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Protecting the Rule of Law as a Fundamental Value of the EU – The Article 7 Procedure and Beyond

I. Introduction: rule of law as a fundamental value of the EU

The European Union is a supranational entity which utilises the concept of integration by law. Thus it could be said that this community is necessarily, by its nature based on the rule of law – this was notably proclaimed by the European Court of Justice in its crucial judgment in *Les Verts*.[1] Beyond becoming a stable point of reference in the Court's argumentation and reasoning[2], the principle was codified in written primary law as well: in the period following the end of the Cold War and leading up to the establishment of the European Union, the Member States decided to insert formal references to the rule of law into the Maastricht Treaty (1992/1993), though in a more symbolic way: reference was made to the 'attachment' of the Member States to principle in the preamble of the Treaty on European Union (TEU), and developing the rule of law was made an objective of the Common Foreign and Security Policy and of development cooperation.[3] It was not before the Treaty of Amsterdam (1997/1999), however, that written primary law went as far as the Court's case law[4] and stated that the Union was founded inter alia on the rule of law, a principle common to the Member States.[5] The Lisbon Treaty (2007/2009), which restructured and amended the TEU significantly, placed the reference to the rule of law in Article 2, which now lists the principle as one of the fundamental values of the European Union. The Article listing the common values was based on the work of the Convention on the Future of Europe, which deliberated numerous possible alternatives before settling for the version reflected in the TEU[6] and reads as follows:

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

Article 2 TEU is referenced by Article 49, the provision of the TEU regulating accession (thus making adherence to the rule of law a legally binding pre-condition to accession). It is logically also referenced in Article 7 TEU, which sets up the procedure regarding the infringement of these values.

Before going into the details of the procedure, we cannot but note that the principle of rule of law as a subject of legal academic writing is, in and of itself, a serious challenge as the exact meaning and scope of the principle is often understood quite diversely,

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1 Case 294/83 *Les Verts v. Parliament* [EU:C:1986:166], para. 23.

2 The landmark statement made in *Les Verts* has since appeared as a fundamental consideration in such highly significant decisions of the Court as Opinion 1/91 [EU:C:1991:490], para 1.; Case C-402/05 P *Kadi and Al Barakaat v. Council and Commission* [EU:C:2008:461], para. 281; and Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [EU:C:2013:625], para. 91.

3 Cf. the Maastricht-era versions of Article 11 TEU and Article 177(2) TEC. See: *L. Pech*, The Rule of Law as a Constitutional Principle of the European Union, Jean Monnet Working Paper NYU School of Law 4|2009, pp. 14.

4 On some related differences in wording and how to reconcile them, see *Pech*, fn. 3.

5 *L. den Hertog,* The Rule of Law in the EU: Understandings, Development and Challenges. Acta Juridica Hungarica 3|2012, pp. 210–211.

6 For an overview see *H.-J. Blanke/S. Mangiameli* (eds.), The Treaty on European Union (TEU). A Commentary, Berlin/Heidelberg 2013, pp. 112–114.

as is the interpretation of the consequences that should follow from a breach of the principle.[7] There is no written definition in EU law on what rule of law means, and the articulation of the principle in legal terms is rare even at the national level. The main dichotomy underlying the concept is that there are formal and material aspects of the rule of law. The previous implies procedural requirements (such as the right to an independent judiciary with open and fair hearings), while the latter assumes that the citizens have moral rights and duties with respect to one another and in relation to the state, which therefore shall adhere to these rights. In its case law, the Court of Justice of the European Union (CJEU) has relied on a more formalistic approach with proper judicial review and legal remedies at the centre.[8] As per the European Commission, rule of law 'makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each member states' constitutional system'. Nevertheless, CJEU and European Court of Human Rights case law, as well as the various documents of the Council of Europe and of the Venice Commission indicate the core meaning, which includes

> legality, […] legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law.[9]

These are formal principles with considerable substantive content.[10]

Vis-à-vis the EU, compliance with the rule of law is "a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law".[11] As mentioned above, the EU as an area of freedom, security and justice without internal frontiers cannot function properly if there is a lack of mutual trust between the member states concerning each other's legal systems. And if the rule of law is imperilled, mutual trust is at risk as well.

Without delving into the problem of defining the rule of law any deeper, in the following we will concentrate on analysing the procedure enshrined in Article 7, as well as the Rule of Law Framework developed by the European Commission, and providing some critical remarks and suggestions.

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7 See *Pech*, fn. 3,. pp. 10–11, quoting and agreeing with *P. Craig*, The Rule of Law, Appendix 5 in House of Lords Select Committee on the Constitution, Relations between the executive, the judiciary and Parliament, HL Paper 151 (2006–2007), p. 97.

8 *Hertog*, fn. 5, pp. 205–210. However, as the rule of law is applicable not only in the internal relations, but to the foreign policy [Article 21(1) and (2b) TEU] and the accession negotiations (Article 49 TEU) as well, and the fact that TEU calls for the respect for fundamental rights (Article 6 TEU), we could say the principle is understood not only in a formal but in a more substantive in a way as well. See *Pech*, fn. 3, p. 53.

9 European Commission Communication, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 Final, 11 March 2014, p. 4. For an overview on the relevant case law see Annex I to the Communication. *Kochenov* and *Pech* list the principle of accessibility of the law, the principle of legitimate expectations and the principle of proportionality as well as components of the rule of law. See *D. Kochenov/L. Pech*, Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality, European Constitutional Law Review 3|2015, p. 523.

10 Case C-168/13 *Jeremy F v Premier Ministre*, ECLI:EU:C:2013:358, para 35–36.

11 European Commission, fn. 9, p. 4.

II. The Article 7 procedure

The Member States opted to create a procedure in order to protect the fundamental values of the Union in the Treaty of Amsterdam. This addressed the discrepancy that while the EU posited the rule of law – among others – as a condition for accession for states[12], it had no mechanism in place to formally control or sanction a breach of fundamental values by its own Member States.[13] The original Amsterdam version of the procedure only contained one option (determining the existence of a serious and persistent breach); the Treaty of Nice added a preventive procedure to the toolkit, while the Lisbon Treaty only amended related Council voting arrangements.[14]

The current version of the provision is structured as follows. Firstly, paragraph 1 details the preventive version of the procedure. Paragraph 2 regulates the version of the procedure by which it can be declared that a breach by a Member State has already taken place. Paragraph 3 contains the sanctions related to the paragraph 2 procedure, paragraph 4 regulates the change and revocation of said sanctions, while paragraph 5 concerns voting arrangements in the Council.

1. Determining a clear risk of a serious breach

The preventive procedure may be initiated by a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission. The decision is taken by the Council, acting by a majority of four fifths of its members. The consent of the European Parliament needs to be obtained. In its decision, the Council may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU. Before this determination is made, the Council is obliged to hear the Member State in question and may address recommendations to it, in accordance with the same procedure. In case such a determination is made, the Council is obliged to regularly verify that the grounds on which the decision was taken continue to apply.

This version of the procedure is meant to prevent actual violations of the fundamental values taking place – it is a serious, formalised warning by the Council to the Member State concerned, but it is strictly speaking not a sanction and results in no limitation of rights. As it may be quite difficult to anticipate the possible future consequences of a situation (or, on the other hand, too easy to claim a possible future effect), the Treaty requires that the risk should be clear – thus there should be no doubt that should the situation in the Member State remain unchanged, a violation of Article 2 TEU would take place.[15] Furthermore, the breach should be serious, meaning that the future violation would be as severe as to completely call into question the adherence to a value (or perhaps to multiple values) contained in Article 2.[16]

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[12] Cf. the human rights-related clauses in the EU's association and co-operation agreements and the Copenhagen Criteria. See: *D. Kochenov*. Busting the myths nuclear: A commentary on Article 7 TEU. EUI Working Paper Law 2017/10, p. 4.

[13] This phenomenon is often referred to as the "Copenhagen dilemma". See: *P. Bárd/S. Carrera/E. Guild/D. Kochenov,* An EU mechanism on Democracy, the Rule of Law and Fundamental Rights. CEPS Papers in Liberty and Security in Europe No. 91, CEPS 2016, p. 2.

[14] *Kochenov*, fn. 12, p. 5.

[15] *J. Schwarze* (Hrsg.): EU-Kommentar. 3. Auflage, Baden-Baden 2012, p. 140.

[16] *Schwarze*, fn. 15, p. 141.

2. Determining the existence of a serious and persistent breach

The second version of the procedure is designed to determine the existence of a serious and persistent breach of a fundamental value. Firstly, a proposal by one third of the Member States or by the Commission is required. The decision is taken by the European Council (i. e. at the highest possible institutional level in the EU), acting by unanimity and after obtaining the consent of the European Parliament. Before the decision is taken, the European Council is obliged to invite the Member State in question to submit its observations.

The right to initiate this procedure lies with a more limited circle, as the Parliament does not have the right of initiative. As mentioned in the case of the preventive version, the violation needs to be of a serious character. It also needs to be persistent, which suggests that in needs to have manifested for a period of time and still be prevalent.[17] Marginal or incidental violations are thus not sufficient to provide a basis for the procedure – however, without a formal, binding definition of the terms serious and persistent, relatively much is left to the political discretion of the European Council.[18]

As for sanctioning the breach, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties in any case continue to be binding on that State. The wording that "certain rights of the Member States may be suspended" suggests that the sanctions may not go as far as to suspend all rights of a particular Member State, or – at least – not on the first occasion.[19] As to what the sanctions may be, the TEU neither specifies nor limits the discretion of the Council, but based on the formulation of the Article suspending Council voting rights is the most severe sanction possible. The decision of the Council should, however, conform to the principle of proportionality[20], which is a general principle of EU law. It is important to stress that expelling a Member State is not a possibility under Article 7.[21]

The sanctions adopted by the Council may subsequently be varied or revoked in response to changes in the situation in question. This implies that the sanctions are intended to remedy the situation, not punish the Member State – although a decision could also be taken to introduce more severe sanctions. The Council has the right to change or revoke the sanctions, but is not obliged, and is – interestingly, and contrary to what the preventive procedure requires – also not expressly obliged by the TEU to regularly verify whether the sanctions should be upheld, though such an obligation can nevertheless be inferred from the principle of sincere co-operation.[22]

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17 *Schwarze*, fn. 15, p. 141.

18 A. *Osztovits*, Az EUSz. 7. cikkének magyarázata, in: *A. Osztovits (*ed.), Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata, Budapest 2011, p. 81. (Osztovits, Commentary on Article 7 TEU).

19 *Schwarze*, fn. 15, p. 141.

20 *Schwarze*, fn. 15, p. 142.

21 *Kochenov,* fn. 12, p. 11 and *B. Fekete*, Alternatív kommentár az EUSz. 7. cikkéhez. Közjogi Szemle 2|2016, p. 7 (*Fekete*, Alternative commentary on Artice 7 TEU).

22 *Schwarze*, fn. 15, p. 142.

3. Voting arrangements

The voting arrangements applying to the European Parliament, the European Council and the Council vis-à-vis Article 7 are laid down in Article 354 of the TFEU (Treaty on the Functioning of the European Union).

Accordingly, when the decision on the Article 7 procedure is taken, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the shall also not be counted in the calculation of the one third or four fifths threshold of Member States. Abstentions do not prevent the adoption of these decisions. As for the decision on the adoption, change or revocation of the sanctions, the qualified majority must be understood as laid down in Article 238(3)(b) TFEU. Where, following a decision to suspend voting rights adopted pursuant to paragraph 3 of Article 7 of the Treaty on European Union, the Council acts by a qualified majority on the basis of a provision of the Treaties, that qualified majority shall be defined in accordance with Article 238(3)(b) TFEU, or, where the Council acts on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, in accordance with Article 238(3)(a) TFEU.

For the purposes of its participation in the Article 7 procedure, the European Parliament is to act by a two-thirds majority of the votes cast, representing the majority of its component Members, the double majority threshold is indicative of the gravity of the decision.

4. Evaluation

The Article 7 procedure is meant to resolve systemic violations of the EU's fundamental values, including the rule of law, and is not a remedy for citizens, nor is it directly aimed at resolving individual violations of rights.[23] It is also inherently different from the infringement procedure (Article 258 TFEU): compared to Article 7, the latter is an almost 'everyday' enforcement mechanism regarding obligations arising from EU law. The Article 7 procedure however does not necessarily require a direct link with the implementation of EU law, as Article 2 talks about the fundamental values in general; thus it is possible that the violation of these values comes about by way of national laws and regulations which do not implement EU law. The fact that theoretically any Member State action or inaction may lead to the triggering of Article 7 regardless whether it is connected to the implementation of EU law explains why the procedural requirements (four fifths majority or unanimity, EP consent) are so strict, as does the severity of the possible sanctions.[24]

The preventive version of the procedure was a logical addition in Nice, as the effectivity of the procedure suffered from the fact that in its original form, it was only established as a reactive and not a preventive tool.[25] It is important to stress at this point, however, that Article 7 TEU does not require that the preventive option be initiated at first: the preventive version and the option to determine an already existing breach are actually separate procedures which may be started independently.[26] The significance of the pro-

[23] *Blanke/Mangiameli*, fn. 6, pp. 351–352.

[24] *Ch. Hillion*, Overseeing the Rule of Law in the EU: Legal Mandate and Means, in: C. Closa/D. Kochenov (eds.), Reinforcing Rule of Law Oversight in the European Union, Cambridge University Press, 2016, pp. 65–66.

[25] The Austrian FPÖ-government related situation in 2000 without any doubt contributed to this amendment. See: *Kochenov*, fn. 12, p. 5.

[26] *Kochenov*, fn. 12, p. 6.

cedure to maintain the rule of law can be seen as vital because a violation of this common value could not only undermine the legitimacy of EU decision-making but also disrupt the proper functioning of the EU legal order which is inter alia based on mutual trust and mutual legal interdependence.[27]

It is quite common knowledge that neither version of the Article 7 seven procedure has ever been initiated yet, regardless of numerous instances where its applicability has been raised.[28] The procedure itself is commonly seen as a 'nuclear option' with very drastic repercussions, even though the preventive version does not contain any sanctions per se: in political statements concerning Article 7, there is usually no differentiation between the versions of the procedure.[29] A further issue regarding the Article is that paradoxically the decision to safeguard the rule of law is a political decision.

There is no role for the Court of Justice under Article 7, even though the constitutional foundations of the EU, including the rule of law and fundamental rights have been largely influenced and developed by it. It would also help to counter claims that the procedure is overly political (even if the Court itself is often labelled as a proponent of judicial activism allowing for policy-based judicial decisions as well[30]): as a judicial institution, it would be able to base its evaluation of the situation solely on the law. The lack of a definition of the Article 2 values and the broad possibility of interpretation of some of the terms of Article 7 would make this a difficult task, but throughout integration history the Court has usually not shied away from defining EU law concepts and filling legal gaps. There is nonetheless one role for the Court of Justice regarding Article 7: according to Article 269 TFEU, the Court has jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7, but solely at the request of the Member State concerned by the Article 7 decision (whichever version).[31] Yet the Court of Justice cannot review the merits of the decision in any way: its jurisdiction in this regard only allows for a review of whether the procedural rules laid down in Article 7 have been complied with.

III. The Rule of Law Framework

As mentioned above, Article 2 TEU means a common ground, laying down a set of values that shall be respected by the EU and the Member States. However, there are difficulties regarding its application and enforcement. Most notably, the normative content of these values is unclear and hard to define, as they refer to premises with moral and political content as well, rather than strictly delimited legal institutions. Consequently, any reaction by the Union to shifts in the Member States necessarily depends on

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[27] *Hillion*, fn. 24, pp. 60–61.

[28] To refer to a less recent but nonetheless striking example: in 2011 in Joined Cases C-411/10 and C-493/10 N. S. and M. E. [EU:C:2011:865], the Court of Justice has essentially found that in Greece there were systemic flaws in the asylum procedure and reception conditions for asylum applicants (para. 86), leading to *de facto* suspension of Dublin transfers. Yet the application of the Article 7 TEU procedure against Greece at the time has not been seriously raised.

[29] See *Hillion*, fn. 24, p. 75, pointing as an example to the 2012 State of the Union address by *José Manuel Durão Barroso*, president of the European Commission at the time.

[30] For a recent overview of the issue see *L. Vilhena de Freitas*, The Judicial Activism of the European Court of Justice, in: *L. Pereira Coutinho/M. La Torre/S. D. Smith* (eds.), Judicial Activism, An Interdisciplinary Approach to the American and European Experiences, Springer Switzerland, 2015, pp. 173–180.

[31] In line with Article 269 TFEU, the request must be made within one month from the date of the Article 7 decision, and the Court shall rule within one month from the date of the request.

political determinants, lacking concrete and actual, legally definable and enforceable elements. The Commission's Rule of Law Framework fits into this scheme: it aims to foster one of the abovementioned values; however, its success is ab ovo questionable.

1. The Rule of Law Framework in General

For the late first half of the 2010s, the European Commission identified certain national measures as components of an increasing rule of law crisis, and developed a new framework to strengthen conformity with the EU values. In its communication from 2014,[32] the Commission aimed to address situations where "a systemic threat to the rule of law" evolves in a member state.[33] It was followed by the appointment of the First Vice-President of the Commission to be in charge of rule of law matters, as well as by the Council of the EU adopting its own initiative in order to establish a political dialogue among the member states on rule of law.[34]

The Framework is based on the premise that

> the Commission and the EU had to find ad hoc solutions since [the previous] EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law.[35]

There has to be "a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU".[36] Therefore, the Framework is designed to resolve tensions before the conditions for activating Article 7 TEU would be met. It deals with systemic threats; consequently it does not affect the infringement procedure in Article 258 TFEU.[37]

> In cases where the mechanisms established at national level to secure the rule of law cease to operate effectively, there is a systemic threat to the rule of law and […] the EU needs to act to protect.

It means the level of activation for the Framework is when

> the authorities of a member state are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanism established at national level to secure the rule of law.

Consequently, it does not deal with individual breaches of fundamental rights or a miscarriage of justice. The political, institutional and/or legal order of a member state, its constitutional structure, separation of powers, the independence and impartiality of the judiciary and the system of judicial review must be threatened, as a result of the adoption

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[32] European Commission, fn. 9,

[33] The Framework does not cover the rule of law of the Union itself; however, it is not because the situation is all but impugned. See *Kochenov/Pech*, fn. 9, p. 513.

[34] Council of the European Union, Press Release No. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, p. 20–21.

[35] European Commission, fn. 9, p. 2.

[36] *J. M. Barroso*, Speech at the Plenary session of the European Parliament, SPEECH/15/516, 12 September 2012, p. 10.

[37] In practice, the antidiscriminative policy of the French government against the Romani ethnicity in 2010, the Hungarian developments in the independence of the judiciary in 2011, and the Romanian government's failure to comply with the judgments of the national constitutional court in 2012 raised the awareness of key EU officials, stating there is an evolving crisis of the rule of law in Europe. See *V. Reding*, Speech at the Centre for European Policy Studies, SPEECH/13/677, 4 September 2013, p. 2.

of new measures or of widespread practices of public authorities and the lack of domestic redress.[38]

The procedure has three stages: the Commission's (i) assessment, (ii) recommendation and (iii) follow-up. All three stages are designed to find a solution through dialogue with the member state concerned, to ensure an objective and thorough assessment of the situation at stake, to respect the principle of equal treatment of member states, and to indicate swift and concrete actions to avoid the use of Article 7 TEU.[39]

In the assessment, the Commission collects and examines all the relevant information and determines whether there are clear indications of a systemic threat. These indications may come from available and recognised institutions, such as the Council of Europe and the EU Fundamental Rights Agency (FRA). In case of a positive answer, the Commission will initiate a dialogue with the member state concerned by sending a "rule of law opinion", making it possible to reflect on the Commission's concerns. The Member State is expected to be co-operative throughout the process, in line with the principle of sincere cooperation in Article 4(3) TEU. Any reluctance by the Member State will be taken into consideration when assessing the seriousness of the threat. While the initiation of the procedure is made public, the dialogue itself is confidential.[40]

At the second stage, if the previous efforts do not lead to a conforming result, the Commission will issue a "rule of law recommendation", indicating that there is objective evidence for a systemic threat and the national authorities are not taking appropriate actions to redress it. It will also define a fixed time limit for the Member State to implement the necessary measures and to inform the Commission on the steps taken. Where appropriate, the recommendation may include specific indications on how to resolve the situation. The Commission's conclusion will be based on the results of the dialogue. The sending of the recommendation and its main content is made public.[41]

During the follow-up, the Commission will monitor the afterlife of the recommendation. It may be based on further exchanges with the Member State concerned. If there is no satisfactory follow-up to the recommendation within the limit set, the Commission will assess the possibility of activating one of the Article 7 TEU mechanisms.[42]

It is noteworthy that the Framework brings the European Parliament and the Council into the procedure by keeping them regularly and closely updated on the progress made in each stage.

In addition, the Commission has to rely on other institutions and bodies as well in order to obtain expert knowledge on particular issues relating to the rule of law. These institutions are, in general, the EU's own FRA, the Venice Commission, the Presidents of the Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU, and the Judicial Councils.[43] The construction of the Framework, being a Commission initiative, nonetheless also aims to reinforce the Commission's own conviction that as the "Guardian of the Treaties" it should maintain a decisive, leading role in protecting the rule of law as well.[44]

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38 European Commission, fn. 9, p. 5–7.

39 European Commission, fn. 9, p. 7.

40 European Commission, fn. 9, p. 7–8.

41 European Commission, fn. 9, p. 8.

42 European Commission, fn. 9, p. 8.

43 European Commission, fn. 9, p. 9.

44 *A. Magen,* Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU, Journal of Common Market Studies 5|2016, p. 9.

2. The Rule of Law Framework in Practice

In November-December 2015, the Commission became aware of the ongoing dispute over the composition of the Polish Constitutional Tribunal, the shortening of the president's and the vice-president's mandate, as well as the nationalisation of the Public State Broadcasters, and asked to be informed about the constitutional situation of the country.[45] In January 2016, the College of Commissioners decided to examine the situation under the Framework and mandated the First Vice-President to enter into dialogue with the Polish authorities. After long and detailed, somewhat unproductive discussions, and the involvement of the Venice Commission and the European Parliament, the Commission, on 1 June 2016, adopted an opinion within the Framework on the rule of law in Poland.[46]

As no significant improvement was made, the Commission adopted a recommendation on the matter on 27 July 2016. Its scope related to the composition of the Constitutional Tribunal, the missing publication of Tribunal decisions in the official gazette, and the effectiveness of the constitutional review. As a result, the Commission found that a systemic threat to the rule of law was apparent in Poland. It has recommended actions to be taken in order to avoid a breakdown and has indicated three months to implement the necessary measures and to inform the Commission on the outcome.[47] Later, a complementary recommendation has been adopted on 21 December 2016 with an indicative time limit of two months.[48]

3. Problems with the Rule of Law Framework

Right at the beginning, the Framework builds upon an excessive premise: that the Member State concerned will engage in a widespread and detailed conversation with the Commission. The positive results depend on the success of this dialogue. If the Member State in question chooses to remain inactive, the discursive approach will not produce a conforming solution.[49]

The Commission also failed to define the clear content of "systemic threat", even though it would be a crucial point as it serves as the trigger for the procedure. It does not only mean that there are difficulties to distinguish between particular and systemic deficiencies based on the procedure, but also that the "systemic threat" and the "systemic violation" in Article 7 TEU are close and confusable categories.[50] Some procedural aspects may also burden the Framework. The confidentiality of the discussions and the legally non-binding nature of the opinion and the recommendation result in a less effi-

[45] The national measures affected heavily other areas as well. In detail see *R. Lupitu*, Defiant Political Paths in Warsaw: Another Breach in Europe and a New Milestone for the Euro-Atlantic Security Architecture, Europolity 1|2016, pp. 25–70.; *U. Jaremba*, The Rule of the Majority vs. the Rule of Law: How Poland Has Become the New Enfant Terrible of the European Union, Tijdschrift voor Constitutioneel Recht 2016, pp. 262–274.

[46] European Commission Recommendation regarding the Rule of Law in Poland, C(2016) 5703 final, 27 July 2016, p. 3–7.

[47] European Commission Recommendation regarding the Rule of Law in Poland, pp. 20–21.

[48] European Commission Press Release on Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland, IP/16/4476, 21 December 2016.

[49] *Kochenov/Pech*, fn. 9, p. 532.

[50] Ibid.

cient process, as well as that the recourse to Article 7 TEU is not automatic once the attempt for a mutually acceptable settlement fails.[51]

The application of the Framework is not coherent, as many stated that it was equally justified to commence a procedure against Hungary based on its illiberal state governance,[52] however, this has not happened (or at least not yet).[53] On the other hand, not much has improved in Poland since the adoption of the Commission recommendations, and the dialogue has turned into more a destructive one.[54]

Finally, the record of the Commission's activities in this field in recent years remains mixed. The inefficiency of the Framework led to a counter-coalition of Eurosceptics, in a legal sense as well, even though the Venice Commission provided strong support during the procedure against Poland.[55]

IV. Concluding remarks

The Article 7 procedure, at first glance, is an essential tool to maintain the value-based community that is the European Union: the common fundamental values laid down in Article 2 TEU need to be safeguarded effectively as regards the EU itself and its Member States as well. We have seen however that a number of questions persist as to the interpretation of Article 7 (and even as to the exact content of Article 2 TEU, i. e. the values this procedure is designed to protect), and the procedure, regardless of it being formulated as a legal provision, is nevertheless essentially a political tool,[56] and one that is usually regarded as too severe to be deployed in practice (regardless of the possibility of using the preventive version). We would like to point out that as a strictly legal tool, the utilization of the infringement procedure is available to the Commission in the field of the rule of law as well, even if it is not designed to counter fundamental systemic deficiencies in the Member States, and could potentially be used to prevent systemic violations of the rule of law – only limited to the field of application of EU law.[57]

As regards related institutional questions, the possible enhanced role of the FRA and the CJEU are the most relevant ones. The FRA Regulation does not specifically envision a role for the Agency in the Article 7 procedure, but as the objective of the FRA is to provide the relevant institutions, bodies, offices and agencies of the EU (and its Member

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[51] Ibid.

[52] For the situation in Hungary see e.g. *T. Drinóczi*, Constitutional Politics in Contemporary Hungary, ICL Journal 1|2016, p. 63–98.

[53] The inaction of the Commission is well presented by the fact that more European Parliament resolutions have been adopted on the matter than Commission standpoints. See European Parliament Resolution on the Situation in Hungary, 2015/2700(RSP), 10 June 2015; European Parliament Resolution on the Situation in Hungary, 2015/2935(RSP), 16 December 2015.

[54] *L. Pech*/*K. L. Scheppele*, Poland and the European Commission, Part III: Requiem for the Rule of Law, VerfBlog 2017. http://verfassungsblog.de/poland-and-the-european-commission-part-iii-requiem-for-the-rule-of-law, 3.11.2017.

[55] *A. von Bogdandy*/*C. Antpöhler*/*M. Ioannidis*, Protecting EU Values – Reverse Solange and the Rule of Law Framework, MPIL Research Series 4|2016, p. 15.

[56] It should be noted that Article 7 TEU is not unique in the sense that the founding treaties of various international organisations (e. g. the United Nations and the Council of Europe) contain similar provisions. *Fekete,* fn. 21, p. 9.

[57] The relationship of the two procedures is not addressed in any way by the Treaties, but the approach taken by the Commission in the Rule of Law Framework suggests a complementarity between the two, and nothing suggests that the application of one would exclude the possibility of the other. *Hillion,* fn. 24, pp. 71–74.

States when implementing EU law) with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights,[58] the possibility of relying on the FRA in the course of the Article 7 procedure cannot be excluded.[59] Developing the role of the FRA into a true early-warning mechanism however would definitely require a significant adjustment of its mandate and thus the amendment of the FRA Regulation.[60]

As for the Court of Justice, it would considerably enhance the acceptability of the Article 7 procedure to include participation an independent judicial institution in some form. In its current form however, the Article is not compatible with a decisive role for the Court and it would require a full restructuring and redrafting of Article 7 to modify it into an actual judicial procedure (i. e. Treaty change would be necessary). It would be possible nonetheless to allow the Court of Justice – via (a perhaps less divisive) modification of inter alia Article 269 TFEU – to review also the content of Article 7 decisions as well. Under the current rules, the limitation of the Court of Justice's competence to formal review is questionable anyway, as according to Article 19 TEU, the role of the CJEU is to – generally – ensure that in the interpretation and application of the Treaties the law is observed; and according to the case law of the Court itself – as famously proclaimed in the very same *Les Verts* case – the fact that the EU is based on the rule of law means neither the Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaties; furthermore, the Treaties have established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.[61] So one may wonder whether the limitation of review of Article 7 decisions to procedural issue is fully in line with these principles: these decisions are not legislative acts, but they are definitely binding acts,[62] with no possibility of review as regards their merits, including as to whether the material conditions to adopt them have been fulfilled or not.[63]

The Rule of Law Framework is yet to produce meaningful results. The inherent defaults of the procedure make it difficult to reach beyond political negotiations and to safeguard the legal interests of European integration. In this sense, it fits alongside the system of Article 7 TEU, giving little ground for optimism. The European Parliament acknowledged this situation, and adopted in 2016 its own mechanism on democracy, the rule of law and fundamental rights.[64] Accordingly, it states that the

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[58] See Article 1 of Council Regulation 168/2007/EC establishing a European Union Agency for Fundamental Rights [OJ 2007 L 53/1].

[59] This is in line with the position of the Council, the Parliament and the Commission articulated regarding the adoption of the FRA regulation. *C. Pinelli*, Protecting the Fundamentals. Article 7 of the Treaty on the European Union and Beyond, FEPS Jurists Network, 2012, p. 14.

[60] Ibid.

[61] Case 294/83 *Les Verts v. Parliament* [EU:C:1986:166], para. 23.

[62] *Blanke/Mangiameli*, fn. 6, p. 630. Cf. also p. 631 for further questions regarding the *locus standi* of the European Council.

[63] See: *M. Broberg/N. Fenger*, Preliminary References to the European Court of Justice (Second Edition). Oxford University Press, 2014, pp. 109–110, noting also that from the restrictive wording of Article 269 it also follows that preliminary ruling requests *vis-á-vis* decisions based on Article 7 TEU also seem to not be allowed.

[64] *S. in 't Veld*, An EU mechanism on democracy, the rule of law and fundamental rights, European Parliamentary Research Service, PE 579.328, October 2016.

> weaknesses in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights could be overcome by the conclusion of an EU Pact for Democracy, the Rule of Law and Fundamental Rights in the form of an interinstitutional agreement. This [agreement] should lay down arrangements for (i) the development of an annual European report on the state of democracy, the rule of law and fundamental rights in the Member States with country-specific recommendations assessing compliance with [fundamental rights], and (ii) a policy cycle for [fundamental rights], involving EU institutions and national parliaments, with country-specific recommendations aimed at monitoring and enforcing Member State compliance, including a [fundamental rights] policy cycle within the institutions of the Union.[65]

Such a procedure would have

> relatively low cost, particularly if the right synergies are found with international organisations, whilst at the same time having significant benefits, notably fostering mutual trust and recognition, attracting more investment, and providing higher welfare standards.[66]

In reality, this method also highlights the politically sensitive character of rule of law, the lack of legally conforming solutions and the fact that there is still a long way to go until the fundamental values of the EU are guaranteed in a constant, stable and legally enforceable way – the shortcomings of Article 7 TEU are clearly highlighted by the various existing or proposed additional non-binding procedures.

[65] Ibid. p. 3.

[66] Ibid.