU. [↑](#footnote-ref-31)
32. It is, of course, arguable that the representation of one democratically unaccountable Member State in the European Council or the Council would not affect the legality of an act adopted by that configuration of the relevant institution, especially if the vote of that Member State had no bearing on the outcome. Although the full resolution of that argument is beyond the scope of this paper, it is suggested that such a view would be too narrow an understanding of representation as understood in Art. 10(2) TEU; in brief, representatives of a Member State may influence the creation and adoption of an act through their mere participation in deliberations, particularly where there is a *de facto* desire to achieve consensus, even when not required *stricto sensu*. [↑](#footnote-ref-32)
33. If the proceedings reach the ECJ in a reference for a preliminary ruling, a declaration of invalidity will be similar to a declaration of nullity under Art. 264 TFEU (*Commission v. Greece* (C-475/01) ECLI:EU:C:2004:585, referred to by Lenaerts, Maselis, and Gutman, *EU Procedural Law*, p.475). [↑](#footnote-ref-33)
34. Article 264(1) TFEU; Lenaerts, Maselis, and Gutman, *EU Procedural Law*, p.411. [↑](#footnote-ref-34)
35. The CJEU has used this facility on grounds of legal certainty: Lenaerts, Maselis, and Gutman, *EU Procedural Law*, p.413 citing, *inter alia*, *Winner Wetten* (C-409/06) ECLI:EU:C:2010:503. [↑](#footnote-ref-35)
36. Lenaerts, Maselis, and Gutman, *EU Procedural Law*, p.415 citing, *inter alia*, *AKZO Chemie v Commission* (C-53/85) ECLI:EU:C:1986:256. [↑](#footnote-ref-36)
37. Lenaerts, Maselis, and Gutman, *EU Procedural Law*, p.415, citing *Internationaler Hilfsfonds v Commission* (T-300/10) ECLI:EU:T:2012:247, at [151]. [↑](#footnote-ref-37)
38. The practical issues with instrumentalising Art. 10(2) TEU are considered below. [↑](#footnote-ref-38)
39. See also, Arts 39 and 40 CFREU. [↑](#footnote-ref-39)
40. See also, the Act concerning the election of the members of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, O.J. 1976, L 278, p. 1, as amended by Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002, O.J. 2002, L 283, p. 1; Art. 223(1) TFEU. [↑](#footnote-ref-40)
41. The judgment in *Delvigne* (C-650/13) ECLI:EU:C:2015:648 demonstrates that national legislation governing the electoral rules in European Parliament elections falls within the scope of EU law, since such legislation involves the Member State implementing its obligation under Art. 14(3) TEU and EU secondary law (at [24-34]). See S. Platon, “The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union” in N. Cambien, D.V. Kochenov, and E. Muir (eds), *European Citizenship under Stress: Social Justice, Brexit and Other Challenges* (Leiden: Brill Nijhoff, 2020), pp.364-386. [↑](#footnote-ref-41)
42. Geiger in Geiger, Khan, and Kotzur (eds), *European Union Treaties: A Commentary*, p.67. [↑](#footnote-ref-42)
43. *Associação Sindical dos Juízes Portugueses* (C-64/16) ECLI:EU:C:2020:460, and its progeny. [↑](#footnote-ref-43)
44. Article 4(2) TEU. [↑](#footnote-ref-44)
45. Geiger in Geiger, Khan, and Kotzur (eds), *European Union Treaties: A Commentary*, p.67. [↑](#footnote-ref-45)
46. This might be consistent with the view of the EU as having a double legitimacy, a democratic one and an international one, as a “community of peoples and states”. (Porras Ramirez in Blanke and Mangiameli (eds), *The Treaty on European Union (TEU)*, p.419; A. von Bogdandy, “The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Treaty of Amsterdam” (2000) 6 C.J.E.L. 27, 27). [↑](#footnote-ref-46)
47. K. Bradley, “Showdown at the Last Chance Saloon: Why ostracising the representatives of a Member State government is not the solution to the Article 7 TEU impasse”, VerfBlog, 23 May 2020, https://verfassungsblog.de/showdown-at-the-last-chance-saloon/, (last visited 2 August 2021). [↑](#footnote-ref-47)
48. Bradley, “Showdown at the Last Chance Saloon”. [↑](#footnote-ref-48)
49. For an earlier version of these arguments, see J. Cotter, “The Last Chance Saloon: Hungarian Representatives may be Excluded from the European Council and the Council”, VerfBlog, 19 May 2020, https://verfassungsblog.de/the-last-chance-saloon/, (last visited 2 August. 2021). See also, Bradley’s rebuttal: Bradley, “Showdown at the Last Chance Saloon”. Other scholars have also called for operationalisation of art. 10 TEU: D. Krappitz and N. Kirst, “An Infringement of Democracy in the EU Legal Order”, *EU Law Live*, 29 May 2020, https://eulawlive.com/op-ed-an-infringement-of-democracy-in-the-eu-legal-order-by-david-krappitz-and-niels-kirst/, (last visited 2 August 2021); Platon, “The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union”, p.382. [↑](#footnote-ref-49)
50. “Die Mitgliedstaaten werden im Europäischen Rat von ihrem jeweiligen Staats- oder Regierungschef und im Rat von ihrer jeweiligen Regierung vertreten, die ihrerseits in demokratischer Weise gegenüber ihrem nationalen Parlament oder gegenüber ihren Bürgerinnen und Bürgern Rechenschaft *ablegen müssen*” (emphasis added). A brief survey of the Dutch, French, Hungarian, Irish, and Romanian versions appears to reveal, however, that the German-language version may be an outlier. The author would like to express his gratitude to Dr Szilárd Gáspár-Szilágyi and Mr Prashant Sabharwal for their assistance with the language versions consulted. [↑](#footnote-ref-50)
51. See also, Chapter V, CFREU, especially, Art. 40. [↑](#footnote-ref-51)
52. As to the limits on the related principle of mutual trust, for instance, see Lenaerts citing *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU) ECLI:EU:C:2016:198: K. Lenaerts, “Upholding the Rule of Law through Judicial Dialogue” (2019) 38 Y.E.L 3, 7. [↑](#footnote-ref-52)
53. K. Lenaerts, “The Principle of Democracy in the Case Law of the European Court of Justice” (2013) 62 Int’l & Comp. L.Q. (2013) 271, 280. [↑](#footnote-ref-53)
54. As to the limits of national constitutional identity, see Scheppele, Kochenov, and Grabowska-Moroz, “EU Values Are Law, after All”, 21-22. In the context of fundamental rights, von Bogdandy et al, have suggested the adoption of a reverse-*Solange* doctrine, whereby the Member States would retain autonomy over fundamental rights protection outside the scope of the CFREU, so long as it can be assumed that they comply with the essence of fundamental rights protected by art. 2 TEU. This concept is easily applied by analogy to the democratic value. See A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, and M. Smrkolj, “Reverse Solange–Protecting the essence of fundamental rights against EU Member States”, (2012) 49 C.M.L. Rev. 489. See also, J.W. Müller, “Should the EU Protect Democracy and the Rule of Law inside Member States?” (2015) 21 E.L.J. 141. [↑](#footnote-ref-54)
55. See, for instance, *Schmid* (C-516/99) ECLI:EU:C:2002:313. [↑](#footnote-ref-55)
56. *Associação Sindical dos Juízes Portugueses*, (C-64/16) ECLI:EU:C:2020:460; *Commission v Poland (Régime disciplinaire des juges)* (C-791/19) ECLI:EU:C:2021:596. [↑](#footnote-ref-56)
57. *Repubblika* (C-896/19) ECLI:EU:C:2021:311, at [60-65]. [↑](#footnote-ref-57)
58. *Repubblika*, at [63]. [↑](#footnote-ref-58)
59. *Junqueras Vies* (C-502/19) ECLI:EU:C:2019:1115, at [63]. [↑](#footnote-ref-59)
60. *Junqueras Vies*, at [63]. [↑](#footnote-ref-60)
61. *Les Verts v Parliament* (C-294/83) ECLI:EU:C:1986:166, at [23]. [↑](#footnote-ref-61)
62. For the link between EU citizenship and the democratic value, see *Wightman and Others* (C-621/18) ECLI:EU:C:2018:999, at [62-67]. [↑](#footnote-ref-62)
63. Müller, “Should the EU Protect Democracy and the Rule of Law inside Member States?”, 144. [↑](#footnote-ref-63)
64. Scheppele et al have pointed out in the context of infringement proceedings that Member States “can play cat and mouse with the Commission by changing its infringing practices just enough to meet the narrow tests of narrow decisions…” (Scheppele, Kochenov, and Grabowska-Moroz, “EU Values Are Law, after All”, 120). [↑](#footnote-ref-64)
65. *Repubblika* (C-896/19) ECLI:EU:C:2021:311, at [60-65]. See D.V. Kochenov and A. Dimitrovs, “Solving the Copenhagen Dilemma: The Repubblika Decision of the European Court of Justice”, VerfBlog, 28 April 2021, https://verfassungsblog.de/solving-the-copenhagen-dilemma/, (last visited 2 August 2021). [↑](#footnote-ref-65)
66. *A.K. and Others* (C-585/18, C-624/18, and C-625/18) EU:C:2019:982; *A.B. and Others* (C-824/18) EU:C:2021:153. [↑](#footnote-ref-66)
67. Dudley, “European Union Membership Conditionality: The Copenhagen Criteria and the Quality of Democracy” (2020) 20 *Southeast European and Black Sea Studies* 525. [↑](#footnote-ref-67)
68. Krappitz and Kirst suggest also that art. 3 of the First Protocol to the ECHR and related case law might, via art. 6(3) TEU, form a basis for defining the EU’s standards in democratic elections (Krappitz and Kirst, “An Infringement of Democracy in the EU Legal Order”). [↑](#footnote-ref-68)
69. *Associação Sindical dos Juízes Portugueses* (C-64/16) ECLI:EU:C:2020:460. [↑](#footnote-ref-69)
70. See Bradley, “Showdown at the Last Chance Saloon”. [↑](#footnote-ref-70)
71. Bradley, “Showdown at the Last Chance Saloon”. [↑](#footnote-ref-71)
72. Bradley, “Showdown at the Last Chance Saloon”. [↑](#footnote-ref-72)
73. It should also be pointed out that an operative interpretation and instrumentalisation of art. 10 TEU is less extreme than other proposals that have been advanced. Hillion has suggested that a Member State acting in systematic violation of the requirements of EU membership could be considered to have triggered art. 50 TEU (C. Hillion, “Poland and Hungary are withdrawing from the EU”, VerfBlog, 27 April 2020, https://verfassungsblog.de/poland-and-hungary-are-withdrawing-from-the-eu/, (last visited 2 August 2021). For a rebuttal to Hillion’s proposal, see J. Cotter, “Why Article 50 TEU is not the solution to the EU’s rule of law crisis”, *European Law Blog*, 30 April 2020, https://europeanlawblog.eu/2020/04/30/why-article-50-teu-is-not-the-solution-to-the-eus-rule-of-law-crisis/, (last visited 2 August 2021). Prime Minister of the Netherlands Mark Rutte has floated the idea of all Member States, other than problematic Member States, triggering art. 50 TEU *en masse* and forming a new union without the ostracised Member States: see T. Theuns, “Could we found a new EU without Hungary and Poland?”, *EUobserver*, 21 September 2020, https://euobserver.com/opinion/149470, (last visited 2 August 2021). Both these suggestions would deprive citizens of the ostracised Member States of all their EU citizenship rights in a way that the proposals in this paper would not. [↑](#footnote-ref-73)
74. M. Blauberger and R.D. Kelemen, “Can Courts Rescue National Democracy? Judicial Safeguards Against Democratic Backsliding in the EU” (2017) 24 J.E.P.P. 321. [↑](#footnote-ref-74)
75. Blauberger and R.D. Kelemen, “Can Courts Rescue National Democracy?”, 328-329. [↑](#footnote-ref-75)
76. Blauberger and R.D. Kelemen, “Can Courts Rescue National Democracy?”, 331-332. [↑](#footnote-ref-76)
77. Blauberger and R.D. Kelemen, “Can Courts Rescue National Democracy?”, 322. [↑](#footnote-ref-77)
78. Pursuant to the *TWD* doctrine, an indirect action via the preliminary ruling procedure is admissible only if the individual lacked standing to bring a direct action: *Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland* (C-188/92) ECLI:EU:C:1994:90. [↑](#footnote-ref-78)
79. The obligation to refer questions relating to the validity of EU laws should also be noted in this context. [↑](#footnote-ref-79)
80. Bradley, “Showdown at the Last Chance Saloon”. [↑](#footnote-ref-80)