

Middlesex University Research Repository

An open access repository of

Middlesex University research

<http://eprints.mdx.ac.uk>

Pech, Laurent and Scheppele, Kim Lane (2017) Illiberalism within: rule of law backsliding in the EU. Cambridge Yearbook of European Legal Studies, 19 . pp. 3-47. ISSN 1528-8870

Final accepted version (with author's formatting)

This version is available at: <http://eprints.mdx.ac.uk/23663/>

Copyright:

Middlesex University Research Repository makes the University's research available electronically.

Copyright and moral rights to this work are retained by the author and/or other copyright owners unless otherwise stated. The work is supplied on the understanding that any use for commercial gain is strictly forbidden. A copy may be downloaded for personal, non-commercial, research or study without prior permission and without charge.

Works, including theses and research projects, may not be reproduced in any format or medium, or extensive quotations taken from them, or their content changed in any way, without first obtaining permission in writing from the copyright holder(s). They may not be sold or exploited commercially in any format or medium without the prior written permission of the copyright holder(s).

Full bibliographic details must be given when referring to, or quoting from full items including the author's name, the title of the work, publication details where relevant (place, publisher, date), pagination, and for theses or dissertations the awarding institution, the degree type awarded, and the date of the award.

If you believe that any material held in the repository infringes copyright law, please contact the Repository Team at Middlesex University via the following email address:

eprints@mdx.ac.uk

The item will be removed from the repository while any claim is being investigated.

See also repository copyright: re-use policy: <http://eprints.mdx.ac.uk/policies.html#copy>

Illiberalism Within: Rule of Law Backsliding in the EU

Laurent PECH, Middlesex University

Kim Lane SCHEPPELE, Princeton University

Abstract:

How should the European Union cope with Member States that no longer respect the basic values of the Union? This article reviews the cases of Hungary and Poland, showing the responses of the major European Union institutions to those two Member States as their governments removed checks on their power, eliminated the independence of judiciaries and failed to honour their European commitments. As the chapter demonstrates, the responses of EU institutions have so far been ineffective at bringing these Member States back into line with European values. We examine the various proposals that have been made to do better, concluding that there is some promise in some legal strategies that are available now but have yet to be tried.

Keywords: Rule of Law, Authoritarianism, European Union, Hungary, Poland

‘The very functioning of the Union and its internal market is endangered if in one of its Member States the fundamental values, in particular the rule of law, are no longer respected.’ Frans Timmermans, 12 April 2017¹

‘As usual, when the leaders – when the members of the great political elite – turn against their own people, there is always a need for inquisitors to launch proceedings against those who voice the opinion of the people. In our earlier four-year term, the European Union had a grand inquisitor, and her name was Madame Reding. That grand inquisitor failed, and now they’ve found a new one: the new grand inquisitor’s name is Timmermans ... at this point in time, Poland is chosen as the inquisition’s main target in order to weaken, to destroy, to break national governance.’ Viktor Orbán, 22 July 2017²

I. INTRODUCTION

In a speech delivered on 26 July 2014, Viktor Orbán, the Hungarian Prime Minister since 2010, explained that ‘the new state that we are constructing in Hungary is an illiberal state, a non-liberal state’ which would ‘not reject the fundamental principles of liberalism such as freedom.’ Instead, it ‘does not make this ideology the central

* We are indebted to Kenneth Armstrong, Dimitry Kochenov, Israel Butler, Jan-Werner Müller, Daniel Kelemen, Tomasz Konieczny, Gábor Halmai, Joelle Grogan and Agata Gostyńska-Jakubowska for their insightful comments on an earlier draft. This paper is current as of August 2015. The usual disclaimer applies.

¹ Answer given by First Vice-President Timmermans on behalf of the European Commission to the question for written answer submitted by Claude Rolin (PPE), E-009716-16.

² Speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tuşnad, Romania), full text available here: <https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans/>

element of state organisation, but instead includes a different, special, national approach'.³ He further argued that he did not believe 'that it is impossible to construct a new state built on illiberal and national foundations within the European Union'.⁴

The implementation of Viktor Orbán's illiberal state agenda has, however, regularly been decried by the EU and described by critics as having transformed Hungary into a 'grey zone between democracy and dictatorship'⁵ and a 'mafia state'.⁶ The recurrent tension between the EU and Orbán recently culminated in the first ever adoption by the European Parliament of a resolution calling for a vote on the activation of the preventive arm of Article 7 of the Treaty on European Union (TEU) on the ground that the 'current situation in Hungary represents a clear risk of a serious breach of the values' on which the EU is based and which are said to be common to the EU Member States.⁷

Article 7 TEU, which is often referred to (inaccurately in our view) as the EU's 'nuclear option',⁸ was first inserted in the EU Treaties via the Amsterdam Treaty in order to empower the EU to monitor and eventually subject any of its Member States to sanctions in a situation of serious and persistent breach of the values laid down in Article 2 TEU, one of which is the rule of law.⁹ Article 7 was further amended by the Nice Treaty to provide for a public warning that EU values are in danger in the situation in which there is a clear risk of a serious breach by a Member State of those values. In this situation, provided that this provision is triggered, 'the Council shall hear the Member State in question and may address recommendations to it' according to Article 7(1) TEU. The public warning of Article 7(1) is often referred to as the preventive arm while the declaration that there is a breach, potentially accompanied by any eventually sanctions such as the suspension of EU voting rights, is outlined in Article 7(2) and (3) and is often called the sanctioning arm. In 2014, the European Commission adopted a 'Rule of Law Framework' for assessing whether a Member State had endangered the rule of law sufficiently that Article 7 TEU should be invoked.¹⁰

Two points may be worth emphasising at this early stage. First, the insertion of Article 7 revealed a lack of confidence amongst the Masters of the Treaties in the effectiveness of pre-accession conditionality¹¹ at a time where the EU was getting

³ Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp, full text reproduced on the official website of the Hungarian government, 30 July 2014: <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>

⁴ Ibid.

⁵ István Hegedus, co-founder of Hungary's Fidesz party, quoted in M Fletcher, 'Is Hungary the EU's first rogue state? Viktor Orban and the long march from freedom', *New Statesman*, 1 August 2017: <http://www.newstatesman.com/world/europe/2017/08/hungary-eus-first-rogue-state-viktor-orban-and-long-march-freedom>

⁶ Bálint Magyar (former Hungarian minister of education), 'The EU's Mafia State', *Project Syndicate*, 21 June 2017: <https://www.project-syndicate.org/commentary/orban-hungary-mafia-state-by-balint-magyar-2017-06#comments>

⁷ Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)), para 9.

⁸ For further analysis, see D Kochenov 'Busting the myths nuclear: A commentary on Article 7 TEU' *EU Working Paper LAW* 2017/10.

⁹ For further analysis, see L Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' 6 *European Constitutional Law Review* (2010) 359.

¹⁰ European Commission, *A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158 final.

¹¹ See generally D Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International, 2008).

ready to welcome ten new countries from Eastern Europe. Existing Member States evidently hoped that the mere presence of Article 7 would act as a sufficient deterrent and prevent any democratic and rule of law backsliding post accession. Second, even the European Commission has taken the position that the scope of Article 7 'is not confined to areas covered by Union law', which means that the Union may act 'in the event of a breach in an area where the Member States act autonomously' because any country breaching the EU's fundamental values in a manner sufficiently serious to be caught by Article 7 would likely 'undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs'.¹²

While the situation in Hungary may well see the preventive arm of Article 7 activated for the first time by the end of 2017, this provision has also become increasingly mentioned in the context of the rapidly deteriorating situation in Poland. Indeed, soon after winning the legislative elections in 2015, Poland's Law and Justice (PiS) party 'embarked on a course of change that places it solidly in the illiberal camp, with many of the initiatives mirroring those enacted by Fidesz in Hungary',¹³ especially its attempt to rapidly capture the Polish Constitutional Tribunal in order to be able to violate the Polish Constitution at will. The actions of PiS led the European Commission to activate its so-called Rule of Law Framework for the first time in January 2016.¹⁴ The situation in Poland has gone from bad to worse since and the multiple rule of law recommendations made by the Commission have not only been ignored but also openly and rudely dismissed by Polish authorities. Jarosław Kaczyński, Poland's de facto leader, went as far as to argue that 'there is nothing going on in Poland that contravenes the rule of law'.¹⁵ Faced with an attempt in July 2017 to dismiss all of the Polish Supreme Courts judges, the European Commission finally explicitly threatened to trigger Article 7(1) TEU immediately 'should the Polish authorities take any measure of this kind'.¹⁶ In the words of President Jean-Claude Juncker, the President of the European Commission:

The Commission is determined to defend the rule of law in all our Member States as a fundamental principle on which our European Union is built. An independent judiciary is an essential precondition for membership in our Union. The EU can therefore not accept a system which allows dismissing judges at will. Independent courts are the basis of mutual trust between our Member States and our judicial systems. If the Polish government goes

For a detailed account of the origins of Article 7, see W Sadurski, 'Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider' (2010) 16 *Columbia Journal of European Law* 385.

¹² European Commission, *Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is founded*, COM(2003) 606 final, 15 October 2003, section 1.1.

¹³ A Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, Freedom House, June 2017, p 38.

¹⁴ European Commission, Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71, Brussels, 13 January 2016.

¹⁵ P Sobczak and J Pawlak, 'Poland's Kaczynski calls EU democracy inquiry "an absolute comedy"', *Reuters*, 22 December 2016. Most recently, Kaczyński denounced the Commission's 'abuse' of its powers and the political character of the Commission's on-going monitoring of the rule of law situation in Poland on the ground that judiciary 'reforms' would fall exclusively within national jurisdiction: 'Poland's Kaczynski says EU's call to halt court reforms 'political'' *Reuters*, 19 July 2017: <http://www.reuters.com/article/us-poland-politics-judiciary-kaczynski-idUSKBN1A428S?il=0>

¹⁶ Commission Recommendation of 26 July 2017 regarding the rule of law in Poland, C(2017) 5320 final, para 58.

ahead with undermining the independence of the judiciary and the rule of law in Poland, we will have no other choice than to trigger Article 7.¹⁷

This article will focus on the EU's attempts to address the systemic threats to and breaches of the rule of law that have materialised inside the EU. It will first explain how rule of law backsliding tends to happen in practice before offering a more theoretical definition of this notion (Part II). A summary of the key features of the Commission's Rule of Law Framework in the light of its first activation against Poland will follow (Part III). The European Commission's efforts to prevent or roll back what we call 'rule of law backsliding' in countries such as Hungary and Poland as well as the actions of the Council and European Parliament will then be critically assessed (Part IV). The paper will conclude with a brief overview of the new mechanism proposed by the European Parliament on 25 October 2016 and some suggestions on the possible way forward to deal with autocratic regimes within the EU (Part V).

To summarise our argument: The Commission invoked a new Rule of Law Framework to cope with a rapidly deteriorating situation in Poland, after the government bluntly attacked the Constitutional Tribunal, but we believe that this effort was bound to fail given that the new framework was based on the questionable presumption that a discursive approach could produce positive results. This presumption reflected the Commission's failure to learn the right lessons from the Hungarian case, which strongly suggested that a discursive approach would be ineffective in a situation where there was a concerted plan to evade Article 2 values. The presumption of a discursive resolution further reflected the Commission's failure to appreciate that would-be-authoritarians always seek to consolidate power as soon as possible and regrettably, the Rule of Law Framework simply delays the time when Article 7 TEU might be invoked until after the critical consolidation of power has already occurred. The Commission's activation of the Rule of Law Framework against Poland has revealed further shortcomings, including the Commission's failure to treat like situations alike by invoking the Rule of Law Framework only against Poland and not against Hungary as well as by the Commission's reluctance to move to the next logical stage – Article 7 TEU – when confronted with belligerent rhetoric and complete non-compliance with its recommendations. In the Commission's defence, however, it is difficult to be bold and firm when you have to work with intergovernmental institutions such as the European Council, which has been reluctant to engage in any criticism of Member States.

Looking beyond the Hungarian and Polish cases, our key argument is that the only way to prevent the occurrence of a consolidated autocracy in violation of EU values is to act fast as soon as the danger signals are clear. A recommendation for speed, however, goes against the general tendency of EU institutions to assume that stalling for time solves most problems. The Rule of Law Framework appears to be designed for normal times when simply slowing a process down cools heads and makes friendly resolution of disputes more likely. But in the abnormal times of a budding autocracy inside the EU, the Rule of Law Framework simply adds a *de facto* compulsory step before the activation of one of the two arms of Article 7. While this may enable the Commission to accumulate incriminating evidence and help create a political environment in which the rogue government may progressively lose the support of its peers before the eventual triggering of Article 7, the Framework has

¹⁷ European Commission acts to preserve the rule of law in Poland, Press release IP/17/2161, Brussels, 26 July 2017.

also arguably made the situation worse by enabling rogue governments, who did not care about their international reputations, to consolidate power in plain sight while the EU dithered over what to do.

If this problem of rogue Member States within the EU is to be solved, we believe that all EU institutions must use all of the tools at their disposal. The Commission must revive and reframe its use of the infringement procedure. We also call on the Commission to more vigorously press the European Council and the Council to unequivocally support its efforts in establishing unambiguous deadlines and instructions when the Rule of Law Framework has been invoked. The European Parliament could have triggered Article 7 if it had worked toward establishing the two-thirds vote it would take to do so. But that could only be done if partisan politics were put aside so that powerful parties such as the European People's Party did not shield their member governments from the consequences of violating EU basic values. Even the Court of Justice must recognise that the EU faces new challenges that call for adjustment of existing doctrine created in better times. For instance, where any EU Member State ceases to comply with the most basic understanding of the rule of law and the EU institutions have otherwise failed to effectively correct the situation, the principle of mutual trust ought to be adjusted.

Europe has been juggling multiple crises in recent years, so the internal affairs of a rogue government or two may seem less critical to Europe's well-being than crises that affect multiple states at the same time, like the euro-crisis, refugee crisis or the fallout from Brexit. But the proliferation inside the EU of governments that no longer share basic European values undermines the reason for existence of the EU in the first place. It also threatens the functioning of a legal framework which 'is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded'.¹⁸ The 'values crisis' may not seem as urgent as the other crises on European plates, but it has the most far-reaching implications for the European project because without common values, there are fewer reasons for the EU to exist. Europe therefore fails to act at its peril. And it needs to act before rogue governments bent on establishing authoritarian regimes become ever more entrenched.

II. A NEW AND SPREADING PROBLEM: RULE OF LAW BACKSLIDING WITHIN THE EU

As early as January 2011, when Hungary took up the rotating presidency of the Council, it was clear that all was not well. Prime Minister Viktor Orbán had only been in power for seven months, but Commission President José Manuel Barroso broke with the usual protocol during a joint press conference which customary involves only congratulating the incoming presidency for its preparation. Instead, Barroso strongly criticised the Hungarian government for having passed laws that raised concern about its commitment to basic values.¹⁹ These concerns were to be often repeated, as

¹⁸ *Opinion 2/13 (EU Accession to the ECHR)*, EU:C:2014:2454, para 168. For an overview of the main normative arguments justifying a reinforced monitoring by the EU of its Member States, see C Closa, 'Reinforcing EU Monitoring of the Rule of Law' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

¹⁹ The first laws to raise concern were media laws bringing all press outlets, whether public or private, broadcast, print or internet-based, under control of a media council that contained only members of the governing party. Statement by President Barroso at the press conference following the meeting of the European Commission with the Hungarian Presidency, 7 January 2011, Speech/11/4.

Hungary went on to adopt a new constitution containing provisions that challenged EU law,²⁰ passed laws about the Central Bank that had not been the subject of consultation with the EU,²¹ captured the ordinary judiciary through lowering the judicial retirement age²² and fired the data protection ombudsman.²³ At first, the Commission handled the consolidation of power in Hungary as a set of individual and separate *acquis* violations.

By 2013, Viviane Reding, vice-president of the Commission, observed that the EU was facing unprecedented ‘rule of law crises’ revealing problems of a *systemic* nature.²⁴ Soon after, President Barroso stressed the increasing number of ‘threats to the legal and democratic fabric in some of our European states’.²⁵ Since then, the rule of law situation has continued to steadily worsen in Hungary under the stewardship of Viktor Orbán. The rule of law also abruptly deteriorated in Poland following the legislative victory of Jarosław Kaczyński’s Law and Justice Party in October 2015. While both the Barroso Commission and the subsequent Juncker Commission have made repeated worried comments about Hungary and the Juncker Commission has publicly criticized Poland, the situation has not improved.

While many organisations, officials and experts have expressed serious and repeated concerns regarding ‘rule of law backsliding’ in these two countries, there is no established definition of this notion, which is now even used in EU official documents.²⁶ Before we offer a definition, it may be useful to briefly explain how rule of law backsliding concretely occurs. The cases of Hungary and Poland, to mention only the EU examples of a broader international trend, suggest a new worrying pattern in the fate of constitutional democracies. One may go as far as to speak of a recipe for constitutional capture being followed in one state after another,²⁷ a process which results in a systemic undermining of the key components of the rule of law such as independent and impartial courts.²⁸ This process follows a well-organised script:

- (1) Rule of law backsliding tends to begin with a significant number of citizens losing faith in their system of government for a number of reasons which vary from increasing inequality, persistent unemployment or the predatory practices of the ruling elites. This is often

²⁰ The Commission sent a warning letter to the Hungarian government on 12 January 2012, less than two weeks after the new constitution came into effect: ‘The European Commission Sanctions Orbán’s Government’, European Parliament in Action, 30 January 2011: <http://europarlament.touteurope.eu/follow/news/news-details/news/the-european-commission-sanctions-orbans-government.html>

²¹ ‘European Commission Warns Hungary over Central Bank Independence’, *EurActiv*, 21 December 2011: <http://www.euractiv.com/section/central-europe/news/eu-warns-hungary-over-central-bank-independence>

²² *Commission v. Hungary (judicial retirement age)*, Case 286/12, EU:C:2012:687.

²³ *Commission v. Hungary (data protection officer)*, Case 288/12, EU:C:2014:237.

²⁴ V Reding, ‘The EU and the Rule of Law – What next?’ Speech/13/677, 4 September 2013. The former Justice Commissioner mentioned explicitly three countries in her speech: Romania, France and Hungary. For further analysis, see D Kochenov and L Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’ (2015) 11(3) *European Constitutional Law Review* 512.

²⁵ State of the Union Address, Speech 13/684, 11 September 2013.

²⁶ See e.g. European Commission, *Turkey 2016 Report, Commission Staff Working Document*, SWD(2016) 366 final, 9 November 2016, p 17: ‘There has been backsliding in the past year, in particular with regard to the independence of the judiciary.’

²⁷ K L Scheppele, ‘The End of the *End of History*’ forthcoming in *University of Toronto Law Review*.

²⁸ According to the European Commission’s Communication on a new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014, p. 4, other core sub-components of the rule of law include the principles of legality and legal certainty, the prohibition of arbitrariness of the executive powers, effective judicial review including respect for fundamental rights.

accompanied by a crisis in the party system in which one of the mainstream parties is either riven with conflict or takes a sharp turn to an extreme which then presents itself as a normal option at the next election;

- (2) Disgruntled citizens vote to break the system by electing a leader who promises radical change, often referring to the ‘will of the people’ while attacking the pre-existing constitutional framework with cleverly crafted legalistic blueprints borrowed from other ‘successful’ autocrats, a pattern that led Professor Cooley to speak of a new ‘League of Authoritarian Gentlemen’;²⁹
- (3) The new autocrats act quickly to shut down the key offices that might resist their consolidation of power, which includes the independent judiciary, the media and the repressive institutions (security services, police, public prosecutor’s office);
- (4) To remain popular, these autocrats engage in benefit giveaways while they seek to control the public debate and eliminate alternative views through the bullying of civil society groups and the deployment of tax police and public prosecutors, newly captured, against their opponents;
- (5) They then change the election law, the electorate (by pushing the opposition out of the country or suppressing their votes) or both;
- (6) When voters eventually wake up to the damage done (usually too late, as the new autocrat has by that time destroyed any channel through which alternative views may be expressed), they have few options to resist because their constitutional system has been captured and no constitutional avenue remains to effectively challenge the government/ruling party;
- (7) In the unlikely situation where resistance nonetheless emerges from the Parliament or from the streets, biased referenda can always be organised to confirm the will of the leader under the guise of the will of ‘the people’, a notion which authoritarian populists find useful to rely upon in order to put themselves ‘above democratic institutions and to overcome obstacles’³⁰ which may stand in their way;
- (8) Having sealed the space against dissenting voices and rewritten electoral regulations, autocrats can then expect to get the votes they need to win subsequent elections by whipping up imaginary enemies or giving away state largesse to garner votes. In this way, the rotation of power from one party to another becomes a feature of the past.

In light of this pattern of constitutional capture,³¹ we propose to define rule of law backsliding as *the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party*. This process enables

²⁹ A Cooley, ‘The League of Authoritarian Gentlemen’, *Foreign Policy*, 30 January 2013. See also J-W Müller, ‘Rising to the challenge of constitutional capture: Protecting the rule of law within EU member states’, *Eurozine*, 21 March 2014: <http://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture>; K L Scheppele ‘The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency’ in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006).

³⁰ Report by the Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law*, 2017, p 6.

³¹ As explained by Professor Jan-Werner Müller, ‘constitutional capture is different from pervasive corruption (a major problem still in Bulgaria and Romania, for instance); but it is also different from individual rights violations, grave as the latter might be. Constitutional capture aims at systematically weakening checks and balances and, in the extreme case, making genuine changes in power exceedingly difficult’, ‘Rising to the challenge of constitutional capture’, note 29 above. For a more comprehensive account, see J-W Müller, ‘Should the EU protect democracy and the rule of law inside Member States’ (2015) 21(2) *European Law Journal* 141.

the establishment of electoral autocracies and the solidification of one-party states³² in which elected officials of the ruling party claim exclusive authority to act on behalf of ‘the people’.

Rule of law backsliding is a decisive issue for the whole EU because it not only affects the citizens of the country where this phenomenon is happening, but it also affects other EU citizens residing in any such ‘illiberal regime’ as well as, indirectly, all residents in the EU through these regimes’ participation in the EU’s decision-making processes and in the adoption of norms that bind all in the EU. In addition, given that implementation of EU law occurs primarily within Member States, a rogue government that no longer feels bound by the basic principles of the EU can create black holes within the EU where EU law no longer can be counted on. Consider, for example, how dependent EU Member States have become on each other’s independent courts. Judicial capture by an illiberal governing party poses a threat to the correct, consistent and effective application of EU law within the affected (not to say infected) Member State. It also poisons the use of EU mechanisms that are in place to guarantee the consistent interpretation and application of EU law at Member State level and to allow enforcement of national court judgments throughout the EU. In a nutshell, EU Member States have become too interdependent to confine the effects of rule of law backsliding only to the backsliding state.

While we refer to ‘rule of law backsliding’ in this paper, a number of connected notions such as ‘stealth authoritarianism’,³³ ‘democratic decay’,³⁴ or ‘authoritarian reversion’³⁵ may be usefully relied upon to make sense of countries like Hungary and Poland. It is important however not to confuse rule of law backsliding with ‘mere’ structural rule of law deficiencies in countries that have been facing endemic corruption, weak institutional capacities, or insufficient resources at the administrative or judicial levels.³⁶ Indeed, one often reads that major rule of law problems can be identified in other EU countries and one should not therefore single out Hungary and/or Poland. The existence of significant rule of law problems in EU Member States with historically weak or corrupt judiciaries or countries facing major budgetary cuts cannot be denied. We believe, however, that Hungary and Poland raise challenges of an utterly different nature because rule of law backsliding is a deliberate strategy pursued by public authorities with the goals of fundamentally undermining pluralism and creating a de facto one-party state where ‘changes in government through fair and honest elections become all but impossible’ following the capture of ‘the executive and legislative branches, but also the media, the judiciary, civil society, the commanding heights of the economy, and the security forces’.³⁷ These are states where the rule of law had in fact been achieved and is now being systematically dismantled, which is a different sort of problem from not being able to achieve the rule of law in the first place. Backsliding implies that a country was once better, and

³² Sadly, this would mean a return to what was once a prevalent model in Eastern Europe: see e.g. J Frenzel-Zagórska (ed), *From a One-Party State to Democracy* (Rodopi, vol 32, 1993).

³³ O Varol ‘Stealth Authoritarianism’ (2015) 100 *Iowa Law Review* 1673.

³⁴ T G Daly, ‘Enough Complacency: Fighting Democratic Decay in 2017’, *International Journal of Constitutional Law Blog*, 10 January 2017: <http://www.icconnectblog.com/2017/01/enough-complacency-fighting-democratic-decay-in-2017-i-connect-column>

³⁵ A Huq and T Ginsburg, ‘How to Lose a Constitutional Democracy’ (2018) 65 *UCLA Law Review* (forthcoming), preprint version available at SSRN: <https://ssrn.com/abstract=2901776>.

³⁶ A von Bogdandy and M Ioannidis ‘Systemic Deficiency in the Rule of Law: What is it, What has been done, What can be done’ (2014) 51 *Common Market Law Review* 59.

³⁷ A Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, Freedom House, June 2017, p 1.

then regressed. We are particularly concerned where this retrogression is a deliberate strategy of a ruling party.

III. THE COMMISSION'S SOLUTION: A NEW RULE OF LAW FRAMEWORK

This section will offer an overview of the key features of the Rule of Law Framework (Part III.A), which the European Commission adopted in March 2014, before reviewing how this new instrument has been applied to Poland (Part III.B) and then offering a critical assessment of the Commission's variable rationale to justify not acting similarly against Hungary (Part III.C).

*A. The Framework's Key Features*³⁸

In his 2013 State of Union address, José Manuel Barroso, then President of the European Commission, called for a new instrument that would fill the space between the Commission's infringement powers laid down in Articles 258-260 TFEU, and what he referred to as the 'nuclear option' of collective sanctions laid down in Article 7 TEU. Underlying this call for a new instrument was Barroso's belief that neither of these two existing options could effectively avert or remedy rule of law crises of a systemic nature.

Barroso's 'nuclear option' was unhelpful because it further undermined the dissuasive nature of Article 7 and it was misleading because there was nothing 'nuclear' about stating the mere existence of a risk of serious breach and eventually adopting recommendations to prevent this risk from materialising. That said, for a warning system, Article 7 is very difficult to use. Article 7(2) TEU requires that any sanction must follow a unanimous vote in the European Council (minus the country subject to the proceedings), something that is nearly impossible to obtain under any circumstances. Moreover, once there are two 'illiberal' national governments in the EU determined to assist each other, this makes the deployment of the 'biting' clause of Article 7 impossible unless both countries are tackled *de concert*.³⁹ Hungary has already committed itself to blocking any eventual sanctions against Poland and vice versa.⁴⁰ Article 7(1) does however contain another clause providing for the adoption of 'recommendations' by the Council should the Council agree that a clear risk of a serious breach of EU values is imminent and that clause does not require unanimity. That said, even invoking this first "warning" step is difficult, since it requires a two-thirds majority of the European Parliament and four-fifths of the Member States in the Council to agree.

With respect to the infringement procedure, the Commission's narrow interpretation of its powers means that it has so far only pursued individual cases where national authorities do not implement or correctly apply *specific* provisions of EU law. This led Barroso to conclude that infringement actions could not be effectively used against 'illiberal governments' when they acted outside the strict scope of EU law or where they violated EU values, which are themselves of a

³⁸ This section borrows from Kochenov and Pech, note 24 above.

³⁹ K L Scheppele 'EU Can Still Block Hungary's Veto on Polish Sanctions' *Politico*, 11 January 2016: <http://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions>

⁴⁰ See e.g. H Foy et al, 'Orban promises to veto any EU sanctions against Poland' *Financial Times*, 8 January 2016.

political and diffuse nature not susceptible to enforcement through infringement actions as currently understood.⁴¹ Under this interpretation, for instance, in the absence of any general EU legislative competence over the organisation of national judiciaries or the standards of higher education systems, governmental attacks on courts or universities – either through legal means or through budgetary and other non-legal strategies – may not be easily subject to infringement proceedings. This explains, for instance, why the Commission sought to protect judicial independence in Hungary via an infringement action based on age discrimination.⁴² Most recently, in the context of Orbán’s attempts to shut down the Central European University, the Commission similarly chose an indirect route to protect academic freedom via an infringement action primarily based on a breach of freedom of establishment and the freedom to provide services.⁴³ In both cases, the charged violation missed the reason why the practice was deeply disturbing as a violation of the basic tenets of the rule of law.

The Commission read Articles 7 TEU and 258 TFEU narrowly when it answered the Justice and Home Affairs Council’s express request in 2013 that it should ‘take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle’⁴⁴ rule of law backsliding. Believing it could not act with the tools available, the Commission concluded that a new instrument was needed. Known as the Rule of Law Framework, this instrument, adopted in March 2014, takes the form of an early warning system whose primary purpose is to enable the Commission to enter into a structured dialogue with the Member State concerned so as to prevent perceived systemic threats to the rule of law from escalating. This procedure consists of three main phases: (i) In the assessment phase, the Commission assesses whether there are clear preliminary indications of a systemic threat in the country under preliminary investigation in which case a ‘rule of law opinion’ will be sent to the government concerned; (ii) In a situation where no appropriate actions are taken following the notification of the opinion, a ‘rule of law recommendation’ may be adopted and may include specific suggestions on ways and measures to resolve the situation within a prescribed deadline; (iii) Finally, in the follow-up phase, the Commission monitors how its recommendation is implemented. Lacking satisfactory implementation, the Commission may then decide at its discretion whether a recourse to Article 7 TEU is warranted, hence the informal name given to the Framework: the ‘pre-Article 7 procedure’.

⁴¹ See L W Gormley, ‘Infringement Proceedings’ in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Methods against Defiance* (Oxford University Press, 2017), p. 78: ‘the likelihood of the Commission acting via the infringement proceedings route in relation to Article 2 TEU seems little more than zero’.

⁴² European Commission, ‘European Commission closes infringement procedure on forced retirement of Hungarian judges’, Press Release IP/13/1112, 20 November 2013.

⁴³ European Commission, ‘Hungary: Commission takes legal action on Higher Education Law and sets record straight on ‘Stop Brussels’ consultation’, Daily News MEX/17/1116, 26 April 2017.

⁴⁴ Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council meeting, Luxembourg, 6 and 7 June 2013, para 9. This request would have most likely never seen the light of day if the Foreign Affairs Ministers of Denmark, Finland, Germany and the Netherlands had not sent a letter to the President of the Commission on 6 March 2013 in which they raised ‘the need to develop a new and more effective mechanism to safeguard fundamental values in the Member states’: European Parliament, Working Document I on the situation of fundamental rights in the European Union in 2012, LIBE Committee, Rapporteur: Louis Michel, PE514.668, 21 June 2013, p 4.

Though the Framework was clearly designed for the case of Hungary, the first time it was activated was when Poland followed Hungary's lead soon after the Law and Justice Party won an absolute majority in the Polish Parliament in October 2015 with only 38% of the vote.

*B. The Framework's First Activation Against Poland*⁴⁵

1. The Commission's Initial Rule of Law Recommendation

On 13 January 2016, the European Commission announced that it would carry out a preliminary assessment of the situation in Poland under the Rule of Law Framework. According to Frans Timmermans, First Vice-President of the European Commission who holds the inaugural rule of law portfolio, the primary justification for this unprecedented step was the fact that the rulings of the Polish Constitutional Tribunal were 'not respected', which 'is a serious matter in any rule of law-dominated state'.⁴⁶ The legislative changes adopted by the *Sejm* with respect to Public Service Broadcasters was the other justification put forward on the ground that democracy requires the protection of 'freedom of expression, freedom of assembly and respect of the rules governing the political and electoral processes'.⁴⁷

In the absence of any concrete action by the Polish authorities to resolve the Commission's rule of law concerns, the Commission formalised them in an Opinion adopted on 1 June 2016, which was not initially made public.⁴⁸ Polish authorities were then invited to submit their observations in response to the Opinion. In the continuing absence of any satisfactory resolution of its concerns, the Commission finally adopted a Recommendation on 27 July 2016.⁴⁹ In the words of First Vice-President Frans Timmermans:

Despite the dialogue pursued with the Polish authorities since the beginning of the year, the Commission considers the main issues which threaten the rule of law in Poland have not been resolved. We are therefore now making concrete recommendations to the Polish authorities on how to address the concerns so that the Constitutional Tribunal of Poland can carry out its mandate to deliver effective constitutional review.⁵⁰

⁴⁵ This section borrows from the following blog posts: L Pech and K L Scheppele, 'Poland and the European Commission, Part I: Dialogue of the Deaf', *Verfassungblog*, 3 January 2017: <http://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>; 'Part II: Hearing the Siren Song of the Rule of Law', *Verfassungblog*, 6 January 2017: <http://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/>; 'Part III: Requiem for the Rule of Law', *Verfassungblog*, 3 March 2017: <http://verfassungsblog.de/poland-and-the-european-commission-part-iii-requiem-for-the-rule-of-law/>

⁴⁶ European Commission, Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71, Brussels, 13 January 2016. When the new Law and Justice Party (PiS) government took office in October 2015, it nullified the election of constitutional judges by the prior parliament and substituted its own judges for theirs. The Constitutional Court declared the election of duplicate judges unconstitutional but the government refused to publish or acknowledge the ruling.

⁴⁷ *Ibid.*

⁴⁸ The Opinion was subsequently published following a request to obtain this document lodged by L Pech, 'Commission Opinion on the rule of law in Poland', *EU Law Analysis*, 18 August 2016: <http://eulawanalysis.blogspot.co.uk/2016/08/commission-opinion-of-1-june-2016.html>

⁴⁹ European Commission, Recommendation of 27 July 2016 regarding the rule of law in Poland, C(2016) 5703 final.

⁵⁰ Quoted in European Commission, Rule of Law: Commission issues recommendation to Poland, Press release IP/16/2643, 27 July 2016.

The Recommendation gave Polish authorities three months to implement a total of five ‘concrete recommendations’. The most significant of these five recommendations required Polish authorities to fully implement the judgments of the Constitutional Tribunal, which Polish authorities had refused to publish and follow, so as to be able to ‘capture’ the Constitutional Tribunal by (unconstitutionally) appointing judges approved by the ruling party.

Rather than seeking to implement any of the European Commission’s recommendations or even engage in a façade of dialogue with it, the Polish government instead focused its energy on denying the legality of Commission’s Rule of Law Framework. The leader of the ruling Law and Justice Party (hereinafter: PiS) threatened the Commission with an annulment action against the Rule of Law Framework while Poland was in the middle of being reviewed under that Framework.⁵¹ This threat was oblivious to the fact that neither the Rule of Law Opinion of 1 June 2016 nor the Rule of Law Recommendation of 27 July 2016 were, strictly speaking, legally binding acts. As such, they could not be subject to annulment actions. Indeed, the Commission’s pre-Article 7 procedure was specifically adopted with the view of promoting the resolution of rule of law problems via a discursive, soft law approach.

Even if an action for annulment could have been brought, the argument that the European Commission overstepped its mandate does not sustain scrutiny. Indeed, Article 7(1) TEU implicitly empowers the Commission to investigate any potential risk of a serious breach of EU values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis. In other words, Article 7 TEU already allows the monitoring of EU countries prior to the determination of a serious breach of EU values given the obvious need for the Council to be able to rely on solid factual evidence before eventually finding against a rogue Member State.⁵² The Rule of Law Framework merely makes more transparent how the communication between the Commission and the potentially offending government shall proceed.

Be that as it may, the Polish government did not limit itself to challenging the legality and legitimacy of the Commission’s actions. It also actively continued to further undermine the functioning of the Polish Constitutional Tribunal via the adoption of a new Act on 22 July 2016 that strongly limited the independence of the court. This led the Venice Commission,⁵³ in another Opinion dedicated to the situation in Poland, to regret that

⁵¹ J Cienski and M de la Baume ‘Poland and Commission plan crisis talks’ *Politico*, 30 May 2016: <http://www.politico.eu/article/poland-and-commission-plan-crisis-talks/>

⁵² The fact that the Council of the EU accepted the Commission’s request to discuss ‘the state of play of its dialogue with Poland on the rule of law’ before emphasising ‘the importance of continuing the dialogue between the Commission and Poland’ suggest an implicit acceptance of the legality of the Commission’s Rule of Law Framework. See Council of the European Union, Outcome of the Council Meeting, 3536th Council Meeting, General Affairs, 16 May 2017, 9299/17, p 6.

⁵³ The Venice Commission is not an EU body but is the Council of Europe’s advisory body on constitutional matters. The Venice Commission has the power to produce reports on its own initiative or at the request of the Council of Europe’s Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities of Europe, Secretary General, or by a state or international organisation (e.g. the European Union) or body participating in the work of the Commission. As noted by Paul Craig, ‘liaison between the Venice Commission and the European Commission has been especially prominent in relation to rule of law problems that have arisen in EU countries, such as Hungary and Poland, while cooperation with OSCE/ODIHR is most common in the context of elections’: P Craig ‘Transnational Constitution-Making: The Contribution of the Venice Commission

instead of unblocking the precarious situation of the Constitutional Tribunal, the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves. They have created new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal's judgments, and have acted to further undermine its independence. By prolonging the constitutional crisis, they have obstructed the Constitutional Tribunal, which cannot play its constitutional role as the guardian of democracy, the rule of law and human rights.⁵⁴

Faced with what Professor Sadurski has not unreasonably described as a 'constitutional coup d'état'⁵⁵ and a government denying the existence of a problem, the Commission was left with no choice but to conclude that Poland had failed to implement any of its recommendations.⁵⁶ But instead of promptly activating Article 7 TEU so as to prevent the capture of the Constitutional Tribunal before the expiry of its President's term of office on 19 December 2016, the Commission decided instead to adopt an additional Recommendation on 21 December 2016, a step not explicitly foreseen in the 2014 Communication describing the Rule of Law Framework. Faced with a clear situation of defiance, the Commission failed to trigger Article 7 and instead played for more time.

2. *The Commission's Complementary Rule of Law Recommendation*

This complementary Recommendation was justified on the basis that some 'important issues remain unresolved' while 'new concerns have arisen in the meantime'.⁵⁷ The new concerns continued to be primarily connected to the Polish Constitutional Tribunal and its enduring inability to ensure the effective constitutional review of legislative acts due to the repeated attempts by Polish authorities to undermine its legitimacy and efficiency. By the time the Complementary Recommendation issued, a PiS-appointed judge had become the acting president in violation of the usual procedure for election of an acting president and was well on her way to becoming the permanent president in the same day.

Seeing the final capture of the Tribunal coming, the Commission highlighted three new issues in particular that the actions of the Polish government had added to its list of violations of the rule of law:⁵⁸ (i) the adoption of three new laws since its first Recommendation, laws designed to further interfere with the operation of the Constitutional Tribunal by providing a roadmap for the PiS party to capture the presidency of the court; (ii) the appointment of an interim president in a highly unusual manner, pursuant to one of the new laws and (iii) abandonment of the normal

on Law and Democracy' (2017) 2 *UC Irvine Journal of International, Transnational, and Comparative Law* 57, p 72.

⁵⁴ Venice Commission, Poland – Opinion on the Act on the Constitutional Tribunal, 108th Plenary session, CDL-AD(2016)026-e, Venice, 14-15 October 2016, para 128.

⁵⁵ 'What is going on in Poland is an attack against Democracy', Interview with *Verfassungblog*, 15 July 2016: <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>

⁵⁶ The Commission required Polish authorities to publish were expurgated from the Constitutional Tribunal's database after the government finally captured the Court. See Ł. Woźnicki, 'Wyroki Trybunału Konstytucyjnego znikają jak u Orwella' (Constitutional Court's judgments disappear as in Orwell), *Gazeta Wyborcza*, 16 May 2017, p. 3.

⁵⁷ Commission Recommendation 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Commission Recommendation 2016/1374 of 27 July 2016, C(2016) 8950 final, para 61.

⁵⁸ *Ibid*, para 25 et seq.

procedure for filling the vacancy of the presidency of the Court. But as the Commission was issuing the new Recommendation, the Polish government sped up and magnified the violations by acting in contradiction of a direct request from the Commission to *not* fill the Tribunal's presidency. Given this pattern of conduct, it is difficult to understand why the Commission thought it would be useful to continue to pursue any sort of dialogue with a government that was so plainly and disrespectfully ignoring its warnings.

Be that as it may, the Commission eventually concluded that the three laws mentioned above and signed by the Polish President of the Republic on 19 December 2016, largely duplicated the Law of 22 July 2016 previously severely criticised by both the European Commission and the Venice Commission as well as previously declared unconstitutional by the Constitutional Tribunal. The government had refused to publish or follow the decision of the Constitutional Tribunal that declared this prior law unconstitutional. Moreover, the re-enactment of the unconstitutional law represented a frontal challenge to the Court and to the European Commission. This led the Commission to logically conclude that the new laws continued to 'seriously threaten the legitimacy of the Constitutional Tribunal and consequently the effectiveness of the constitutional review'.⁵⁹ In light of the continuing existence of a situation of a systemic threat to the rule of law in Poland, Polish authorities were asked to address the Commission's criticisms within two months of receipt of the Commission's complementary Recommendation. In a thinly veiled warning, the Commission finally pointed out that 'recommendations adopted under the rule of law Framework do not prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU'.⁶⁰

Despite an obvious continuing deterioration of the situation from the time that the Rule of Law Framework was first activated through the public and intemperate rejection of all of its recommendations,⁶¹ the Commission has appeared unable to draw the logical conclusion from its own analysis and move closer to actually starting a sanctioning process. This omission is all the more shocking because the actions of the Polish government in December openly defied a particular warning that it should not fill the position of Tribunal president before it had complied with the EU's earlier warnings. By failing to act more forcefully as soon as the deadline laid down in its first Recommendation had expired, the Commission left Polish authorities ample time to prepare the ground for the effective capture of the Constitutional Tribunal not only in relative peace but also in plain disregard of the Polish Constitution.⁶² Looking for

⁵⁹ Ibid, para 60.

⁶⁰ Ibid, para 69.

⁶¹ See e.g. Statement of the Network of the Presidents of the Supreme Judicial Courts of the EU on the Situation in Poland: <http://network-presidents.eu/sites/default/files/StatementPoland.pdf>; Statement of the ENCJ Executive Board concerning judicial reforms in Poland, Brussels, 26 April 2017: https://www.ency.eu/index.php?option=com_content&view=article&id=235%3Ajudicialreformspoland&catid=22%3Anews&lang=en; OSCE/ODIHR, Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland, 5 May 2017, para 13: 'If adopted, the amendments could undermine the very foundations of a democratic society governed by the rule of law, which OSCE participating States have committed to respect as a prerequisite for achieving security, justice and stability.'

⁶² See e.g. T Konciewicz, 'Constitutional Capture in Poland 2016 and Beyond: What is Next?' *Verfassungsblog*, 19 December 2016: <http://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/> and the joint statement by four former presidents of the Polish Constitutional Tribunal, *Verfassungsblog*, 30 November 2016: <http://verfassungsblog.de/statement-by-the-former->

any reason not to do what any reasonable assessment of the situation would lead any lawyer to conclude, the Commission decided to procrastinate further by seeking to get national governments to debate the Polish situation. This was done on 16 May 2017 within the framework of a meeting of the General Affairs Council, though it was discussed under the unpromising heading ‘any other business’. While the discussion was unprecedented and positive to the extent that the Commission’s diagnosis and recommendations appeared to have been strongly supported by most national governments, the session merely resulted in the following two-sentence conclusion:

The Commission informed the Council on the state of play of its dialogue with Poland on the rule of law. Ministers emphasised the importance of continuing the dialogue between the Commission and Poland.⁶³

In other words, having sought action from the Council, the Commission found itself tasked with more dialogue, much time having been wasted in the process with no tangible sign of any conforming behaviour in Warsaw and no deadline imposed by which time Article 7 would be invoked. As expected, the Council’s rather lukewarm support for the rule of law and persistent inability to unambiguously and publicly censure Polish authorities have since convinced the Polish ruling party that nothing would ever come of sanctions. Instead, the Polish government evidently concluded that it was time to double down and capture the whole judicial system in plain sight. But instead of immediately triggering Article 7, the Commission decided once again to give more time for dialogue.

3. The Commission’s Third Rule of Law Recommendation

Adopted on 26 July 2017, the Commission’s third Rule of Law Recommendation complements its previous two Recommendations.⁶⁴ This third Recommendation is justified by four new legislative acts rushed through the Polish Parliament that month: (i) The law on the Supreme Court; (ii) the Law on the National Council for the Judiciary; (iii) the Law on the Ordinary Courts’ Organisation; and (iv) the Law on the National School of Judiciary. Together, they allowed the government to fire all judges of the Supreme Court and to replace the leadership of the lower courts, as well as to take over the system of judicial appointments from that moment forward. Even though the first two laws were unexpectedly vetoed on 24 July by the Polish President under massive pressure from street demonstrations, Kaczyński announced that he would not take no for an answer and vowed to introduce the laws again.

For the Commission, these laws, if they were to enter into force, would simply abolish the rule of law in Poland as they would ‘structurally undermine the independence of the judiciary in Poland and would have an immediate and concrete impact on the independent functioning of the judiciary as a whole’.⁶⁵ The Commission significantly diagnosed that the unconstitutional recomposition of the Polish Constitutional Tribunal already meant that ‘the constitutionality of Polish laws can no longer be effectively guaranteed’ and its judgments ‘can no longer be

presidents-of-the-constitutional-tribunal-marek-safjan-jerzy-stepien-bohdan-zdziennicki-and-andrzej-zoll/

⁶³ Council of the EU, 3536th Council meeting, General Affairs, 9299/17, 16 May 2017.

⁶⁴ Commission Recommendation of 26 July 2017 regarding the rule of law in Poland, C(2017) 5320 final.

⁶⁵ *Ibid.*, para 45(2).

considered as providing an effective constitutional review'.⁶⁶ Even though the Commission's own reasoning led it to conclude that there had been a complete breakdown of the rule of law in Poland, it could still not act. Instead, Frans Timmermans warned that 'the option of triggering Article 7 of the Treaty was part of the discussion and it should come as no surprise to anyone that, given the latest developments, we are coming very close to triggering Article 7'.⁶⁷

Of course, any attempt to use the sanctioning arm of Article 7 against Poland alone was doomed as Viktor Orbán had already made a public commitment to defend Poland should the EU attempt to adopt sanctions under this Treaty provision.⁶⁸ So the Commission went a different route: it decided to initiate an infringement procedure regarding the Law on the Ordinary Courts Organisation on the grounds that this legislation would not only violate EU gender discrimination rules by introducing a different retirement age for female and male judges but it would also undermine the independence of Polish courts by permitting the government to replace the leadership of the lower courts, the independence of which would be required under Article 19(1) TEU and Article 47 of the EU Charter of Fundamental Rights.⁶⁹

This emphasis on the possible violation of the principle of judicial independence is important as it may, if confirmed by the Court of Justice, give the Commission power to insist on major changes to the judiciary under the pain of Article 260 TFEU sanctions, where no Member State can block such a move.⁷⁰ In addition, a finding that judicial independence has been compromised could also lead to the suspension of the principle of mutual trust where Poland is concerned.⁷¹ However, as will be shown below, the Commission has in the past tried to 'tame' Orbán's autocratic behaviour via multiple infringement actions but this only led to Pyrrhic victories. It would also be naïve to think that current Polish authorities will respond with anything but their usual disdain should the Court of Justice rule against them.

Indeed, in the context of another infringement action initiated by the Commission following increased logging in the Białowieża Forest, a protected Natura 2000 site, the Polish government has publicly indicated its intention to ignore the Court of Justice's interim injunction to suspend all logging.⁷² In the words of Poland's environment minister, Poles 'will not be insulted by those who don't know about the rules of protection of environment'.⁷³ Similar defiant rhetoric has been used by

⁶⁶ Ibid, para 45(1).

⁶⁷ European Commission, Opening remarks of First Vice-President Frans Timmermans: College readout on grave concerns about the clear risks for independence of the judiciary in Poland, 19 July 2017, Speech/17/2084.

⁶⁸ See Viktor Orbán's speech at the 28th Bálványos Summer Open University and Student Camp, 22 July 2017, Tusnádfürdő (Băile Tuşnad, Romania): 'we must make it perfectly clear that a campaign of inquisition against Poland will never succeed, because Hungary will resort to all the legal mechanisms offered by the European Union in order to show its solidarity with the Polish people.' Full text of the speech is available here: <https://visegradpost.com/en/2017/07/24/full-speech-of-v-orban-will-europe-belong-to-europeans/>

⁶⁹ European Commission acts to preserve the rule of law in Poland, Press release IP/17/2161, 26 July 2017

⁷⁰ For further analysis, see part V.B.

⁷¹ For further analysis, see Part IV.B.

⁷² *Commission v Poland*, C-441/17 R, EU:C:2017:622.

⁷³ J Berendt, 'Defying E.U. Court, Poland Is Cutting Trees in an Ancient Forest' *New York Times*, 31 July 2017. According to a CJEU spokesperson, 'the idea that the member state wouldn't comply with a court order is unprecedented, and [so is] what the consequences would be', cited in K Oroschakoff and W Kość, 'Poland opens another front with Brussels over primeval forest', *Politico*, 9 August 2017.

Hungarian officials in their dealings with EU since Viktor Orbán appears to have understood US President Trump's election as a licence to once again mock EU authorities and flout EU values in plain sight as it has moved to harass and close some of the last remaining independent civil institutions in the country that get funding from American sources.⁷⁴ And yet again, the Commission is proving reluctant to either submit Hungary to the Rule of Law Framework or trigger Article 7 in the face of overwhelming evidence that Orbán's Hungary cares not a whit for the rule of law.

C. The Commission's Persistent Refusal to Activate the Rule of Law Framework Against Hungary

Rather than offering an overview of the structural and continuing attacks on the rule of law in Hungary since Viktor Orbán returned to power – they have been well documented elsewhere⁷⁵ – the Commission's reasons for not acting more forcefully against Hungary will be analysed here.

Before the latest set of attacks targeting the Central European University and civil society groups occurred in spring 2017, the European Parliament had made clear in December 2015 its concerns that there was a systemic deterioration of the situation in Hungary,⁷⁶ highlighting among other things measures adopted against human rights of migrants, asylum seekers and refugees, the functioning of the constitutional system, the independence of the judiciary, 'and many worrying allegations of corruption and conflicts of interest'.⁷⁷ This diagnosis led the Parliament to call on

the Commission to activate the first stage of the EU framework to strengthen the rule of law' so to as initiate 'an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary, including the combined impact of a number of measures, and evaluating the emergence of a systemic threat in that Member State which could develop into a clear risk of a serious breach within the meaning of Article 7 TEU'.⁷⁸

The resolution further added that Hungary 'is a test for the EU to prove its capacity and political willingness to react to threats and breaches of its own founding values by

⁷⁴ The Commission acted quickly to initiate an infringement action when the Hungarian Parliament adopted a law that would have the effect of closing American-accredited Central European University, but did not expedite the process to allow its intervention to have any effect before the deadlines set in the law took effect. A new NGO law has just taken effect as we write, requiring NGOs to disclose foreign sources of funding. On 13 July 2017, the Commission decided to send a letter of formal notice to Hungary as this law would breach EU law and in particular the right to freedom of association enshrined in the EU Charter of Fundamental Rights and the rules governing the free movement of capital: European Commission, 'Hungary: Commission launches infringement procedure for law on foreign-funded NGOs', Press release IP/17/1982. See Part III.C for further analysis.

⁷⁵ See e.g. the references given in the multiples resolutions adopted by the European Parliament and most recently, its resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)). For more comprehensive accounts, see also B Jávör (Green MEP), *Letter to Mr. Timmermans on the systemic threat to the rule of law in Hungary*, 5 May 2017: <http://javorbenedek.hu/en/letter-to-mr-timmermans-on-the-systemic-threat-to-the-rule-of-law-in-hungary>; FIDH (International Federation for Human Rights), *Hungary: Democracy under Threat. Six Years of Attacks against the Rule of Law*, November 2016, No 684a: https://www.fidh.org/IMG/pdf/hungary_democracy_under_threat.pdf

⁷⁶ European Parliament resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)).

⁷⁷ para F.

⁷⁸ para 8.

a Member State'⁷⁹ and noted that EU inaction may have contributed to similar developments taking place in some other Member States.⁸⁰

The Commission did not reply with a similar sense of urgency and threat. In her speech at the European Parliament before the adoption of this resolution, Věra Jourová, the Commissioner for Justice, argued that she saw no 'grounds at this stage to trigger Article 7 or the Rule of Law Framework'.⁸¹ After providing a shockingly long list of violations of EU law committed by Hungarian authorities – apparently not realising she was actually making an overwhelming case for more drastic action – the Commissioner concluded that 'concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play'.⁸²

Jourová's justifications of the Commission's position failed to convince a majority of MEPs who correctly emphasised that the Commission's approach 'focuses mainly on marginal, technical aspects of the legislation while ignoring the trends, patterns and combined effect of the measures on the rule of law and fundamental rights' and continues to ignore that infringement proceedings 'have failed in most cases to lead to real changes and to address the situation more broadly'.⁸³ The European Parliament could have also pointed out that it is ludicrous to believe that the 'Hungarian justice system' could remedy to any serious extent the threats and breaches of EU values identified in the Parliament's resolution because the independence and impartiality of the Hungarian judiciary had already been fatally undermined following repeated and ultimately successful attempts by Orbán's ruling party to seize control over the appointment of judges, determine according to political criteria the viability of individual judge's careers and seize the process through which cases were assigned to specific judges.

Orbán has since pushed through the Hungarian Parliament new laws that provide additional reasons for rule of law concern: an Act amending the National Higher Education Act which has the practical effect of singling out Central European University for effective closure (hence nicknamed Lex CEU) and a new Act on the Transparency of Organisations Receiving Support from Abroad that would stigmatize all NGOs and foundations receiving foreign money by requiring them to disclose all sources of income and label themselves as foreign funded.⁸⁴ These renewed attacks on

⁷⁹ para 5.

⁸⁰ The Parliament had enacted many previous resolutions with regard to the situation in Hungary, most ambitiously the 'Tavares Report', named after its rapporteur, which passed the European Parliament in July 2013: See European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, A7-0229/2013. This resolution concluded (para 57) 'that the systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames, and the content of such modifications, are incompatible with the values referred to in Article 2 TEU, Article 3, paragraph 1, and Article 6 TEU, and deviate from the principles referred to in Article 4, paragraph 3, TEU; [and the Parliament] considers that – unless corrected in a timely and adequate manner – this trend will result in a clear risk of a serious breach of the values referred to in Article 2 TEU...'

⁸¹ European Parliament, Question for oral answer to the Commission by Claude Moraes on behalf of the LIBE Committee (O-000140/2015): Situation in Hungary: follow-up to European Parliament resolution of 10 June 2015 (2015/2935(RSP)) (B8-1110/2015), Brussels, 2 December 2015.

⁸² *Ibid.*

⁸³ European Parliament, Resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)), para 7.

⁸⁴ For a critique of the Lex CEU adopted on 4 April 2017, see G Halmi, 'Legally sophisticated authoritarians: the Hungarian Lex CEU', *Verfassungblog*, 31 March 2017: <http://verfassungsblog.de/legally-sophisticated-authoritarians-the-hungarian-lex-ceu> and P Bard, *The Open Society and Its Enemies: An attack against CEU, academic freedom and the rule of law*, CEPS

academic freedom and civil society have however led to strong criticism not only from EU institutions but also individual EU Member States, the Council of Europe as well as and perhaps more surprisingly from the US government.⁸⁵ Most importantly, it led to the adoption of yet another resolution by the European Parliament on the situation in Hungary on 17 May 2017. This time, however, on the back of increasing uneasiness within the ranks of the European People's Party regarding Orbán's authoritarian behaviour and anti-EU rhetoric,⁸⁶ the European Parliament crossed the Rubicon and called for preparations to be made for a vote on triggering Article 7(1) TEU, the preventive arm of the mislabelled 'nuclear option.' In this resolution, the European Parliament noted that it

9. Believes that the current situation in Hungary represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and warrants the launch of the Article 7(1) TEU procedure;

10. Instructs its Committee on Civil Liberties, Justice and Home Affairs therefore to initiate the proceedings and draw up a specific report with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU, in accordance with Rule 83 of its Rules of Procedure⁸⁷

Faced with this renewed call for meaningful action, the First Vice-President of the Commission offered a new reason to justify the Commission's inaction when asked whether it may have been easier to deal with the situation in Poland had the EU not turned 'a blind eye to Victor Orbán's actions' for so long:

Poland and Hungary are different. Orbán and the Hungarian government have never refused a dialogue with us. A constructive dialogue, not only pointing at divergent views, is the European way of solving such disputes. But the truth is that a few times we have opened procedures against Hungarian handling of the law. And this has stopped, for instance, decrease of the pension age for the judges [by this means Orbán tried to eliminate established judges and introduce his own].⁸⁸

Policy Insights, No 2017/14, April 2017. For a critique of the Lex NGO, see Venice Commission, *Hungary – Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad*, CDL-AD(2017)015-e, Strasbourg, 20 June 2017: the Law adopted on 13 June 2017 'will cause a disproportionate and unnecessary interference with the freedoms of association and expression, the right to privacy, and the prohibition of discrimination' (para 68).

⁸⁵ See e.g. CEU, 'Portuguese Parliament Unanimously Condemns Lex CEU', 24 April 2017: <https://www.ceu.edu/article/2017-04-24/portuguese-parliament-unanimously-condemns-lex-ceu>;

Council of Europe (PACE), *Alarming developments in Hungary: draft NGO law restricting civil society and possible closure of the European Central University*, Resolution 2162, 27 April 2017; US Department of State, Government of Hungary's Legislation Impacting Central European University, Press Statement, 23 May 2017 ('The United States again urges the Government of Hungary to suspend implementation of its amended higher education law, which places discriminatory, onerous requirements on U.S.-accredited institutions in Hungary and threatens academic freedom and independence').

⁸⁶ M de la Baume, 'MEPs increasingly back kicking Viktor Orbán out of EPP', *Politico*, 27 April 2017: <http://www.politico.eu/article/viktor-orban-europe-meps-increasingly-back-kicking-out-of-epp>.

⁸⁷ European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)).

⁸⁸ B Wieliński, Interview with Timmermans: 'Poland should be a leader in Europe – but it needs to cooperate', *Euractiv*, 22 May 2017. We might add that Timmermans' optimism about the effects of the earlier infringement action can be met with evidence that shows that the vast majority of Hungarian judges were in fact removed from office and Fidesz-loyal judges substituted in their place. Once the infringement action was brought on age discrimination grounds, compensation of those adversely affected rather than their reinstatement became an adequate remedy. See K L Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures' in C Closa and D Kochenov

There are several rather obvious problems with this ‘defence’. First, it is hard to reconcile it with Jourová’s previous emphasis on the existence of national rule of law safeguards which, allegedly, would still be functioning and effective in Hungary contrary to the situation in Poland. Second, it suggests that would-be-autocrats are free to undermine the rule of law as long as they agree to enter into a dialogue with the Commission. Third, what the Commission may view as constructive dialogue with Orbán may be viewed by those with experience with the current Hungarian government as a façade of dialogue only. As shown by the multiple and recurrent violations of EU values listed by the European Parliament in its multiple resolutions on the ‘situation’ in Hungary, this dialogue has led only to minor tinkering with offending laws and to no substantial changes in the overall situation since the debate about Hungary’s descent into authoritarianism began.

The Hungarian’s answer to the latest infringement action initiated by the Commission with respect to the so-called Lex CEU also makes Timmermans’ ‘constructive dialogue’ thesis ring particularly hollow. Speaking of the letter of formal notice publicly announced by Timmermans on 26 April 2017, János Lázár, Orbán’s chief of staff, said that the ‘Commission was unable to present a single, normal legal argument which could be taken seriously,’⁸⁹ using the same defiant language which deployed by Polish officials in their dealings with the EU. Given that CEU has a deadline for compliance of October 2017 and there is no chance of getting a ruling from the Court of Justice by that time, the Hungarian government knows that it has already won the battle for CEU by appearing to engage in ‘dialogue’.⁹⁰

Finally, considering the Commission’s track record in bringing infringement proceedings, it is puzzling that Frans Timmermans still appears to believe that the Commission’s actions could lead to a successful outcome. To paraphrase him, ‘the truth’ is the opposite of what he suggested as explained by Agnes Batory, a professor at the Central European University:

[...] compliance was creative (the judges were allowed to return to the courts, but not to the high administrative positions they had been removed from, since those had been filled during their forced early retirement; the ombudsman was given compensation but his position was not reinstated) or symbolic (with the government backing off only to appoint a Fidesz loyalist as Central Bank governor down the line). None of the concessions prevented the Hungarian government from achieving its partisan goals. Commission action amounted to little more than chipping away at the edges of a new constitutional order cementing a single political

(eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016), 105.

⁸⁹ See Associated Press, ‘Hungary Sees No Reason to Change Law Affecting Soros School’, *US News*, 25 May 2017: <https://www.usnews.com/news/best-states/new-york/articles/2017-05-25/hungary-sees-no-reason-to-change-law-affecting-soros-school>

⁹⁰ In a preliminary opinion issued on 11 August 2017, the Venice Commission regretted the lack of a ‘more transparent and inclusive legislative procedure’ with respect to the adoption of the Lex CEU and noted that ‘introducing more stringent rules without very strong reasons, coupled with strict deadlines and severe legal consequences, to foreign universities which are already established in Hungary and have been lawfully operating there for many years, appears highly problematic from the standpoint of rule of law and fundamental rights principles and guarantees’: Opinion 891/2017, *Hungary – Preliminary Opinion on Act XXV of 4 April 2017*, CDL-PI(2017)005, paras 120 and 123. This Opinion was met with what has now become the inane default answer of any member or official associated with Hungary’s ruling party when faced with external criticism. See e.g. ‘Governing Fidesz says some in Venice Commission sponsored by Soros’, *Daily News*, 13 August 2017: <https://dailynewshungary.com/governing-fidesz-says-venice-commission-sponsored-soros/> (citing the parliamentary group leader of the Fidesz party).

party's hold on political power in an EU member state.⁹¹

Even Věra Jourová no longer shares Frans Timmermans' confidence in the effectiveness of infringement actions. Having noted 'worrying trends' in both Poland and Hungary, she argued that the imposition of any administrative steps, infringements or any other measures was unlikely to result in 'any real change.'⁹²

There is arguably only one key difference which may explain, but *not justify*, why the Commission decided that it had no choice but to activate the Rule of Law Framework against Poland: In the absence of a supermajority to revise the Polish Constitution, the ruling party had to blatantly *violate* the Constitution in order to achieve its authoritarian goals while in Hungary, the government's constitutional majority in the parliament allowed it to create an illiberal state by amending the constitution every time it was tempted to violate it. Indeed, in the Polish situation, the Commission was primarily seeking to get a Member State to comply with its own Constitution and stop undermining the independence and functioning of its Constitutional Tribunal, hence avoiding the potential neo-colonial criticism that might come from the EU requiring a Member State to follow EU law. In Hungary, Commission seemed much less confident challenging laws that had been enacted in a domestically constitutional manner. With Hungary, the Commission's default preference was to use the infringement procedure, which, given the way it has been deployed, has not produced any meaningful results because it aimed to reverse facts on the ground, something it did not have the power to accomplish. The reasons behind the failure of the EU institutions, and in particular, the Commission, to counter 'constitutional capture' and prevent rule of law backsliding will be further analysed below.

IV. THE LIMITS OF EUROPEAN INSTITUTIONS IN PROTECTING EUROPEAN VALUES

The Treaties imagine that all European institutions play a role in protecting European values. The Commission may propose to trigger Article 7 TEU, but so may Member States, and the Parliament. While enacting any part of Article 7 TEU requires supermajorities of both Parliament and Council, it is unclear who should go first in framing the action and in determining its timing. Perhaps it is precisely this attempt to spread responsibility for European values across EU institutions that has resulted in the paralysis we have witnessed even while Member States attack the basic values of the European project. To sanction any Member State, the vast majority of – and in the case of sanctions, all – Member States must act together, just as the vast majority of MEPs must also agree, but no institution bears the primary responsibility for starting the process or ensuring that the record is compiled to sustain the charges.

While the European Commission should be commended for at least attempting to take the initiative in preventing rule of law backsliding via the adoption and application of a new instrument (Part IV.A), the Council has been, at best, missing in action. Not only has it repeatedly failed to rise to the challenge, but it has, at times, played an overtly counterproductive role (Part IV.B). And while the European Parliament has regularly adopted resolutions calling for action, it has itself proved so

⁹¹ A Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' (2016) 94(3) *Public Administration* 685.

⁹² N Nielsen, 'EU commissioner tells Hungarians to resist Orban' *EUobserver*, 10 April 2017: <https://euobserver.com/justice/137559>.

far unable to offer more than a critique of other EU institutions' inaction, a situation which one may connect to the prioritisation of party politics by some of its members. So far the Parliament has never mustered the relevant supermajority to trigger Article 7 TEU on its own (Part IV.C). This section takes each of the major institutions one by one to show how the different pressures on each have made that institution ineffective in protecting European values.

A. The European Commission's Failings

Our main critique of the European Commission in failing to uphold the rule of law across the Union is this: Both the design of the Rule of Law Framework and its subsequent application to Poland reveal the Commission's failure to draw the right lessons from its past dealings with Hungary, where the Commission failed to halt the consolidation of power before it became entrenched. It was clear from the start that the Rule of Law Framework suffered from a crucial design weakness; it was entirely based on the highly questionable presumption that a discursive approach – a 'constructive dialogue'⁹³ or a 'broader political dialogue'⁹⁴ to paraphrase Frans Timmermans – could lead to positive outcomes. But when a government is bent on deliberately undermining constitutional checks on power, dialogue only gives that government time to consolidate gains. While the Commission may be forgiven for failing to understand Orbán's strategy when he first set out to create an 'illiberal state', it is difficult to understand how the Commission could still consider in 2015 that a period of 'structural dialogue' could restrain anyone else who was using Orbán as a model. If Member States stumbled into violating European values unawares, it might have been helpful to warn them. But if Member States are deliberately undertaking to become illiberal, then dialogue – itself premised on liberal values – is unlikely to work. Looking back, it should have been obvious that the non-legally binding nature of the rule of law recommendation(s), and the discretionary recourse to Article 7 TEU upon continued noncompliance were bound to produce fruitless discussions that failed to slow down the consolidation of power, as indeed the Polish case has since demonstrated.

The Polish saga has revealed another shortcoming: By further postponing the eventual triggering of Article 7(1) TEU, the activation of the Rule of Law Framework has given the Polish authorities time to further entrench legal changes that are clearly incompatible with Article 2 TEU while allowing the other EU institutions to believe that the Commission has the problem in hand. While the Commission may not have drawn the right lessons from its past dealings with Hungary, the current Polish authorities have been eager students of the Hungarian case. They have not failed to notice that the EU acts slowly and that there is not much the Commission can do if it is presented with a *fait accompli*. Once a government has created facts on the ground - packed courts, fired officials, purged institutions - the Commission's tools fail to work. The Commission can virtually never force a change in an existing situation but

⁹³ B Wieliński, Interview with Timmermans, note 88 above.

⁹⁴ European Commission, Opening remarks of First Vice-President Frans Timmermans in the European Parliament debate on Hungary, Speech/17/1118, Brussels, 26 April 2017: 'We also considered that given the wider situation [...] a broader political dialogue between the Hungarian authorities, other Member States, and the European Parliament and the Commission should take place.' This speech includes no less than ten references to the need for or the benefits of a 'dialogue'.

only lay out ground rules for the future.⁹⁵ Poland's ruling party must have understood that it would not be possible for the Commission in Poland, as it was not possible for the Commission in Hungary, to reinstate fired judges (or dismiss unlawfully appointed ones), insist on new members of no-longer-independent boards, restore civil society organisations closed by funding cuts or amplify the robustness of the opposition after state-sponsored bullying had scared people into leaving the country. During the rule of law 'structured dialogue,' Poland has seemed to speed up its program of undermining checks on power even as EU institutions appeared to have de facto delegated monitoring and follow up to the Commission, acting alone. During this time, other EU institutions were willing to wash their hands of this mess while the Commission appeared to be in charge so they aided and abetted the consolidation of power in Poland through inaction.

The Polish rule of law probe also exposed the Commission's failure to foresee that the presence of two illiberal countries in the EU would annihilate the dissuasive nature of the sanctioning arm of Article 7(2-3) TEU, which requires a unanimous vote in the European Council before sanctions can issue. Poland and Hungary clearly saw this possibility, however, because Orbán quickly announced Hungary would veto Article 7 sanctions⁹⁶ as soon as the Commission launched the Rule of Law Framework against Poland.⁹⁷

The Polish case has further confirmed that the Commission's discretionary power to activate the Framework could easily lead to like cases being treated as unlike for reasons of political convenience. Hungary, the case for which the Framework was designed, has still never been challenged under the Framework even though it carried out many of the same policies that caused the Framework to be activated in the Polish case. Some commentators have speculated that the Commission failed to act against Hungary because the powerful European People's Party (EPP) protected an allied government while the Commission acted quickly against Poland, whose government was affiliated with the more marginal European Conservatives and Reformists (ERC) party.⁹⁸ It is otherwise difficult to convincingly explain why two similar cases should be treated so differently.⁹⁹

⁹⁵ One irony of the Commission's infringement actions against Hungary is that the Commission was able to ensure that Hungarian judges were protected in the future from unexpected changes in their collective terms of employment but the benefits went to the judges that Orbán's team had handpicked for office. In short, the infringement action resulted not in Orbán's judges being removed and the previously independent judges reinstated, but instead in Orbán's judges becoming more entrenched in office. See K L Scheppele, 'Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12', *Eutopia Law*, 29 April 2014: <http://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber>

⁹⁶ See e.g. C Keszthelyi, 'Hungary counts on Poland veto, won't backtrack', *Budapest Business Journal*, 23 May 2017: https://bbj.hu/politics/hungary-counts-on-poland-veto-wont-backtrack_133253

⁹⁷ H Foy et al, 'Orban promises to veto any EU sanctions against Poland,' *Financial Times*, 8 January 2016.

⁹⁸ M Matthijs and D Kelemen, 'Europe Reborn: How to Save the EU from Irrelevance' (2015) 94 *Foreign Affairs* 96; Interview with R Tavares and K L Scheppele, 'The Rule of Law Challenge in Europe: From Hungary to Poland' *European Green Journal*, 23 January 2016: <https://www.greeneuropeanjournal.eu/the-rule-of-law-challenge-in-europe-from-hungary-to-poland/>

⁹⁹ For an overview of the additional factors which may explain why the Commission 'seems to be treating the Polish government more harshly than the Hungarian one', see also A Gostyńska-Jakubowska, 'Poland: Europe's new enfant terrible?' CER Bulletin article, 22 January 2016: <http://www.cer.eu/publications/archive/bulletin-article/2016/poland-europes-new-enfant-terrible>

Had Hungary been subject to the Rule of Law Framework as requested by the European Parliament in December 2015,¹⁰⁰ we could now be in a position to simultaneously subject both Poland and Hungary to sanctions under Article 7 TEU. In doing so, one could argue that no country currently under Article 7 challenge should be able to protect another state similarly under challenge since any interpretation of Article 7 in the light of the *effet utile* principle should logically lead one to conclude that Poland and Hungary ought to lose their veto of sanctions against the other in such a scenario. Be that as it may, we submit that the Commission has failed in its duty to act as the guardian of the Treaties by not triggering Article 7 TEU against *both* Poland and Hungary even apart from the instrumental reason that Article 7 TEU is foiled by two rogue states acting in concert if sanctions are attempted against them one at a time.

The Commission has come up to a cliff's edge with Poland while having threatened on numerous occasions to take further steps with Hungary without consequence. But the Commission always stops before it can take serious steps. It seems to believe that it must secure the Council's backing before activating 7(1) TEU, but this adds a political element which may be considered ill-advised for an institution that is supposed to act independently and whose insulation from politics was institutionally organised to enable it to take 'difficult' decisions in ensuring the uniform application of Union law. Pragmatically speaking, if the Commission triggered Article 7 TEU, it would finally oblige national governments, meeting in the Council, to face up to their own responsibilities to keep European values at the centre of the Treaties.

B. The Council: Between Lethargy and Acquiescence

While our criticism has been so far directed at the Commission, the Commission's inability to prevent rule of law backsliding in Hungary and Poland is due in no small part to the lack of any strong support originating from the European Council or the Council of Ministers. And in the few instances where either Council has decided to move out of their usual torpor, their ill-advised interventions weakened the Commission's authority.

Indeed, rather than unambiguously supporting the Commission's Rule of Law Framework, national governments decided instead to establish their own 'annual rule of law dialogue',¹⁰¹ which is tragically ineffective because it asks EU countries to report on themselves without any independent check. This inevitably tends to produce more self-congratulation than criticism, as indeed it has thus far. The Council's rule of law dialogue scheme followed on the adoption of a poorly argued opinion by the Council Legal Service in which it denied the Commission's authority to adopt its Rule of Law Framework.¹⁰² Both this opinion and the decision not to explicitly support the

¹⁰⁰ European Parliament, Resolution of 16 December 2015 on the situation in Hungary (2015/2935(RSP)).

¹⁰¹ Council of the EU, 3362nd Council meeting, General Affairs, press release no. 16936/14, 16 December 2014.

¹⁰² Legal Service, Council of the European Union, Opinion on the Commission's proposed Framework on the Rule of Law of 27 May 2014 (10296/14). As noted by Kochenov and Pech, Article 7 'already implicitly empowers the Commission to investigate any potential risk of a serious breach of the EU's values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis' with the Commission saying explicitly as much 'in 2003 in its Communication on Article 7 TEU without the Council expressing any objection then', note 24 above, pp 529-530. For similarly strong critiques of

Commission's Framework were particularly disappointing and one may wonder what had happened to the countries, which just a few years before, asked the Commission to introduce a 'new, light mechanism' to enable it to make recommendations or report back to the Council 'in the case of concrete evidence of violations' of the EU's fundamental values or principles.¹⁰³

During the Barroso Commission, the European Council remained completely silent on the situation in Hungary. Even in the Juncker Commission, when it became clear that Hungary was not an isolated case, the European Council broke its silence about the rule of law crisis only once. Then, European Council President Donald Tusk, himself a Pole, made a statement on the eve of a confrontation in Poland between governing party MPs and opposition protestors but only to suggest that all sides might behave themselves, and honour the Polish constitution.¹⁰⁴ The European Council, however, did not act as an institution and its component Member States largely refrained from comment. This abdication of the European Council as the one of the EU's largest countries abandoned the rule of law reveals yet another weakness in the European project: A country that could meet the entry criteria to join the EU was presumed to retain its constitutional-democratic commitments over the long haul so the EU gave itself few options to correct problems if a country's commitments began to falter.¹⁰⁵

If the EU is not a community of values, however, it is only an economic shell. Amnesty International was therefore right to call for European governments to 'step up to the plate and support the people of Poland by placing this serious threat to rule of law and human rights on the agenda of the Council'.¹⁰⁶ The Council, meeting in the General Affairs Council configuration, finally put the rule of law crisis on its agenda for the first time in 16 May 2017 and, in that session, a majority of Member States criticised Poland for its behaviour and lack of cooperation with the Commission. Only Hungary, the Czech Republic and the United Kingdom, directly or indirectly supported Poland's position.¹⁰⁷ However unprecedented, this was mere criticism, not a move toward deadlines, ultimatums or sanctions. And, as we have seen, the Council did not act but instead told the Commission to continue its dialogue with Poland. The Polish government's rush to purge of the whole Polish judiciary soon afterwards showed the government clearly believed that nothing would happen to it if it did.

this opinion, which has since been referred to by the Polish government to argue that the Commission is acting *ultra vires*, see also P Oliver and J Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54(5) *Journal of Common Market Studies* 1075; L Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017), p 136 et seq.

¹⁰³ See Final Report of the Future of Europe Group, 17 September 2012. Ironically, Poland was one of the eleven signatories of the so-called Westerwelle Report.

¹⁰⁴ Reuters, 'Poland crisis: Donald Tusk calls for respect of people and constitution', *The Guardian*, 17 December 2016.

¹⁰⁵ See e.g. Editorial Comments, 'Fundamental Rights and EU membership: Do as I say, not as I do!' (2012) 49 *Common Market Law Review* 481. Arguably, the Council of Europe was supposed to prevent and remedy any eventual problems arising post EU accession. For a recent book offering a comprehensive overview of the pivotal role played by the Council of Europe in the promotion and protection of human rights, democracy and the rule of law, see S Schmahl and M Breuer, *The Council of Europe. Its Law and Policies* (Oxford University Press, 2016).

¹⁰⁶ Amnesty International, EU: Commission's action to stand up for rights of people in Poland must be backed by European States, Press release, 21 December 2016: <http://www.amnesty.eu/en/news/press-releases/all/eu-commission-s-action-to-stand-up-for-rights-of-people-in-poland-must-be-backed-by-european-st-1013/#.WGC9nWSLRhC>

¹⁰⁷ D Robinson, 'EU ministers hit out at Poland over judicial reforms', *Financial Times*, 16 May 2017.

Speaking after the Council's meeting but before the rule of law situation further deteriorated in July, Frans Timmermans, said: 'All the tools are in the toolbox and if we need to use a tool in the toolbox, then the commission is free to do so.'¹⁰⁸ Time will tell whether the Council's minimalistic support will finally convince – or at least not dissuade – the Commission to trigger Article 7 TEU against Poland. In the meantime, the European Parliament has begun a process to activate Article 7 against Hungary.

We understand that there may be indeed a cost to be paid if the Commission calls for the use of Article 7 and none of the other key EU institutions take any note of it. But to wait for a clear signal from a majority of national governments that Article 7 would succeed seems like a pretext for justifying inaction. Indeed, why would any national government explicitly signal its intent to support the Commission when there is no certainty the Commission would trigger Article 7? Such a public stand would require paying a diplomatic price with no guarantee that the Commission would follow through. Rather than trying to guess what the other EU institutions would do, the Commission should act in its role of guardian of the Treaties and do what the law requires rather than what the politics will sustain.

C. The European Parliament and the Prioritisation of Party Politics

Of all the European institutions, the European Parliament has been the most vocal in its condemnation of rule of law backsliding in both Hungary and Poland. Early on, the Parliament took the lead in putting Article 7 on the table with regard to Hungary, when the Tavares Report was overwhelmingly adopted in 2013.¹⁰⁹ The Tavares Report was not even the first time that the Parliament took a stand: the European Parliament had previously passed repeated resolutions criticising particular laws, starting with Hungary's media law and continuing through the constitutional overhaul.¹¹⁰ The Tavares Report, however, broke ground in putting the concerns into one systemic framework. Regrettably, the Parliament's call in the Tavares Report for Hungary to be carefully monitored by the Commission, with the goal of eventually triggering Article 7 TEU if Hungary did not change its ways, led to no concrete actions to address the specific issues listed in the resolution. Indeed, neither the Commission nor the Council took up the responsibilities that the Parliament had urged on them, and nothing public¹¹¹ was done about Hungary's backsliding.¹¹²

¹⁰⁸ Ibid.

¹⁰⁹ The adoption of the so-called Tavares report (see resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary) was preceded by the resolutions of 16 February 2012 on the recent political developments in Hungary and of 10 March 2011 on media law in Hungary.

¹¹⁰ European Parliament, Resolution of 10 March 2011 on media law in Hungary, P7_TA(2011)0094; Resolution of 5 July 2011 on the Revised Hungarian Constitution, P7_TA(2011)0315; Resolution of 16 February 2012 on recent political developments in Hungary, P7_TA(2012)0053.

¹¹¹ Various statements coming from the Commission indicated that individual Commissioners may have been involved in backstage negotiations with the Hungarian government during this period, but external observers still reasonably interpreted the absence of a public commitment to bringing Hungary back to the rule of law as a lack of concern for the problem. The Council's silence, however, masked no backstage efforts to address the Hungarian problem, as far as we can tell.

¹¹² For an overview of the European Parliament's role and initiatives in this area, see J Sargentini and A Dimitrovs, 'The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?' (2016) 54(5) *Journal of Common Market Studies* 1085. In July 2017, Judith Sargentini was appointed rapporteur for the European Parliament's investigation into whether Article 7(1) TEU should be triggered against Hungary.

Rather than seeking to trigger Article 7, which it could do on its own, the European Parliament got into the habit of regularly admonishing Hungarian authorities and calling for other European institutions to get their acts together to address Hungary.¹¹³ Finally, in May 2017, the Parliament adopted a (non-legislative) resolution on Hungary in which it delegated to the Civil Liberties Committee (LIBE) the task of writing a resolution that would explicitly trigger the preventive arm of Article 7 TEU.¹¹⁴

That said, a key factor explaining the European Parliament's adoption of the resolution of 17 May 2017 was the weakening support for Orbán within the European's People Party (EPP), currently the largest party in the European Parliament. Although at least half of the EPP members split from the party's official position and allowed the Tavares Report to pass in July 2013, Orbán has been so far effectively shielded from criticism and meaningful sanctions by the leadership of the EPP.¹¹⁵ It took blatant attacks on the Central European University in spring 2017 for the EPP leadership to finally give its members a free vote when the latest resolution regarding Hungary was put to a ballot.¹¹⁶ This small concession has so far enabled EPP leaders to avoid an open rebellion and contain discontent without having to exclude the MEPs belonging to Orbán's party. The primary and official reason given by the Chair of the EPP group at the European Parliament, Manfred Weber, to justify this stance is that Orbán's engagement with the EPP and the EU at large, by contrast to the uncompromising attitude of Kaczyński, was a reason to support Orbán.¹¹⁷ Considering Orbán's rhetoric and actions since 2010, one cannot take this reasoning seriously.¹¹⁸ Weber's stance can only be explained by a less noble reason: losing Fidesz MEPs, who have been loyal members of the EPP when it comes to voting, would undermine the EPP's primacy within the Parliament and its ability to appoint its members to the most powerful offices.¹¹⁹

¹¹³ See resolutions of 16 December and 10 June 2015 on the situation in Hungary.

¹¹⁴ Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)).

¹¹⁵ For an academic analysis that shows how party loyalties can blunt moves to sanction autocratic regimes within the EU, see D Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52(2) *Government and Opposition* 211, p 225: 'the majority of EPP members and the party leadership have repeatedly undermined the efforts of EU institutions to censure the Orbán regime.' On party politics as one of the key obstacles to the triggering of Article 7, see also U Sedelmeier, 'Protecting democracy inside the European Union? The party politics of sanctioning democratic backsliding in the European Parliament' (July 2016) *MAXCAP Working Paper* No 27.

¹¹⁶ The resolution was adopted by 393 votes against 221, with 64 abstentions. The resolution was opposed by the 11 Fidesz MEPs as well as most EPP MEPs from Germany (including Manfred Weber, the Chair of the EPP group), Spain, Italy, Romania and other countries, for a total of 93 EPP votes against the resolution. Overall, however, a majority of EPP members either voted in favour of the resolution (67) or abstained (40).

¹¹⁷ Reuters, 'Hungary's Orbán has to change behaviour: EU center-right', 29 April 2017: <http://www.srnnews.com/hungarys-orban-has-to-change-behavior-eu-center-right-2>.

¹¹⁸ Most recently, the Hungarian Prime Minister went as far as accusing the EU of siding with 'terrorists': see Z Simon, 'Hungary's Orbán Rails Against EU But Says He Doesn't Back Exit', *Bloomberg*, 12 June 2017: <https://www.bloomberg.com/news/articles/2017-06-12/hungary-s-orban-rails-against-eu-but-says-he-doesn-t-back-exit>

¹¹⁹ According to an unnamed EPP official, losing Fidesz MEPs 'would be a "wound" to the group' considering their loyalty and voting record, cited in M de la Baume and R Heath, 'Center-right's angry at Orbán, but won't kick him out', *Politico*, 6 April 2017. See also T King, 'Ties that bind Hungary's Fidesz and European Parliament', *Politico*, 7 April 2017: 'By crudely tying the appointment of the Commission president to the European Parliament elections, the European Council has given Europe's bigger political groups a perverse incentive to sign up national parties of dubious ideology and/or practice to their ranks, and to keep them signed up, no matter their behavior.'

The EPP has had less difficulty calling for decisive action against Poland which one may link to the fact that Poland's governing 'Law and Justice party' belongs to the ERC, a relatively marginal parliamentary group in the European Parliament that is about to become even more marginal when Brexit takes the British Tories out of the party. And indeed, to give a single example, the resolution of 14 September 2016 on developments in Poland, which reiterated the Parliament's concerns about the paralysis of the Polish Constitutional Tribunal, was easily adopted by 510 votes out of the 699 votes cast. The EPP itself voted overwhelmingly in favour of the resolution with only its Hungarian members voting against it, along with a few MEPs from elsewhere.

These precedents suggest that support within the European Parliament for preventing or sanctioning rule of law backsliding in a particular country may only be secured when the two largest groups in the Parliament – the European People's Party and the Socialists & Democrats group – have no self-interested reason to block the Commission's actions.¹²⁰ This also means that it would be wrong therefore to lay the blame only at the door of the Commission for not having done more with respect to Hungary when it has a Council missing in action and the largest party in the Parliament doing its best to shield Orbán from EU censure. The politics of the rule of law in the EU are far less principled than they should be.

As we write, it remains uncertain whether the report called for in the resolution of 17 May 2017 that will propose activation of Article 7(1) TEU will secure the 'two-thirds majority of the votes cast, representing the majority of its component Members', as required by Article 354 TFEU. Based on the results of the vote on 17 May 2017 – when the resolution was adopted by 393 votes out of 678, i.e. 58% of the voting MEPs with abstentions included – defenders of the rule of law do not yet have the votes. Assuming the same reluctant attitude and mixed messages from EPP leadership, the activation of Article 7(1) will be a close call as it will require a two-third majority which should include at least 376 MEPs. Perhaps it would be easier to trigger Article 7(1) against Poland which, considering Polish authorities' behaviour and record since January 2016, would also be amply justified.

In light of the above, one may conclude that there are three primary shortcomings of the EU answers to the 'illiberal' turn in Hungary and Poland:

- (i) EU institutions have a tendency to procrastinate even when faced with evident and persistent breaches of EU values by would-be-authoritarians but procrastination only makes this particular problem worse;
- (ii) EU institutions' default position is to hide their inaction behind strong rhetoric and to mask their ineffectiveness with symbolic compromises, declaring victory when facts on the ground have not changed, and
- (iii) Partisan loyalties have so far been stronger than the rule of law.

It is only because Polish authorities have been so blatantly uncompromising – even publicly rude – in their dealings with EU officials, so plainly undeterred in their attempts to destroy their own judiciary and so clearly undefended by a major pan-

¹²⁰ V van Hüllen and T Börzel, 'The EU's Governance Transfer. From External Promotion to Internal Protection?' (2013) *SFB-Governance Working Paper* No 56, p 22. See also M Meijers and H van der Veer, 'Hungary's government is increasingly autocratic. What is the European Parliament doing about it?' *Washington Post*, 3 May 2017 (having examined 1,634 written parliamentary questions from April 2010 until January 2017, authors argue that the EPP has sought to keep Hungary's democratic backsliding off the agenda and that radical rights parties similarly kept quiet on this issue).

European party, that the Commission takes few risks in proceeding. By contrast, Hungarian authorities know how to play the EU game by engaging symbolically and retreating strategically (if temporarily) when they must. Plus, the governing party in Hungary picked its political family well, as recently demonstrated by Jean-Claude Juncker's public support for Orbán, a fellow member of the EPP.¹²¹ In engaging in a semblance of dialogue and symbolic compliance when they must, the Hungarian authorities have done just enough to retain the support of the EPP leadership and to permit the Commission to claim that the dialogue continues, while still undermining the rule of law at every turn.

V. THE WAY FORWARD: LOOKING BEYOND ARTICLE 7 TEU TO PRESERVE THE RULE OF LAW

Save for an *effet utile* interpretation of Article 7 TEU that would allow a simultaneous Article 7 move against both Hungary and Poland to eliminate the veto of each in favour of the other, the presence of two illiberal EU countries means that the sanctioning arm of Article 7 has been effectively neutralised by the need for unanimity in the European Council. Against this background, officials, academics and civil society groups have proposed a range of ambitious solutions requiring Treaty change, such as rewriting Article 7.¹²² It is however unrealistic to expect any Treaty change in this area if only because EU Treaties also require unanimity and Member States still in the crosshairs can be expected to veto such changes. As such, rather than discussing 'pie in the sky' type solutions, we will offer an overview of the most promising proposals for dealing with the rule of law crisis in the current moment. We begin with the recent and ambitious proposal adopted by the European Parliament (Part V.A), and then consider a number of additional proposals (Part V.B) before ending with what is, in our opinion, the most realistic outcome one may expect given the present circumstances (Part V.C).

A. *The European Parliament's Proposal for a New Mechanism*

¹²¹ 'Asked about the difference between dealing with the Polish leadership and Hungary's Prime Minister Viktor Orbán, Juncker said: "Well, I've got a caring relationship with Orbán. We talk regularly, I see him regularly — even if it's not always made public — because I think I do not want to lose Hungary." He didn't make the same pledge about Poland, or even mention it', F Eder, 'Jean-Claude Juncker, upbeat and ready for a fight', *Politico*, 3 August 2017.

¹²² For an overview of the proposals made before the adoption of the Rule of Law Framework in 2014, see Kochenov and Pech, 'Monitoring and Enforcement of the Rule of Law in the EU', see note 24 above, p 526. See also the proposals mentioned in the European Parliament resolution of 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), and which can be summarised as follows:

- Article 2 TEU and the EU Charter to become a legal basis for legislative measures;
- National courts to gain jurisdiction bring proceedings relating to the legality of Member States' actions on the same basis;
- Revision of Article 7 TEU;
- One-third of MEPs to gain the right to refer EU legislation to the CJEU;
- Revision of legal standing rules for natural and legal persons under Article 263 TFEU in situations where they allege violations of the EU Charter;
- Abolition of Article 51 of the Charter to transform EU Charter into a proper federal Bill of Rights;
- Revision of the unanimity requirement when it comes to adopting legislation in areas relating to fundamental rights.

On 25 October 2016, the European Parliament recommended the establishment, ‘until a possible Treaty change’, of a new mechanism in the form of an interinstitutional agreement to more effectively monitor EU countries’ adherence to the values laid down in Article 2 TEU.¹²³ This mechanism would permit ongoing assessment of all Member States’ compliance with the rule of law so as to be able to spot deviating states early. The proposed new mechanism’s new features can be summarised as follows:

- (i) Instead of the current ‘crisis-driven’ approach where EU institutions react to perceived breaches of Article 2 values in specific countries, the new mechanism would be a permanent one to which all EU Member States would be subject as a matter of principle;
- (ii) Called the DRF pact (DRF stands for Democracy, the Rule of Law and Fundamental Rights), the new mechanism also aims to guarantee compliance with EU values through preventative as well as corrective and sanctioning measures. Potential breaches at national level would be identified via new annual reports (DRF Report) that would include a general part and country-specific recommendations. This would be accompanied by a new monitoring cycle (DRF policy cycle) involving the main EU institutions, national parliaments as well as civil society, the EU Fundamental Rights Agency and the Council of Europe. The Commission would take the administrative lead when it comes to assessing compliance with Article 2 TEU on the basis of these new reports;
- (iii) To avoid political influence when it comes to assessing a country’s adherence to Article 2, a new expert panel (DRF Expert Panel¹²⁴) is to be set up and be made responsible for drafting the DRF report;
- (iv) To avoid confusion and duplication, the DRF report is supposed to incorporate into a single instrument the Commission’s Rule of Law Framework and the Council’s Rule of Law Dialogue as well as the Commission’s Justice Scoreboard, the Media Pluralism Monitor, the anti-corruption report and peer evaluation procedures based on Article 70 TFEU, which provides for the establishment of Member State monitoring mechanisms. It would also replace the existing Cooperation and Verification Mechanism for Bulgaria and Romania;
- (v) In situations where evidence supports the conclusion that there are breaches of core elements of Article 2 values, the Commission is to start a dialogue with that Member State without discretion or delay;
- (vi) In situation where the DRF expert panel is of the view that there is a clear risk of a serious breach of Article 2 values and that there are sufficient grounds for invoking Article 7(1) TEU, the European Parliament, the Council and the Commission shall each promptly discuss the matter and each institution shall adopt a reasoned decision which shall be made public;
- (vii) Finally, in situations where the DRF expert panel is of the view that there is a serious and persistent breach of Article 2 and that there are sufficient grounds for invoking Article 7(2), the European Parliament, the Council and the Commission shall each discuss the

¹²³ European Parliament resolution of 25 October 2016, *ibid*, para. 1.

¹²⁴ The proposal to involve a new expert body is not without recalling the proposal to set up a ‘Systemic Deficiency Committee’ made by A von Bogdandy et al, ‘Protecting EU values’ in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press, 2017), p 228 et seq. In this instance, the DRF Expert Panel is to be composed of one qualified constitutional court or supreme court judge not currently in active service designated by the national parliament of each Member State and ten further experts appointed by the European Parliament chosen from a list of experts nominated by: (i) the federation of All European Academies (ALLEA); (ii) the European Network of National Human Rights Institutions (ENNHRI); (iii) the Council of Europe, including the Venice Commission, GRECO and the Council of Europe Human Rights Commissioner; (iv) the CEPEJ and the Council of Bars and Law Societies of Europe (CCBE); (v) the UN, the OSCE and the OECD.

matter without delay and each institution shall adopt a reasoned decision which shall be made public.

The above proposal, which closely reflects the one made by Dutch ALDE MEP Sophie in 't Veld,¹²⁵ should be commended for offering a comprehensive and potentially more effective, transparent and objective framework than currently exists. It also positively reflects most of the recommendations made in two research reports¹²⁶ commissioned by the European Parliamentary Research Service.¹²⁷ In particular, the proposed DRF pact creatively links the suggested DRF report with the possible launch of 'systemic infringement actions', which would bundle several infringements together to make the case that systemic violation is at issue,¹²⁸ and calls for 'the setting up of an endowment for democracy grant-giving organisation that supports local actors promoting' ¹²⁹ Article 2 values within the Union. Disappointingly, the Commission has since expressed its opposition to the Parliament's proposal on the basis of reasons one may find as unpersuasive as the reasons put forward by the Commission to justify not triggering the Rule of Law Framework for Hungary:

At this stage the Commission has serious doubts about the need and the feasibility of an annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a committee of "experts" and about the need for, feasibility and added value of an inter-institutional agreement on this matter. Some elements of the proposed approach, for instance, the central role attributed to an independent expert panel in the proposed pact, also raise serious questions of legality, institutional legitimacy and accountability. Moreover, there are also practical and political concerns which may render it difficult to find common ground on this between all the institutions concerned. The Commission considers that, first, the best possible use should be made of existing instruments, while avoiding duplication. A range of existing tools and actors already provide a set of complementary and effective means to promote and uphold common values. The Commission will continue to value and build upon these means.¹³⁰

¹²⁵ Report with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), LIBE Committee, Rapporteur: Sophie in 't Veld, A8-0283/2016, 10 October 2016.

¹²⁶ See European Parliament (EPRS study), An EU mechanism on democracy, the rule of law and fundamental rights – Annex I An EU mechanism on democracy, the rule of law and fundamental rights (study written by L Pech et al.), PE 579.328, April 2016; Annex II Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights (study written by P Bárd et al.), PE 579.328, April 2016. Professor Dimitry Kochenov, a frequent co-author of ours, was also involved in drafting Annex II.

¹²⁷ According to the European Parliamentary Research Service (EPRS) itself, the root causes of the gap between the proclamation of Article 2 values and actual compliance by EU institutions and Member States are to be found in certain weaknesses in the existing EU legal and policy framework: See European Parliament (EPRS), An EU mechanism on democracy, the rule of law and fundamental rights, European Added Value Assessment, PE 579.328, October 2016.

¹²⁸ European Parliament resolution of 25 October 2016, note 122 above, para. 10. The idea of systemic infringement action was first made by one of the present authors: See K L Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in *Reinforcing Rule of Law Oversight in the European Union*, note 18 above, 105. The use of systemic infringement actions was one of the six main recommendations made in European Parliament (EPRS study), An EU mechanism on democracy, the rule of law and fundamental rights – Annex I, note 126 above, p 135.

¹²⁹ European Parliament resolution of 25 October 2016, note 122 above, para 17. This also reflects another recommendation made in Annex I, note 125 above, p 152.

¹³⁰ European Commission, Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, SP(2017)16, 17 February 2017.

This reaction to the constructive proposal of the European Parliament may be viewed as the latest example of the Commission simultaneously guarding its territory while shirking its responsibilities.¹³¹ There is still however one relatively easy way for the Commission to do more: It could more forcefully interpret and more vigorously apply its infringement powers by initiating ‘systemic infringement’ actions that would eventually subject the rule of law rogue states to financial sanctions should they fail to change course.

B. The (Short-Term) Way Forward: Systemic Infringement Actions

Given the resistance of the Commission to political persuasion either outside or within the rule of law framework, the most promising solution in the short term may be for the Commission to respond legally by replying to *systemic* attacks on the rule of law through *systemic* infringement actions. Such actions would allow the Commission to rely on a familiar tool, while adjusting it slightly to meet the new challenges.

The European Commission is the Guardian of the Treaties, and so it is the Commission’s responsibility to ensure that the Treaties - including the values that form the basis of the Treaties - are in force across the Union. The infringement action is one of its standard tools for ensuring the consistent application of EU law. Even without the support of other EU institutions, the European Commission could adopt a more ambitious interpretation of its infringement powers by adjusting the normal infringement action in two ways to deal with Member States that systematically challenge the rule of law: (i) By packaging together a set of distinct complaints into a single infringement action, the Commission could show that it can connect the dots the same way that the autocrats do by acknowledging that the takeover of multiple independent institutions is part of a common plan to erode checks and balances; (ii) By defending the view that systemic infringements call for a systemic remedy, the Commission could, if confirmed by the Court of Justice, insist on changes that would reverse the damage caused to the uniform application of European law across the Union.

The Commission could bring such a ‘packaged claim’ under Article 4(3) TEU by arguing that the Member State is systematically thwarting the realisation of EU law within its national legal system. Alternatively, it could bundle ordinary *acquis* violations together with violations of the Charter of Fundamental Rights to demonstrate that the combined set of violations rises to a more serious level than the typical infringement. In fact, the Commission has already done this once with regard to its initial objections to Hungary’s asylum policy,¹³² an approach it broadened when it issued its more comprehensive complementary formal notice against Hungary in asylum matters in May 2017.¹³³ Alternatively, the Commission could challenge a Member State for a violation of Article 2 values directly, under the rubric of the rule of law. After all, if it could trigger Article 7 to address rule of law violations, why

¹³¹ P Bárd and S Carrera, *The Commission’s Decision on ‘Less EU’ in Safeguarding the Rule of Law: A play in four acts*, CEPS no 2017/08, March 2017.

¹³² European Commission, Commission opens infringement procedure against Hungary concerning its asylum law, Press release, IP/15/6228, 10 December 2015.

¹³³ The new complementary notice includes new allegations in the area of asylum and immigration policy that involve several provisions of the Charter of Fundamental Rights. See European Commission, ‘Asylum: Commission follows up on infringement procedure against Hungary concerning its asylum law’, May infringements package – Part 1: key decisions, Memo/17/1280, 17 May 2017.

couldn't it use its ordinary powers to attempt a legal resolution of the matter before moving to the more political options laid down in Article 7?

If the Court of Justice agreed with the Commission that the whole was greater than the sum of the parts by finding a systemic violation of EU law, this would give the Commission more room to insist on systemic compliance with the principles of EU law rather than formalistic compliance with only the formal letter of the *acquis*. The intervention of the Court would also help depoliticise the whole issue, which is one of the main objections of governments that argue against any meaningful monitoring of their rule of law records by the Commission. Be that as it may, the systemic approach advocated here would crucially prevent cosmetic patches from disguising the underlying systemic problems. For example, when the Hungarian government replaced the existing data protection officer in violation of his EU-law-guaranteed independence, the rule of law required more than simply compensating the person who had been fired. Instead, some guarantee that the data protection function would still be independently performed as EU law requires would be important to ensure, but that was not done.¹³⁴ As we saw with the Commission's piecemeal attempts to address the Hungarian government's initial consolidation of power, the Hungarian government could easily meet very specific infringement actions with narrow if not largely useless gestures of compliance (for example, compensating the old data protection officer while the government's new data protection officer dropped all of the cases brought by the former data protection officer that were contested by the government). Had the action been brought on the more ambitious argument that the right to data protection was under threat, then the remedies would address restoration of the infringed rights. A more comprehensive approach to compliance would allow the Commission to tailor the remedies to the nature of the problem identified.

If the Commission is unwilling to reinterpret the infringement procedure in this way, then Member States, as suggested by Professor Kochenov,¹³⁵ could rediscover Article 259 TFEU and test this more comprehensive approach in the Court of Justice themselves. Under Article 259 TFEU, one or more Member States can file an infringement action directly against another Member State for violating EU law and bring the matter before the Court of Justice without requiring the agreement of any EU institution. Rediscovering Article 259 could also be a way to push the Commission into acting, as an Article 259 TFEU action must go first to the Commission to see whether the Commission wants to join the action (thereby converting to an Article 258 TFEU infringement action), before the matter is eventually brought before the Court of Justice. Article 259 TFEU has the reputation of being used for losing causes but that is only because the Commission tends to avoid joining the frivolous ones even though those cases can still continue without the Commission on board. If a Member State invokes Article 259 TFEU to denounce a systemic threat to or breach of the rule of law in another Member State, it might not only spur the Commission to act under Article 258 TFEU when it is otherwise on the fence, but it also provides an avenue for the relevant Member State(s) to raise additional points before the Court of Justice.

¹³⁴ Scheppele, 'Making Infringement Procedures More Effective: A Comment on *Commission v. Hungary*, Case C-288/12'; see also M Dawson and E Muir, 'Hungary and the *Indirect* Protection of EU Fundamental Rights and the Rule of Law' (2013) 14 *German Law Journal* 1960.

¹³⁵ D Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool' (2016) 15(7) *Hague Journal on the Rule of Law* 153.

Either way - whether the Commission brings an infringement action under Article 258 TFEU or one or more Member State(s) bring an action under Article 259 TFEU - the Court of Justice would then be offered an opportunity to decide whether systemic attacks on the rule of law and in particular on the independence of the national judiciaries or other institutions crucial for the correct application of EU law in Poland and Hungary should lead it to reconsider the principle of mutual trust.¹³⁶ In both Hungary and Poland, national courts have been (Hungary) or are in the process of being (Poland) captured by their respective governments so it is no longer possible to assume that EU law will be applied properly in cases in which the governments have a reason to avoid EU standards more systemically. Since the Commission has failed in its front-line responsibility to ensure that Hungary and Poland retained independent judiciaries, the Court of Justice will soon be faced with cases that will require it to think systemically about what to do when a whole judicial system has been politically compromised.¹³⁷

To borrow the analogy made by Professor Daniel Halberstam, the EU legal order may be viewed as a hydraulic system whose functioning depends on three interrelated conditions: a common set of values and similar level of fundamental rights protection throughout the Union; the Union's ability to effectively remedy violations of its values at Member State level; and a safety valve for the Court of Justice to invoke overriding policy justifications where compliance with mutual trust would otherwise tear the Union apart.¹³⁸ Should one of these elements weaken, the remaining element(s) must strengthen correspondingly. As a result, where any EU Member State ceases to comply with the most basic understanding of the rule of law but the EU institutions have otherwise failed to effectively correct the situation, the principle of mutual trust ought to be relaxed at the Court of Justice. Already there is a sign that the Court of Justice has endorsed Professor Halberstam's analysis by relaxing the principle of mutual trust when Member States have been found by the European Court of Human Rights to breach Convention rights in a systemic way.¹³⁹

¹³⁶ The Network of the Presidents of the Supreme Judicial Courts of the EU has recently recalled that 'co-operation in the field of justice is largely based on mutual trust in the administration of justice within the European Union' and expressed its concern 'that the interferences by the Polish authorities will not only have the effect of undermining the rule of law, but also mutual trust in the administration of justice'. See Statement of the Network of the Presidents of the Supreme Judicial Courts of the EU on the Situation in Poland: <http://network-presidents.eu/sites/default/files/StatementPoland.pdf>

¹³⁷ As previously noted and in a welcome move, the Commission has recently and for the first time noted a possible direct breach of the independence of Polish courts by reference to Article 19(1) TEU in combination with Article 47 of the EU Charter in the context of an infringement action aimed at the law on the organisation of ordinary courts: European Commission, 'European Commission launches infringement against Poland over measures affecting the judiciary', Press release IP/17/2205, 29 July 2017.

¹³⁸ D Halberstam, "'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16(1) *German Law Journal* 105, p 131.

¹³⁹ See *NS and ME*, Joined Cases C-411/10 and C-493/ME, EU:C:2011:865 (EU law precludes a conclusive presumption that Member States observe the fundamental rights conferred on asylum seekers) and more recently, *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198 (where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be for instance systemic or generalised, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State).

But this cautious approach of the Court of Justice, in which it allows specific exemptions from the principle of mutual trust only in the face of an adverse decision from the European Court of Human Rights has not yet acknowledged that Member States may be in violation of basic values protected by the EU treaties beyond those also covered by the ECHR or certified by the European Court of Human Rights. Without an institution that can assess and monitor compliance with basic EU values, as the European Court of Human Rights does for ECHR rights, the Court of Justice may feel more reluctant to draw this systemic conclusion on its own. This is another reason why the Commission should, at the very least, monitor and document the state of the rule of law in problematic Member States.

Considering that mutual trust is such a bedrock constitutional principle of the EU, however, a persistent and systemic threat to this presumption may well signal a danger for the Union as such. If so, one may wonder what the Court would decide and what it would take as sufficient evidence of a rule of law breach. The Court of Justice may have no choice but to confront the issue of whether Polish courts after a successful political purge of the judiciary may still be considered independent and impartial courts able to provide effective legal protection. While the constitutionality of Polish laws can no longer be effectively guaranteed following the unconstitutional capture of the Polish Constitutional Tribunal, as rightly noted by the Commission, the four laws designed to capture the ordinary judiciary pushed through in July 2017 (two of which have since been vetoed by the Polish President), ‘raise grave concerns as regards the principles of judicial independence and separation of powers’¹⁴⁰ and have the potential of structurally undermining ‘the independence of the judiciary in Poland’.¹⁴¹ This might eventually raise the issue of whether Polish courts would no longer constitute ‘courts’ within the meaning of Article 267 TFEU, if the Polish ruling party is eventually successful in its attempts to purge and capture the national judiciary as a whole. As noted by Professor Sarmiento, in such a situation, Polish courts would not have ‘courts of law under the standards of EU law’ and should therefore lose their ability to communicate with the Court of Justice via national references for a preliminary ruling.¹⁴² The same question may be raised in Hungary, where judicial appointments and careers are already in the hands of a political official after the leadership of the ordinary judiciary had already been purged, as both the Venice Commission and International Bar Association have documented.¹⁴³ While the Commission has the luxury of avoiding whatever it does not want to face, the Court does not have such a convenient exit strategy when a case raising these issues is brought before it.¹⁴⁴

¹⁴⁰ Commission Recommendation of 26 July 2017, note 16 above, para 12.

¹⁴¹ *Ibid.*, para 45(2).

¹⁴² D Sarmiento, ‘The Polish Dilemma’, *Despiteourifferencesblog*, 17 July 2017: <https://despiteourifferencesblog.wordpress.com/author/despiteourifferencesblog/>

¹⁴³ Venice Commission, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Opinion 663/2012, CDL-AD(2012)001; Venice Commission, Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD(2012)001, Opinion 683/2012, CDL-AD(2012)020; International Bar Association’s Human Rights Initiative (IBAHRI), *Courting Controversy: The Impact of Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary*, September 2012: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=f95a6bf2-99cf-42c8-9c24-d3b7a531207c>; IBAHRI, *Still Under Threat: The Independence of the Judiciary in Hungary*, October 2015: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=a00b5f64-4b05-4b25-81c6-5e507c45cc74>.

¹⁴⁴ In what may be a pure coincidence, in a recent article, the current President of the CJEU strongly emphasises that while the principle of mutual trust should be understood as a constitutional one, it is by

If a systemic infringement procedure results in an adverse judgment of the Court of Justice, and the Commission tries and fails to get the Member State in question to comply, the Commission could return to the Court under Article 260 TFEU to request a large fine, as befits a significant violation, and it could even seek penalty payments where relevant.¹⁴⁵ In fact, given the capacious wording of Article 260 TFEU, we see no reason why the Commission could not deduct the resulting fine from the funding streams that the EU has allocated to the offending Member State. Money is fungible, and withholding EU funds pending a successful removal of the infringement would provide an added incentive for the Member State to comply with the Court of Justice judgment. In fact, financial sanctions in an infringement procedure may be the most effective way to restore the rule of law considering the political constraints that seem to paralyse all of the EU institutions outside the litigation context. Indeed, Poland and Hungary are two of the largest recipients of EU regional and cohesion funding. The prospect of the Commission withholding EU funds until a Member State brought itself back into the rule of law fold may well concentrate the rogue states' governments on actual and not just symbolic compliance.

As the recent example of Poland shows, new welfare benefits, seemingly unaffordable in the long term, are being used to 'buy' popularity while the capture of the Polish state is taking place.¹⁴⁶ This follows a pattern from Hungary, where state-owned utility rates were lowered before the last election to persuade voters that the governing party should be returned to office.¹⁴⁷ Putting a financial squeeze on the ability of these governments to buy popularity with electorates may not be a bad thing; such governments would have to run for office on their records instead. While suspending already committed EU funding would itself breach the rule of law absent reasoned opinions within the footprint of existing EU law,¹⁴⁸ a number of options may be explored in the short term. Attaching the suspension of funds to a judgement under Article 260 TFEU is one but this is not the only possibility for withholding EU funds for rule of law violations. As suggested by Marek Grela, who was Poland's first permanent representative to the EU, 'the Commission could declare that the absence of independent judicial scrutiny and the sacking of experts means it can no longer certify that EU funds are being properly spent', which 'could justify additional

no means absolute and should not be confused with 'blind trust' as mutual trust needs to be 'earned' by each Member State through effective compliance with EU fundamental rights standards. See K Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) 54(3) *Common Market Law Review* 805.

¹⁴⁵ For a critical overview of this suggestion pointing out that financial penalties tend not to improve compliance and because they are linked to a Member State's ability to pay, also tend not to be sufficiently significant to result in compliance especially when considering what would be at stake for would-be-authoritarians, see D Kochenov, 'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analysed' (2013) XXXIII *Polish Yearbook of International Law* 145, pp 167-168.

¹⁴⁶ See e.g. H Foy and E Huber, 'Polish pension U-turn alarms economics but cheers voters', *Financial Times*, 3 December 2016.

¹⁴⁷ Orbán gained tremendous popularity by cutting utility rates before the 2014 election but after the election, the Commission decided that these rate cuts were not consistent with EU energy policy. E Balogh, 'A New Crusade in Brussels over the Price of Electricity', *Hungarian Spectrum*, 3 December 2016.

¹⁴⁸ For the argument that Regulation No 1303/2013, which governs multiple EU schemes providing financial support under the EU cohesion policy, would necessarily imply independent national courts in the absence of which the Commission would be entitled to suspend EU funding, see I Butler, 'To Halt Poland's PiS, Go for the Euros', *Liberties*, 2 August 2017: <https://www.liberties.eu/en/news/to-halt-polands-pis-go-for-euros>

safeguards before structural or agricultural funds are disbursed.¹⁴⁹ EU money could also be rerouted through infra-national authorities, sidestepping the central government.¹⁵⁰ Direct or indirect financial support for civil society groups should also be considered.¹⁵¹ More radically, one suggestion proposes to change the rules regarding the next EU budgetary period in order to allow for EU funding to be frozen when a country stops complying with the rule of law.¹⁵²

B. *Proposals for the Future: A New Article 2 Conditionality Requirement and/or Multi-Speed Europe*

New approaches are clearly required. One proposal that has been suggested involves introducing a new conditionality requirement on EU funding that would require compliance with European values before funding could be awarded. In the words of Commissioner Jourová:

[We] need to ensure that EU funds bring a positive impact and contribute more generally to promote the EU's fundamental rights and values. That is why I intend to explore the possibility to strengthen the "fundamental rights and values conditionality" of EU funding to complement the existing legal obligations of Member States to ensure the respect of the Charter when implementing EU funds.¹⁵³

This new requirement has been explicitly proposed with the situation in Poland in mind as it has been allocated a total of €86 billion from various EU cohesion funds for the period 2014-2020 and would, under normal circumstances, expect substantial funds in the next budget cycle as well.¹⁵⁴ Preparatory work is supposed to begin this year, with Commissioner Jourová warning that eligibility criteria for EU structural funding as well as the future of the EU cohesion policy are going to be reviewed.¹⁵⁵ Significantly, the suggestion to condition EU cohesion funding on 'compliance with

¹⁴⁹ Taylor, 'For EU, Poland is not yet lost', *Politico*, 23 November 2016: <http://www.politico.eu/article/for-eu-poland-is-not-lost-yet-jaroslav-kaczynski-sanctions>.

¹⁵⁰ This might be less effective in Hungary where the national government removed the autonomy of local governments in the massive constitutional reform of 2011-2012.

¹⁵¹ See the proposal for a new EU funding instrument modelled on the European Instrument for Democracy and Human Rights and the European Endowment for Democracy made in report commissioned by the European Parliament: EPRS study, Annex I An EU mechanism on democracy, the rule of law and fundamental rights (study written by L Pech et al), note 126 above, pp 152-153.

¹⁵² M Meyer-Resende, 'How to Fix Europe's Rule of Law Blindspot', *Politico*, 12 June 2017: <http://www.politico.eu/article/how-to-fix-europe-rule-of-law-blindspot-poland-hungary-democratic-decline/>. For an instructive overview of the rise of spending conditionality in EU internal policies in the 2014-20 budgetary period and the argument that 'the influx of conditionality in the EU internal budgetary process suggests a paradigm shift towards a conditional solidarity, contingent upon Member States' continuous performance under the treaties', see V Vita, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality', (2017) 19 *Cambridge Yearbook of European Legal Studies* 1.

¹⁵³ '10 years of the EU Fundamental Rights Agency: a call to action in defence of fundamental rights, democracy and the rule of law', Vienna, 28 February 2017, Speech/17/403.

¹⁵⁴ See e.g. the data available here: <https://cohesiondata.ec.europa.eu/>. Poland has for instance been allocated ESIF funding of €86 billion representing an average of €2,265 per person over the period 2014-2020.

¹⁵⁵ M Becker, 'Democracy in Europe. EU Commissioner Pushes for Hard Line on Poland', *Spiegel Online*, 7 March 2017: <http://www.spiegel.de/international/europe/eu-commissioner-pushes-for-hard-line-on-poland-a-1137672-druck.html>

fundamental principles of the rule of law'¹⁵⁶ has since received the explicit support of Germany and been confirmed by the (German) Commissioner in charge of the budget but not the support, rather surprisingly, of the President of the European Commission himself.¹⁵⁷

There is no strong appetite to trigger Article 7 against both Hungary and Poland, but linking EU funding with Article 2 compliance may be more popular, especially given the extra pressure on the EU budget that the UK withdrawal from the EU will create.¹⁵⁸ A number of counterarguments may however be raised, among which one may mention the implicit assumption that rule of law backsliding remains primarily a problem for countries that are large recipients of EU funding and that this solution therefore appears discriminatory.¹⁵⁹

Should this solution fail to materialise and other measures fail to contain or prevent rule of law backsliding, it is then likely that calls for a multi-speed Europe¹⁶⁰ or a two-tiered EU with a more deeply integrated and institutionalised Eurozone¹⁶¹ are bound to grow louder. Hungary and Poland are both outside the Eurozone, so calls to more strongly integrate the Eurozone and leave the others behind may well allow the rule of law states to leave the non-rule-of-law states behind in a second-tier Europe without the need to take note explicitly of rule of law problems.

Faced with the choice between seeing cohesion funds conditioned on values compliance or being relegated to a second-tier Europe as the rest of the Member States forge ahead, governments in Central Europe may soon, in the words of Ivan Krastev, 'be forced to choose between a future of deeper integration with Western Europe, or a future where Central Europe is increasingly marginalized', that is, according to the author, 'a choice between Emmanuel Macron and Viktor Orbán'.¹⁶² Should other Member States choose multi-speed Europe instead of direct EU sanctions, we could then see the institutionalisation of a new European configuration,

¹⁵⁶ F Eder, 'Berlin looks into freezing funds for EU rule-breakers', *Politico*, 30 May 2017: <http://www.politico.eu/article/poland-rule-of-law-europe-germany-berlin-looks-into-freezing-funds-for-eu-rule-breakers/>

¹⁵⁷ E Maurice, 'Commission hints at political conditions for EU funds', *EUobserver*, 30 May 2017: <https://euobserver.com/institutional/138063>

¹⁵⁸ One should however note that the adoption of the EU's multiannual financial framework requires the unanimous agreement of the Council (Article 312 TFEU). When it comes however to the definition of the tasks, priority objectives and the organization of the EU structural funds, the ordinary legislative procedure applies (Article 177 TFEU).

¹⁵⁹ M Steinbeis, *The Hand on the Faucet*, *Verfassungsblog*, 3 June 2017: <http://verfassungsblog.de/the-hand-on-the-faucet/>. To this criticism, one might respond that systemic infringement actions followed by fines paid for by state treasuries are still available.

¹⁶⁰ See scenario 3 'Those Who Want More Do More' in European Commission, *White paper on the future of Europe – Reflections and scenarios for the EU27 by 2025*, COM(2017)2025, 1 March 2017.

¹⁶¹ European Commission, *Reflection paper on the deepening of the economic and monetary union*, COM(2017)291, 31 May 2017. To reinforce the democratic accountability and effective governance of the EMU, the report suggests among other things the institutionalisation of the Eurogroup and the setting up of a Euro area Treasury and a European Monetary Fund. One may note in passing that this reflection paper also suggests the strengthening of the link between policy reforms and the EU budget to foster convergence by making inter alia the disbursement of EU structural and investment funds conditional on progress in implementing concrete reforms in areas such as public administration and the judicial system via the European Semester.

¹⁶² 'Central Europe's Tough Choice: Macron or Orban?' *European Council on Foreign Relations*, 23 June 2017: http://www.ecfr.eu/article/commentary_central_europes_tough_choice_macron_or_orban_7303

with core EU countries flanked by ‘a buffer zone of semi-autocratic member states on its eastern border’.¹⁶³

VI. CONCLUDING REMARKS

During the French presidential election campaign, Emmanuel Macron warned that one cannot have a country engaged in social and fiscal dumping ‘while being in breach of all its principles’.¹⁶⁴ Poland was the clear target of this remark. The newly elected French President added that ‘one cannot have an Europe debating the decimal point of every single one of the national budgetary issues and which decides to do nothing when you have an EU Member State behaving like Poland or Hungary on topics relating to university and knowledge, refugees or fundamental values’.¹⁶⁵

Coincidentally or not, Macron’s election was rapidly followed by the first ever discussion in the Council of the rule of law situation in a specific Member State (about Poland), the first ever parliamentary vote to prepare the ground for triggering Article 7 (against Hungary) and increasing pressure on both Poland and Hungary from the Council and the Commission with respect to the EU refugee resettlement scheme.¹⁶⁶ Given what we have seen already, however, one should not expect any effective rule of law improvements in Hungary and Poland if the European institutions continue to believe in the (illusory merits) of a ‘constructive dialogue’ approach with autocrats. We should also not expect improvements in the situation if European parties, particularly the EPP, continue to shield their members from European enforcement actions. But perhaps the most discouraging and damning reaction of all is the reaction of most of the other Member States so far to the rule of law crisis in the EU, a reaction characterized by complete and total silence.

But the Member States who believe themselves unaffected are not protected against the influence of creeping autocracy within the EU. The popular anger and party malfunctions that brought Fidesz to power in Hungary and PiS to power in Poland are not confined to those two countries. Across the EU, we see signs of increasingly popular autocratic leaders coming closer and closer to power. EU Member States need to wake up to the fact that the actions of Hungary’s Orbán and Poland’s Kaczyński provide a model that can easily spread to other EU countries led by populists with autocratic ambitions. Even apart from a desire to preserve the rule of law in Poland and Hungary, EU institutions ought to take seriously the threat these countries represent to liberal constitutional democracy as such. The more states fall victim to the siren song of populism, the harder it will be to solve the problem within EU institutions. Better to fix the problems while the EU still can.

¹⁶³ B Magyar, ‘The EU’s Mafia State’, *Project Syndicate*, 21 June 2017: <https://www.project-syndicate.org/commentary/orban-hungary-mafia-state-by-balint-magyar-2017-06#comments>

¹⁶⁴ Interview with *La Voix du Nord*, 27 April 2017: <http://www.lavoixdunord.fr/154291/article/2017-04-27/je-ne-poursuivrai-pas-l-europe-comme-elle-est-affirme-emmanuel-macron#>

¹⁶⁵ Ibid.

¹⁶⁶ European Commission, Relocation and resettlement: Commission calls on all Member States to deliver and meet obligations, IP/17/1302, 16 May 2017. The Commission’s Twelfth report on relocation and resettlement explicitly singles out Poland and Hungary: ‘Hungary and Poland should start pledging and relocating immediately, while the Czech Republic should start pledging and relocating again without delay’, COM(2017) 260 Final, p. 4. And the Commission has filed a commentary infringement action against Hungary for its asylum policy: Commission follows up on infringement procedure against Hungary concerning its asylum law, available at [http://europa.eu/rapid/press-release MEMO-17-1280_en.htm](http://europa.eu/rapid/press-release_MEMO-17-1280_en.htm).