

# How the EU Can and Should Cope with Illiberal Member States

## 1. TRADITIONAL MECHANISMS: INFRINGEMENT PROCEDURES AND ARTICLE 7

In this paper, I deal with the ways in which the European Union cope with recent deviations from the shared values of rule of law and democracy – the «basic structure» of Europe – in some of the new Member States in East-Central Europe, especially in Hungary and Poland. The starting point of deviation is Article 2 of the Treaty of the European Union, which demands «*respect for human dignity, freedom, democracy, equality, rule of law and [...] human rights including the rights of minorities*». The EU's first reaction, instead of addressing its values directly towards Member States not complying with the principles of fundamental rights and rule of law, was to use indirect means of pressure, dependent on EU economic competences to a large extent (Dawson and Muir 2013). But the EU has also direct legal authority to protect the values of constitutionalism in the Member States.

In the case of Hungary, the EU, until 2013, when the Fourth Amendment to the Fundamental Law was enacted, which finally dismantled the Constitutional Court and other checks and balances of the governmental power<sup>1</sup>, did not use any of its capacities. In March 2013, after the Fourth Amendment was introduced to the Hungarian Parliament, the Danish, Finnish, Dutch and German Ministers of Foreign Affairs issued a Joint Letter, which called for a new mechanism to safeguard the fundamental values of the EU, secure

<sup>1</sup> On 11 March, 2013 the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court. The most alarming change concerning the Constitutional Court annulled all Court decisions prior to when the Fundamental Law entered into force. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary.

compliance, and for the Commission to take an increased role in it<sup>2</sup>. Later, upon the request of the European Parliament, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment to the Fundamental Law of Hungary<sup>3</sup>. The report is named after Rui Tavares, a Portuguese MEP at that time, who was the rapporteur of this detailed study of Hungarian constitutional developments since 2010. On 3 July 2013, the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of the right, this tally gave the lie to the Hungarian government's claim that the report was merely a conspiracy of the left.

With its acceptance of the Tavares Report, the European Parliament has created a new framework for enforcing the principles of Article 2 of the Treaty. The report calls on the European Commission to institutionalize a new system of monitoring and assessment.

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report, but rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on «the equal treatment due to Hungary». The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: «We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain». The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The Hungarian text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. In its conclusion, the Hungarian Parliament calls on the Hungarian government «not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of improving life for Hungarian families». These words very much reflect the Orbán-government's view of

<sup>2</sup> Available at [www.Ministerie van Buitlandse Zaken brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20\(1\).pdf](http://www.Ministerie_van_Buitlandse_Zaken_brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20(1).pdf).

<sup>3</sup> <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>

«national freedom», the liberty of the state (or the nation) to determine its own laws: «This is why we are writing our own constitution...And we don't want any unsolicited help from strangers who are keen to guide us...Hungary must turn on its own axis»<sup>4</sup>.

Encouraged by the Tavares report, then Commission President Barroso also proposed a robust European mechanism to be «activated as in situations where there is a serious, systemic risk to the Rule of Law»<sup>5</sup>. Commission Vice-President Reding, too, announced that the Commission will present a new policy communication<sup>6</sup>.

Due to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the European Parliament. The changes leave in place provisions that undermine the rule of law and weaken human rights protections. The Hungarian parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013<sup>7</sup>. The government's reasoning

<sup>4</sup> For the original, Hungarian-language text of Orbán's speech, entitled *Nem leszünk gyarmat!* [*We won't be a colony anymore!*] see e.g. <[http://www.miniszterelnok.hu/beszed/nem\\_leszunk\\_gyarmat](http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat)> The English-language translation of excerpts from Orbán's speech was made available by Hungarian officials, see e.g. Financial Times: Brussels Blog, 16 March 2012, at: <<http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFtC>>.

<sup>5</sup> J.M.D. Barroso, *State of the Union address 2013*, Plenary session of the European Parliament (Strasbourg: 1 September, 2013) SPEECH/13/684. <http://europa.eu/rapid/press-release-SPEECH-13-684-en.htm>.

<sup>6</sup> V. Reding, *The EU and the Rule of Law – What Next?*, Centre for European Policy Studies (Brussels: 4 September, 2013) SPEECH/13/677. <http://europa.eu/rapid/pressreleaseSPEECH-13-677-es.htm>.

<sup>7</sup> Here are the major elements of the amendment: a) Regarding political campaigns on radio and television, commercial media broadcasters are able to air political ads, but they must operate similar to public media channels – i.e., distribution of air time for political ads should not be discriminatory and should be provided free of charge. But since commercial media cannot be obliged to air such ads, it is unlikely that commercial outlets would agree to run campaign ads without charge; b) Regarding recognition of religious communities (in line with the relevant cardinal law), the amendment emphasizes that all communities are entitled to operate freely, but those who seek further cooperation with the state (the so-called 'established churches') must still be voted upon by Parliament to receive that status. This means that the amendment does not address discrimination against churches the government has not recognized. Parliament, instead of an independent body, confers recognition, which is necessary for a church to apply for government subsidies. c) The provision that enabled the government to levy taxes to settle unforeseen financial expenses occurring after a court ruling against the country – such as the European Court of Justice – was also removed, but the reasoning adds that the government is always free to levy new taxes, and this amendment will cost Hungarian taxpayers at least 6 billion Forints in the next 5 years; d) One positive amendment removed the power of the president of the National Judicial Office to transfer cases between courts – a change already made on the statutory level, but since the head of the Office is already able to appoint new judges loyal to the government all over the country, the transfer power is no longer necessary to find politically reliable judges. Both the foreign and Hungarian Human Rights NGOs said that the «amendments show the government is not serious about fixing human rights and rule of law problems in the constitution». See the assessment of Human Rights Watch: <http://www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short>, and the joint opinion of three Hungarian NGOs: <http://helsinki.hu/otodik-alaptorveny-modositas-nem-akarasnak-nyoges-a-vege>

states that the amendment aims to «finish the constitutional debates at international forum» (meaning with European Union – G.H.). A statement from the Prime Minister’s Office said: «The government wants to do away with those... problems which have served as an excuse for attacks on Hungary», but this minor political concession does not really mean that the Hungarian government ever respected at least the formal rule of law, as some commentators claim (Bogdandy 2016).

## 2. THE RULE OF LAW FRAMEWORK AND ITS USE AND NON-USE

As none of the suggested elements have worked in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the rule of law in the Member States<sup>8</sup>. This framework is complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem which persistently noncompliant Member States pose. This happened when Hungary suddenly lowered the retirement age of judges and removed from office the most senior ten percent of the judiciary, including a lot of court presidents, and members of the Supreme Court. The European Commission brought an infringement action, claiming age discrimination. The European Court of Justice in *Commission v. Hungary* established the violation of EU law<sup>9</sup>. But unfortunately, the decision was not able to reinstate the dismissed judges into their original position, and stop the Hungarian government from further seriously undermining the independence of the judiciary, and weakening other checks and balances with its constitutional reforms. Apparently, the ECJ wanted to stay away from Hungarian internal politics, merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State<sup>10</sup>. This was the reason that Kim Lane Scheppele suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action (Scheppele 2016).

The new framework allows the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to the rule of law. This new framework can best be described as a «pre-Article 7 procedure», since it establishes an early warning tool to tackle threats to the rule of law,

<sup>8</sup> Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, A new EU Framework to strengthen the Rule of Law

<sup>9</sup> ECJ, 6 November 2012, Case C-286/12.

<sup>10</sup> For the detailed facts of the case and the assessment of the ECJ judgement see (Halmai 2017).

and allows the Commission to enter into a dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 will be used. The Framework process is designed as a three steps procedure. First, the Commission makes an assessment of the situation in the member country, collecting information and evaluating whether there is a systemic threat to the rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations to the member country about how to resolve the issue. Third, the Commission monitors the response and follow-up of the member country to the Commission's recommendations.

In June 2015, the European Parliament passed a resolution condemning Viktor Orbán's statement on the reintroduction of the death penalty in Hungary and his anti-migration political campaign, and called on the Commission to launch the Rule of Law Framework procedure against Hungary<sup>11</sup>. But the Commission ultimately refused to launch the procedure with the argument that though the situation in Hungary raised concerns, there was no systemic threat to the rule of law, democracy and human rights<sup>12</sup>.

In December 2015, after the Hungarian Parliament in July and September enacted a series of anti-European and anti-rule-of law immigration laws (Halmai 2015) as a reaction to the refugee crisis, the European Parliament again voted on a resolution calling on the European Commission to launch the Rule of Law Framework. The Commission continued to use the usual method of infringement actions, finding the Hungarian legislation in some instances to be incompatible with EU law (specifically, the recast Asylum Procedures Directive (Directive 2013/32/EU) and the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64/EU)). This was the first time that the Commission has alleged a violation of the Charter of Fundamental Rights in an infringement action<sup>13</sup>.

<sup>11</sup> <http://www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey>

<sup>12</sup> Hungary: no systemic threat to democracy, says Commission, but concerns remain, Press Release, 2 December 2015.

<sup>13</sup> See this option as one of three scenarios using the Charter as a treaty obligation in (Hoffmeister 2015, 201.) According to Hoffmeister in the first scenario, a Charter right is further specified by EU secondary law. For example, Article 8 Charter on the protection of personal data lies at the heart of Directive 95/46/EC which largely harmonises the rules on data protection in Europe. In the second scenario, the Charter right is not underpinned by specific EU legislation. That is the case, for example, with Article 10(1) of the Charter on the freedom of thought, conscience and religion. According to Armin von Bogdandy and his colleagues national courts could also bring grave violations of Charter rights, such as freedom of the media in Article 11 to the attention of the CJEU by invoking a breach of the fundamental status of Union citizenship in conjunction with core human rights protected under Article 2 TEU. The idea behind this proposal is that the EU and Members States can have an interest in protecting EU citizens within a given member state. See (Bogdandy *et al.* 2012). Also András Jakab suggests to use the EU Charter by reinterpreting its Article 51(1), which would make it also applicable in purely domestic cases in order to enforce rule of law compliance. See (Jakab 2016).

Also at the end of May 2016, the Commission issued two infringement procedures against Hungary. The first one demands that Hungary change its law forbidding the sale of agricultural land to foreigners<sup>14</sup>. The other requests that Hungary ensure that Roma children enjoy access to quality education on the same terms as all other children and urges the government to bring its national laws on equal treatment as well as on education and the practical implementation of its educational policies into line with the Racial Equality Directive<sup>15</sup>.

On 26 April 2017 the European Commission started another Article 258 infringement action on the amendment to the Hungarian Higher Education Law, which aimed at closing down the Central European University in Budapest. According to the Commission's statement<sup>16</sup> the law is not compatible with the fundamental internal market freedoms, notably the freedom to provide services and the freedom of establishment. But the Commission also invoked the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union, as well as the Union's legal obligations under international trade law. The Commission sent a Letter of Formal Notice to the Hungarian Government, in which it mentions the draft legislation on the governmental oversight of the so-called «foreign» non-government organisations, a law that very much bears resemblance to President Putin's «foreign agent», as being also on the Commission's radar screen together with the new asylum law adopted at the end of March 2017.

In May 2017, the Parliament adopted the first ever a resolution on Hungary in which calling for a vote on the activation of the preventive arm of Article 7 of the TEU on the ground that the «current situation in Hungary represents a clear risk of a serious breach of the values». In the 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 Procedure»<sup>17</sup>.

<sup>14</sup> [http://europa.eu/rapid/press-release\\_IP-16-1827\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1827_en.htm).

<sup>15</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-1823\\_da.htm](http://europa.eu/rapid/press-release_MEMO-16-1823_da.htm).

<sup>16</sup> [http://europa.eu/rapid/press-release\\_MEX-17-1116\\_en.htm](http://europa.eu/rapid/press-release_MEX-17-1116_en.htm).

<sup>17</sup> European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP)). In July 2017, Judith Sargentini was appointed rapporteur for the European Parliament's investigation

In September 2017 the European Court of Justice dismissed Hungary and Slovakia's case against the Council's 2015 plan to relocate up to 160,000 asylum seekers across member states, including 1294 to Hungary from Italy and Greece over a period of two years. «The mechanism actually contributes to enabling Greece and Italy to deal with the impact of the 2015 migration crisis and is proportionate» – the ruling states<sup>18</sup>. While the Slovakian government fully respected the verdict, László Trócsányi, the Hungarian Minister of Justice promised to defend «Hungary's sovereignty, constitution, and identity» against the Commission, which is violating countries' rights, and the Polish Prime Minister also committed to support Hungary in not accepting relocated refugees<sup>19</sup>.

Despite all these non-compliances, Commission first vice-president Frans Timmermans in an interview given after the ECJ judgment dismissed the idea that Hungary poses the same threat to the rule of law that Poland does: «The situation in Hungary is not comparable to the situation in Poland»<sup>20</sup>.

The first step to use the new Rule of Law Framework was taken by the European Commission against Poland in early January 2016. The Commission initiated a dialogue with Poland. Meanwhile, the Polish Foreign Minister asked the Venice Commission, the advisory body of the Council of Europe for an opinion on the legal solutions contained in the amendments to the Law on the Constitutional Tribunal. The Venice Commission issued its opinion in mid-March of 2016<sup>21</sup>. The report states that «Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections». Regarding the Constitutional Tribunal, it remarked: «as long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights».

After the Polish government made clear that it did not intend to follow the recommendations of the Venice Commission, the European Parliament

into whether Article 7(1) TEU should be triggered against Hungary.

<sup>18</sup> <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>.

<sup>19</sup> <http://www.politico.eu/article/hungary-says-ecj-ruling-on-refugee-quotas-has-raped-eu-law-asylum-seekers-italy-greece-relocation-scheme>.

<sup>20</sup> <https://www.bloomberg.com/news/articles/2017-09-17/poland-s-authoritarian-shift-spurs-warning-of-economic-trouble>.

<sup>21</sup> Opinion no. 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland. Adopted by the Venice Commission at its 106th Plenary Adopted by the Venice Commission at its 10 Plenary Session (Venice, 11-12 March 2016).

on April 13, 2016 voted overwhelmingly in support of a resolution declaring that the Polish government's confrontation with the Constitutional Tribunal posed a danger to «democracy, human rights and the rule of law». The resolution also called on the Polish government to end the crisis over the Tribunal, and if that does not happen, for the European Commission to activate the «second stage» of the rule of law mechanism.

In early June 2016 the Commission sent its opinion<sup>22</sup>, despite a furious statement of Jaroslaw Kaczyński, who warned that if the Commission continued to press its unprecedented rule of law procedure against Poland, the country could issue a challenge to the European Court of Justice «at any time», adding that the inquiry was «dreamed up» and went beyond what is allowed by the EU treaties<sup>23</sup>. After the adoption of the opinion, Frans Timmermans said: «The rule of law is one of the foundations of the European Union. There have been constructive talks which should now be translated into concrete steps to resolve the systemic risk to the rule of law in Poland. The Opinion adopted today presents our assessment of the issues at stake, building on the dialogue, which started in January. On this basis we stand ready to continue the dialogue with the Polish authorities»<sup>24</sup>.

The Polish parliamentary majority responded by adopting a new law on the Constitutional Tribunal on 7 July that leaves no doubts that they are not holding back. The law reintroduces the provisions that were already either disqualified by the Court as unconstitutional, or criticized by the Venice Commission. As Tadesz Koncewicz points out, the attacks on the Court have two dimensions: external and internal. The external opens up the possibilities for the government to unconstitutionally interfere in a way that makes the Court

<sup>22</sup> The full text of the opinion was not published, and a request by Laurent Pech, professor of Middlesex University was rejected by the Commission on the ground that the disclosure «would undermine the protection of the purpose of the ongoing investigation» as any disclosure «at this point in time would affect the climate of mutual trust between the authorities of the Member state and the Commission, which is required to enable them to find a solution and prevent the emergence of a system threat to the rule of law». The Commission's subsequent decision to publish a Rule of Law Recommendation on 27 July 2016 led Professor Pech to ask the Commission to review their initial refusal to disclose the Opinion, adopted on 1 June 2016. Having reviewed the application, the Secretariat General of the Commission finally accepted the disclosure of the full text of the Opinion. For the story of the FOI request and the full text see Laurent Pech's blogpost of 19 August, 2016. <http://eulawanalysis.blogspot.it/2016/08/commission-opinion-of-1-june-2016.html>.

<sup>23</sup> <http://www.politico.eu/article/poland-and-commission-plan-crisis-talks/>. Boyden Gray, former US ambassador to the EU in an opened article written in the «Wall Street Journal» also questioned the authority of the EU to use the Framework against Poland: «The European Union's current overreaching and meddling in Poland's legal affairs under the guise of its lawless, ironically named «Framework to Strengthen the Rule of law», provides a glimpse at some of the dynamics underlying last month's Brexit vote. The framework, announced in March 2014, did not directly factor into Brexit, but it demonstrates the EU's troubling propensity to harass its member states and dictate Brussels-based solutions for domestic problems. If pursued, the framework could further destabilize the EU» <http://www.wsj.com/articles/the-european-union-shows-poland-why-we-have-brexit-1467747768>.

<sup>24</sup> [http://europa.eu/rapid/press-release\\_IP-16-2015\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2015_en.htm).



dependent on outside forces. Internally, the provisions tie the Courts's and cripple its ability to act in a timely and speedy fashion (Koncewicz 2016a). To «compensate» for the most questionable and clearly unconstitutional provision, which required a the two-third majority of every court decision to annul a law, which was harshly criticized by the Venice Commission, the new law introduced the minimum number of judges to sit on the Full Court. According to this quorum provision, at least 11 judges out of the 15 will always be required. As a result of this, the main powers reserved to the Full Court will remain on paper, for instance if four of the six judges nominated by PiS are absent. As an external limitation, the absence of the Attorney General, an appointee of the governing majority, whose mandatory participation is required in a number of cases, can also make it impossible for the Court to rule. The judges loyal to the government still, in a minority, will have also another opportunity to block the review procedure of a questionable law of the new parliament. At least four of them will have the right to demand postponement of any case twice during a three-month period, without giving reasons.

Another provision that can immunize laws adopted by the new governing majority from effective constitutional review is the one that strictly requires the Constitutional Tribunal to hear cases in the order they are filed. In addition, the temporary provisions of the new law state that it must be applied to the approximately one hundred cases that were pending before before the Court before the law's entry into force. Additionally, the law states that any new law can only be considered by the Court after a 30-day minimum waiting period. Also an internal attack on the Court's jurisdiction, there is a limitation on its power to review the procedure in which an act was enacted. According to this new provision, the Court is only entitled to check the contents of a challenged act, and not, for instance, the lack of competence of the lawmaking body.

One of the new external limits allows the President of the Republic to veto the previously autonomous decision of the General Assembly of Constitutional Tribunal judges to exclude a judge for disciplinary reasons, which would have threatened some low moral standing judges nominated by PiS. The President of the Republic will also have the power to change the sequence in which the Court has to adjudicate its cases. The President of Poland is free to select as President and Vice-President of the Tribunal from the list submitted by the General Assembly of the judges. The new rules do not rule out a situation in which a judge receiving one vote (which can be his/her own) will be considered as a candidate for the position. Probably the dirtiest trick among the external attacks is a provision limiting the duty of the government to publish the judgments of the Court issued after 10 March, which is exactly one day after the most important judgment annulling the first amendment to the law on the Constitutional Tribunal, and not published by the government

so far. Another highly provocative sign of the lack of willingness to compromise is the fact that three judges constitutionally elected by the previous Sejm still wait to be sworn in by the President, and the new law fails to provide any guarantee for them to reach the bench ever.

As a reaction to the new law, the human rights commissioner of the Council of Europe, Nils Muižnieks, has expressed concern about the adoption of the bill: «I am very concerned about the adoption by the Polish Sejm of a bill on the Constitutional Tribunal yesterday because it poses a serious threat to the rule of law. For this serious reason, I call on the Senate to prevent a bad bill from becoming law and ensure that the rule of law in Poland is fully respected». Secretary General of the Council of Europe, Thorbjørn Jagland, also responded to the Polish parliamentary action by asking the Venice Commission to examine the legislation<sup>25</sup>. On 27 July, the European Commission opened the second phase of the mechanism by publishing its Recommendation. The document closely reflects the content of the Opinion, but it puts more emphasis on the issue of the effective functioning of the Polish Constitutional Tribunal following, *inter alia*, the adoption of the law on the Constitutional Tribunal by the Polish Parliament on 22 July 2016. The Recommendation announced that there was «a systematic threat to the rule of law in Poland»<sup>26</sup>. Frans Timmermans, the Commission vice-president, called on the Polish government to take action to guarantee the independence of the constitutional tribunal over the next three months<sup>27</sup>.

Despite the Commission Recommendation, the new law on the Constitutional Tribunal was formally approved on 30 July and was due to take effect on 16 August 2016. But the regulation was challenged even before taking effect by opposition parties who sent it to the court for scrutiny. The Constitutional Tribunal ruled on 11 August that most of the provisions in the new law replicate those already found to be unconstitutional in the March judgment. Therefore, the Tribunal reiterated that its ruling about the unconstitutionality of the new law must be published immediately in the shortest possible time. This warning was a reaction to a statement of Kaczyński, which was pronounced even before the decision, saying that whatever the Tribunal decides it will not be published (Koncewicz 2016b). After this judgment, the government raised a new, most probably deadly weapon in the war against the

<sup>25</sup> <http://www.humanrightseurope.org/2016/07/poland-nils-muiznieks-concerned-by-new-constitutional-tribunal-bill>.

<sup>26</sup> Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_2016.21701.0053.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_2016.21701.0053.01.ENG).

<sup>27</sup> <https://www.theguardian.com/world/2016/jul/27/poland-rule-of-law-systematic-threat-european-commission>.

Court: the prosecutor launched an abuse-of-powers investigation against the head of the Tribunal, Andrzej Rzeplinski (Koncewicz 2016c).

At its plenary session on 14-15 October 2016 the Venice Commission adopted its new opinion on the Act on the Constitutional Tribunal. In the concluding part the Commission states that the shortcomings elaborated throughout the text of the opinion «show that 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»<sup>28</sup>.

A day after the expiration of the deadline set by the Recommendation in a letter to the European Commission the Polish Prime Minister dismissed the Commission's demand to take steps to rectify its alleged erosion of democratic standards, saying that the issue would be resolved domestically: «In our dialogue with the European Commission, we have assumed that our co-operation will be based on such principles as objectivism, or respect for sovereignty, subsidiarity, and national identity ... We have gradually come to realize that interferences into Poland's internal affairs are not characterized by adherence to such principles. On top of that, such actions are largely based on incorrect assumptions which led to unwarranted conclusions»<sup>29</sup>.

A couple of days later, EU Commission President Jean-Claude Juncker told Belgian newspaper *Le Soir* that the so-called Article 7 procedure will lead to nothing «because some [EU] member states are already saying they will refuse to invoke it...This a priori refusal de facto invalidates Article 7. I note this with sadness and disappointment, hoping that the people will not give free rein to those who will end up harming their interests»<sup>30</sup>.

Yet, on 21 December 2016, the Commission adopted an additional Recommendation regarding the rule of law in Poland, because «there continues

<sup>28</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)026-e). Prior to the meeting of the Venice Commission Poland's Foreign Ministry announced that Polish officials would not attend the meeting because they do not want to legitimize a commission they consider biased. <http://www.businessinsider.com/ap-poland-to-avoid-rights-meeting-where-it-will-face-scrutiny-2016-10?IR=T>.

<sup>29</sup> A. Eriksson, *Poland Rejects «Interferences» on Rule of Law*, euobserver, 28 October 2016. <https://euobserver.com/institutional/135716>.

<sup>30</sup> [http://en.europeonline-magazine.eu/juncker-eu-powerless-against-authoritarian-slide-in-poland-hungary\\_493513.html](http://en.europeonline-magazine.eu/juncker-eu-powerless-against-authoritarian-slide-in-poland-hungary_493513.html).

to be a systemic threat to the rule of law in Poland», hence the Commission invites the Polish government to solve these problems within two month, and if there is no satisfactory follow-up it will decide «whether or not to resort to the procedure laid down in Article 7 TEU»<sup>31</sup>. The concerns of the Commission were linked to the adoption of three new laws that permitted the President of the Republic to name a temporary Constitutional Tribunal President replacing the outgoing head of the court. The new interim President's first action was to allow the three so-called «anti-judges», unlawfully elected by the PiS majority in Sejm to assume their judicial duties suspended by the previous Tribunal President, and participate in the meeting to nominate a new President to the head of the state, who two days later appointed the temporary President as the new permanent President of the Tribunal.

On 20 February 2017, the Polish government once again has dismissed the European Commission's demands by saying that the changes Warsaw has implemented are «in line with European standards» and that it has created «the right conditions for a normal functioning» of the Constitutional Tribunal.

On 26 July 2017, the Commission adopted its third Rule of Law Recommendation, justified by four new legislative acts rushed through the Polish Parliament that month:

(a) The law on the Supreme Court; (b) the Law on the National Council for the Judiciary; (c) the Law on the Ordinary Courts' Organisation; and (d) the Law on the National School of Judiciary. In this Recommendation the Commission explicitly threatened to trigger Article 7(1) TEU immediately «should the Polish authorities take any measure of this kind»<sup>32</sup>. Since the first two laws were vetoed by the Polish President the Commission decided to initiate an infringement procedure regarding the Law on the Ordinary Courts Organisation on the grounds that this legislation would not only violate functioning 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<sup>33</sup>.

On 20 December 2017 the European Commission issued the fourth Rule of Law Recommendation, but this time accompanied by a Reasoned Proposal for a Decision of the Council on the determination of the clear risk of a serious breach of the rule of law by Poland under Article 7(1) TEU, and also

<sup>31</sup> [http://europa.eu/rapid/press-release\\_IP-16-4476\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4476_en.htm).

<sup>32</sup> Commission Recommendation of 26 July 2017 regarding the rule of law in Poland, C(2017) 5320 final, para 58.

<sup>33</sup> European Commission acts to preserve the rule of law in Poland, Press release IP/17/2161, 26 July 2017.

referred the Polish Law on the Ordinary Courts Organisation to the Court of Justice under Article 258 TFEU<sup>34</sup>. The combined use of the fourth recommendation and the triggering of Article 7 means that should the Polish government finally decide to implement the Commission's recommendations within three months, the Commission has indicated its readiness to «reconsider» its Article 7(1) proposal. Commissioner Vera Jourová justified the harsh reaction of the Commission regarding the independence of the courts with the argument that «if one national system of judiciary is broken, the EU system is broken»<sup>35</sup>, since Polish courts are EU courts as well. The other justification to initiate Article 7 in the case of a non-functioning judicial system is that it not only undermines separation of power, but it makes also impossible to maintain a market economy (Kochenov, Pech and Scheppele 2017). Additional to this, since violations of the rule of law including judicial independence are direct and very visible in the EU criminal justice sector, where the emphasis is on national courts engaging in a dialogue, none of the instruments based on mutual trust can possibly work without judicial independence (Ballegooij and Bárd 2016).

### **3. ASSESSMENT OF THE FRAMEWORK**

There are critiques of the Framework, which were formulated in general terms, without any reference to its use in the Polish case. The UK government, for instance, criticized the proposal right after its adoption. The Cameron government raised two critical objections: the duplication of existing institutions and procedures to deal with the same issue, and the undermining of the role of Member States in the Council by the Commission's enhanced role<sup>36</sup>.

The British criticism was followed by some harsh concerns of the Council, first formulated in an Opinion of its Legal Service, the main argument being that the absence of solid and unambiguous Commission competence made the Framework procedure incompatible with the principle of conferral<sup>37</sup>. Based on this Opinion, the Italian Presidency of the Council prepared a short paper about a potential mechanism, which emphasized the exclusive

<sup>34</sup> [http://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](http://europa.eu/rapid/press-release_IP-17-5367_en.htm). About the Commission's decision triggering Article 7 see Taborowski (2018).

<sup>35</sup> [https://ec.europa.eu/commission/commissioners/2014-2019/jourova/announcements/speech-commissioner-jourova-high-level-seminar-finland-100-years-finnish-and-european-perspectives\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/jourova/announcements/speech-commissioner-jourova-high-level-seminar-finland-100-years-finnish-and-european-perspectives_en).

<sup>36</sup> See UK House of Commons, European Scrutiny Committee Documents considered by the Committee on 7 May 2014 – Commission Communication, A new EU Framework to strengthen the Rule of Law. [www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xliii/8304.htm](http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xliii/8304.htm).

<sup>37</sup> Council of the European Union, Opinion of the Legal Service, Commission's Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties Doc 10296/14. <http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>.

role of the Council and the method of «constructive dialogue»<sup>38</sup>. The Council endorsed both the «dialogue among all Member States» and its own exclusive role under the new mechanism «based on the principles of objectivity, non-discrimination and equal treatment of all Member States ... without prejudice to the principle of conferred competences, as well as the respect of national identities of all Member States»<sup>39</sup>.

As Carlos Closa observed, the proposed «naming and shaming» procedure, which takes place once a year in the Council, and does not even need to be public, does not foresee any ultimate consequences»<sup>40</sup>. Joseph Weiler on the other hand argues that the Council's dialogue approach was driven from an implicit acknowledgement of the constitutional limits imposed on the Union against the «appetite for jurisdictional and competence expansion of the Union in general and the Commission in particular» (Weiler 2016, 313). Weiler, while acknowledging the mostly noble intention of the Commission by framing the states' violation of the Union's core values as one concerning the rule of law, suggests to replace the formalist notion of the rule of law with a substantive and not merely procedural content, which entails an insistence on democratic legitimation. And since neither of the two primordial features of democratic legitimation – accountability and representation – operate in the EU, Weiler concludes that although the Union should take robust actions within its competences and jurisdictional limits against Member States violating the rule of law, it should also eliminate its own democratic deficit (Weiler). But even regarding the members states' democratic crisis, Amichai Magen raises the question why it has been framed exclusively in terms of the rule of law, rather than the other foundational values listed in Article 2 TEU (Magen 2016). Similarly, both Ginaluigi Palombella and Dimitry Kochenov argue that the formal conception of the rule of law as a process of balancing between different formal sources of positive law diverge from the substantive requirements of an oversight (Palombella 2016).

Another general theoretical critique of the Framework comes from the sociological reflections of Paul Blokker, who also characterizes the EU's action as being a one-sided legalistic and formal-procedural approach (Blokker 2016). He argues for consideration of «supporting circumstances» in terms of the social and political structures and cultural support within the Member States which encourage more civil participation in constitutional matters.

<sup>38</sup> Italian Presidency of the Council of the European Union, A Fresh Start Programme of the Italian Presidency 1 July to 31 December 2014. [http://italia2014.eu/media/1349/programma\\_en1\\_def.pdf](http://italia2014.eu/media/1349/programma_en1_def.pdf).

<sup>39</sup> Conclusion of the Council of 14 December 2014. Press Release of the Council, 16 December 2014, PRESSE 652 PR CO 74. In 3 October the Italian government hosted the 'annual rule of law dialogue' in Rome with the participation of 12 governments' representatives. <http://www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law>.

<sup>40</sup> The detailed critique of the 'dialogue' see Closa (2016), as well as Oliver and Stefanelli (2016).

Similarly, Armin von Bogdandy and his colleagues argue that the most apt European response to systemic deficiencies is to combine judicial mechanisms with complementary political approach. Therefore, they propose to consider complementing their earlier «Reverse Solange» approach with a «Systemic Deficiency Committee», composed of eminent figures, which should monitor the respect of fundamental European values in all Member States (Bogdandy, *et al.* 2016).

Critics of the Framework's use in the case of Poland argue that the pre-Article 7 procedure of dialogue, which could lead to the Commission's advice to move on to activate Article 7, is based on the Commission's assumption that the state of rule of law is not that bad in Poland, and that it will take a lot of time, especially because the Polish government is not ready for a constructive dialogue. Therefore, reliance on the Rule of Law Framework alone, if only because of its soft and discursive nature, cannot remedy a situation where systemic violations of EU values form part of a governmental plan to set up an «illiberal» regime, as happened both in Hungary and Poland (Kochenov and Pech 2016).

Hence, it is a legitimate question whether the Commission should have started an Article 7 procedure in the first place, and preferably not only against Poland but against its forerunner, Hungary at once, in order to avoid that Hungary – as Prime Minister Orbán already indicated in early January in the Hungarian public radio<sup>41</sup> – vetoes the sanctions of Article 7, which requires unanimity (Kochenov 2016a)<sup>42</sup>. But one has to take into account also that Article 7, especially in the case of new Member States, which are very dependent on EU funding, is not the most effective tool without the threat of economic sanctions (Bugarič and Ginsburg 2016, 79). In principle sanctions could concern any «right deriving from the application of the Treaties' to the Member State», but Article 7(3) is unclear as the substance of the sanctions that can be imposed. There are arguments that the suspension of EU funding can be among them (Besselink 2016). But even if this is the case, it is also true, that economic sanctions should be backed by a strong regional consensus and strong domestic support, and neither of these conditions are present in Poland or Hungary currently.

Instead of the Article 7 approach, Brussels has chosen the very cautious pre-Article 7 option, and only against Poland. This indicates that the EU is not

<sup>41</sup> <http://www.politico.eu/article/poland-strikes-back-at-eu-on-media-law-frans-timmermans-stepkowski-andrzej-duda>.

<sup>42</sup> About the suggestion to start a joint Article 7 procedure against Poland and Hungary see (Scheppelle 2016a). According to Scheppelle this would be the only chance to avoid Hungary's veto regarding the sanction against Poland, because in her view a member state, which is also warned under Article 7(1) cannot possibly veto the decision in the case of its «fellow-traveler». But **in** my opinion this exclusion cannot be derived neither from Article 7 TEU nor from Article 354 TFEU. Armin von Bogdandy sees a realistic chance that even the current Hungarian government does not stand with the PiS government in undoing Europe. See (Bogdandy 2016).

quite ready to treat equally serious problems equally, and irrespective of the importance and the political colour of the governing forces of a particular Member State, and is reluctant to sanction either of these backsliding Member States. In the case of a small Member State, such as Hungary, one must keep in mind first and foremost that the governing Fidesz party delivers votes to the EPP, the largest faction at EP (Kelemen 2017). In the case of Poland, the main reason for the reluctance may lie in its importance of the country within the EU that is a reliable ally against Russia's threatening rhetoric. In other words, the main reason why the Parliament has not had much of an impact on rule of law development may be explained with reference to its own internal political division (Sargentini and Dimitrovs 2016). But the Parliament is far from alone in having treated the issue as a purely political one. The Commission also politically calculated its inaction in the case of Hungary and slow action regarding Poland. In other words, the Commission disengaged from conflicts that it assessed to be too costly, trying to maintain its credibility<sup>43</sup>. Also after the enormous blow of Brexit, EU leaders do not want to reinforce the impression that the EU is disintegrating rather tolerating non-compliance with the joint values (Müller 2016). This allowed member states to engage in symbolic or creative compliance, designed to create the appearance of norm-conforming behavior without giving up their original objectives. The implication of this is that both compliance and enforcement is symbolic<sup>44</sup>. The Council openly formulated a harsh critique of the Rule of Law Framework, willing to replace it with the harmless approach of yearly dialogue with all Member State. In other words, besides the political unwillingness of the Parliament, there was a clear rivalry between the Council, which has been given a role by Article 7, and the Commission, mandated to act by the Rule of Law Framework.

#### 4. ADDITIONAL RECOMMENDED TOOLS

The possibility of shortcomings of the rule of law mechanism in the case of Poland led to a legislative initiative report prepared by the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (rapporteur: Sophie in't Veld (ALDE, Netherlands), accompanied by a European Added Values Assessment (EAVA) prepared by the European Parliament's think tank, called Added Value Unit, presenting recommendations to the Commission on an EU

<sup>43</sup> See a similar critique of the Commission's behaviour by Sophia in't Veld, rapporteur of the LIBE committee, while submitting a new proposal, known as the EU Pact for Democracy, the Rule of Law and Fundamental Rights: «The Commission will only do something when there's a problem somewhere. Political considerations play a role: is it a big country or a small country? Which parties are in government? The big leap that we need to take is that we monitor all member states on the same basis». <http://www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law>.

<sup>44</sup> This phenomenon is convincingly proved by Ágnes Bátorí through the examples of the 2010 French, 2012 Romanian and the 2010-2013 Hungarian constitutional crises. See (Bátorí 2016).



mechanism on democracy, the rule of law and fundamental rights. On 25 October, 2016 the European Parliament adopted resolution approving the LIBE report<sup>45</sup>. The main conclusion of the resolution is that there is a gap between the proclamation of the rights and values listed in article 2 TEU and actual compliance by EU institutions and Member States, resulting in significant economic, social and political costs. The root causes for this lack of compliance are to be found in certain weaknesses in the existing EU legal and policy framework on democracy, the rule of law and fundamental rights. These weaknesses, the EAVA argues, could be overcome by an inter-institutional pact further clarifying the scope for EU action and the division of labor between and among the EU institutions, agencies and Member States in the areas of monitoring and enforcement (Evas and Ballegooij 2016). Both the LIBE recommendation and the EAVA interim assessment analyses the specific policy option called for in Parliament's resolution of 10 June 2015. This policy option proposes the establishment of an EU mechanism (or «pact» as the recommendation suggests to name it) aimed at strengthening the enforcement of democracy, the rule of law and fundamental rights. It has two core elements: a) an annual monitoring of democracy, the rule of law and fundamental rights based on an EU scoreboard; and b) an EU policy cycle for democracy, the rule of law and fundamental rights, involving EU institutions and national parliaments.

In order to support the preparation of the legislative report by the European Parliament (LIBE) «on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights» (2015/2254(INL)) on 14 March 2016 the European Parliament sent a request the EU Fundamental Rights Agency (FRA) to deliver an opinion «on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values as listed in Article 2 TEU». In its opinion dated 8 April 2016, FRA proposes the creation of an EU fundamental rights information system, which could be used to populate indicators to systematically monitor respect for the values of Article 2 of the TEU, and allow for the generation of regular synthesis reports, thereby providing an objective evidence base of information and contextual analysis of indicators<sup>46</sup>, and check-lists<sup>47</sup>. These synthesis reports could complement the various

<sup>45</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)). file:///Users/halmaigabor/Documents/EUI/ROL\_mechanism/2016Oct25%20EP%20resolution%20on%20DRF%20Pact.pdf.

<sup>46</sup> About the possibility to develop indicators based on the Charter drawing upon experience of developing indicator tables to assist monitoring of state human rights treaty compliance by United Nations human rights treaty bodies see (Scheinin 2016).

<sup>47</sup> Such a rule of checklist was adopted by the the Venice Commission at its plenary session in 11-12 March 2016, and endorsed by the Council of Europe's Ministers' Deputies meeting in 6-7 September. European Commission for Democracy Through Law, CDL-AD(2016)007.

reports related to fundamental rights delivered by the three EU institutions; the European Parliament, Council of the EU and the European Commission. They could also contribute to the annual dialogue on the rule of law in the Council of the EU, as well as other debates on the situation in EU Member States that risk undermining mutual trust in the common area of freedom, security and justice<sup>48</sup>.

But before the Parliament, the Council and the Commission could set up any review mechanism for Hungary, on 26 April 2017 the European Parliament held another debate on Hungary, and stated in a resolution that «recent developments in Hungary have led to a serious deterioration in the rule of law, democracy and fundamental rights, which is testing the EU's ability to defend its founding values»<sup>49</sup>. Therefore, the resolution calls for:

«a) the launching of Article 7(1). MEPs instruct the LIBE Committee to draw up a formal resolution for a plenary vote, b) the Hungarian Government to repeal laws tightening rules against asylum-seekers and non-governmental organizations, and to reach an agreement with US authorities, making it possible for the Central European University to remain in Budapest as a free institution, c) the European Commission to strictly monitor the use of EU funds by the Hungarian Government»<sup>50</sup>.

## 5. THE POSSIBILITY AND DESIRABILITY OF ECONOMIC SANCTIONS

The fear from Hungary's veto in the case of an Article 7 procedure against Poland indicated for many that the desired oversight requires new tools<sup>51</sup>. One of these can be an EU value spending conditionality.

Conditionality in general and spending conditionality in particular is a long-standing EU policy tool<sup>52</sup>. The values of Article 2 TEU are elaborated

<sup>48</sup> See Opinion 2/2016 of the European Union Agency for Fundamental Rights on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information. Vienna, 8 April 2016.

<sup>49</sup> The resolution was adopted by 393 votes to 221 with 64 abstentions, which means some members of European Peoples Party (EPP), the party group of Fidesz, the Hungarian governing party did not vote against the resolution. Manfred Weber, the president of the EPP-group also harshly criticized the Lex CEU. According to its press-release «the EPP wants the CEU to remain open, deadlines suspended and dialogue with the US to begin». EPP also stressed that «NGOs are an integral part of any healthy democracy, that they represent the civil society and that they must be respected». <http://www.epp.eu/press-releases/prime-minister-orban-to-comply-with-eu-laws-and-epp-values-following-meeting-with-epp-presidency>.

<sup>50</sup> <http://www.europarl.europa.eu/news/en/press-room/20170511IPR74350/fundamental-rights-in-hungary-meps-call-for-triggering-article-7>.

<sup>51</sup> As formulated wittily and appositely by Israel Butler: «...the EU needs to respond with more than just warnings that it will deliver further warnings». <https://www.liberties.eu/en/news/to-halt-polands-pis-go-for-euros>.

<sup>52</sup> About the history and the recent debates on spending conditionality in the EU see (Vita 2017).

for candidate countries of the EU in the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993, to provide the prospect of accession for transitioning countries that still had to overcome authoritarian traditions. The Treaty on the European Union sets out the conditions (Article 49) and principles (Article 6(1)) to which any country wishing to become an EU member must conform. Regarding constitutional democracy, the political criteria are decisive: stability of institutions guaranteeing democracy; the rule of law; human rights; and respect for, and protection, of minorities. This was the main instrument, which governed the biggest enlargement in the Union's history: starting in 2004 with ten new Member States, mostly from the former communist countries, followed by the accession of Romania and Bulgaria in 2007, and concluded by the admission of Croatia in 2013<sup>53</sup>. As Dimitry Kochenov argues, the assessment of democracy and the rule of law criteria during this enlargement was not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowledgement that the Copenhagen political criteria had been met (Kochenov 2004). It happened only after Croatia's accession that the European Commission suggested various adjustments to the negotiation procedure (Hillion 2013). But not only were the conditionality requirements not taken seriously, but their maintenance was also missing after accession (Closa 2016). The only time the EU expressed some doubts and extended the validity of pre-accession values-promotion in the form of a post-accession monitoring was the so-called Cooperation and Verification Mechanism applicable to Bulgaria and Romania, which remained in force even after they became full members (Vachudova and Spendzharova 2012). During the 2012 Romanian constitutional crisis, the Commission successfully used the fact that the Mechanism had been expected to be discontinued in the middle of the crisis as leverage (Bátori 2016, 10).

The weakness of the Copenhagen criteria and the lack of their application after accession caused a discrepancy between EU accession conditions and membership obligations, which made it easier for backsliding new Member States not to comply with EU values and principles.

During EU's long and mostly unsuccessful struggle for compliance with Viktor Orbán's government ever since its coming to power in 2010 occasionally the European Commission has put on hold some EU fundings to Hungary, as it happened in 2013 after the Hungarian Parliament enacted the Fourth Amendment to the new Fundamental Law. But the official reason

<sup>53</sup> The Croatian enlargement was somewhat special, as it was part of the EU's Stabilization and Association Policy and the conditionality was different as well. *Inter alia* it included the collaboration with the ICTY. I am grateful to Elizabet van Rijckevorsel for pointing this out.

for this suspension wasn't the grave violation of the rule of law, but some alleged irregularities in the way development subsidies have been managed by Budapest<sup>54</sup>.

Real financial sanctions were proposed against Poland and Hungary in mid-August 2016 by two German members of European Parliament. Ingeborg Gräßle, a Christian-Democrat MEP and the head of the Parliament's committee on budgetary control suggested: «There needs to be stronger rules for the disbursement of funds...Countries that don't respect EU laws, or countries that don't participate enough in the resettlement of migrants or the registration of refugees, should be deprived of funds». Vice president of the Parliament, the Liberal Alexander Graf Lambsdorff, singled out Poland and Hungary as net recipients of EU funds that have been flouting EU values by saying: «The federal government must ensure, when the EU budget is reviewed this fall, that EU countries that are net recipients, such as Poland and Hungary, show more solidarity in [on] the issue of refugees and also respect European values»<sup>55</sup>.

In 2017 the European Parliament linked the monitoring of EU funds in Hungary with the government's disrespect of EU values and policies for instance on migration and refugees. After a debate on Hungary at the plenary session on 26 April 2017 the Parliament stated in a resolution that «recent developments in Hungary have led to a serious deterioration in the rule of law, democracy and fundamental rights, which is testing the EU's ability to defend its founding values»<sup>56</sup>. Therefore, the resolution calls for: «a) the launching of Article 7(1). MEPs instruct the LIBE Committee to draw up a formal resolution for a plenary vote, b) the Hungarian Government to repeal laws tightening rules against asylum-seekers and non-governmental organizations, and to reach an agreement with US authorities, making it possible for the Central European University to remain in Budapest as a free institution, and finally c) the European Commission to strictly monitor the use of EU funds by the Hungarian Government»<sup>57</sup>.

<sup>54</sup> <https://www.ft.com/content/9b85c228-04f1-11e3-9e71-00144feab7de>.

<sup>55</sup> <http://www.welt.de/politik/ausland/article157586134/Deutschland-ist-Zahlmeister-in-Europa.html>.

<sup>56</sup> The resolution was adopted by 393 votes to 221 with 64 abstentions, which means some members of European Peoples Party (EPP), the party group of Fidesz, the Hungarian governing party did not vote against the resolution. Manfred Weber, the president of the EPP-group also harshly criticized the Lex CEU. According to its press-release «the EPP wants the CEU to remain open, dead lines suspended and dialogue with the US to begin». EPP also stressed that «NGOs are an integral part of any healthy democracy, that they represent the civil society and that they must be respected». <http://www.epp.eu/press-releases/prime-minister-orban-to-comply-with-eu-laws-and-epp-values-following-meeting-with-epp-presidency>.

<sup>57</sup> <http://www.europarl.europa.eu/news/en/press-room/20170511IPR74350/fundamental-rights-in-hungary-meps-call-for-triggering-article-7>.

The German Government went even further regarding the latter call of the Parliament by suggesting to link receipt of EU cohesion funds to respect for democratic principles<sup>58</sup>. The proposal was drafted explicitly 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<sup>59</sup>. Germany, together with Austria and Italy has also been repeatedly argued that spending conditionality should be used to discourage Member States' non-compliance with the EU migration and asylum acquis, in particular with the Council's refugee relocation plan<sup>60</sup>.

Also Günther Öttinger, the German budget commissioner of the European Commission said that EU funds could become conditional after 2020, depending on the respect for the rule of law<sup>61</sup>. Similarly, Commissioner Jourová argued for such a new conditionality requirement: «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<sup>62</sup>. In October 2017 Jourová linked again EU funds to rule of law, by saying that «[...] We need to make better use of EU funds for upholding the rule of law. [...] In my personal view we should consider creating stronger conditionality between the rule of law and the cohesion funds»<sup>63</sup>. On the other hand, Commission President Juncker said that the proposal could «divide the European Union»<sup>64</sup>. Also academic critics pointed out that the proposal, if implemented can undermine the European citizens' union of by leaving be-

<sup>58</sup> <http://www.politico.eu/article/poland-rule-of-law-europe-germany-berlin-looks-into-freezing-funds-for-eu-rule-breakers>.

<sup>59</sup> 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. Cited by Pech and Scheppele (2017).

<sup>60</sup> Germany Supports Cutting EU Funds to Countries That Refuse Refugee Quotas, *Business Insider*, 15 September 2015; *Austria Threatens EU Funding Cuts over Hungary's Hard Line on Refugees!*, in *The Guardian*, 8 March 2017; *Italy Threatens Hungary: EU Countries Who Reject Migrant Quota Should Have Funding Cut*, in *Express.co.uk*, 12 October 2016.

<sup>61</sup> <https://euobserver.com/institutional/138063>.

<sup>62</sup> *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.

<sup>63</sup> <https://euobserver.com/political/139720>.

<sup>64</sup> <http://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison>.

hind those citizens who have the misfortune to live in a members state with an authoritarian national government<sup>65</sup>.

Others argue against negative spending conditionalities by raising the usual concerns regarding every EU oversight measures and sanctions, namely the absence of a correlative reform of EU's own democratic, human rights and rule of law performance<sup>66</sup>. Even though I am convinced that in the case of new Member States, which are very dependent on EU funding, even the most serious tools, like Article 7 are ineffective without the threat of economic sanctions, I have to admit that Article 7(3) is unclear about the substance of sanctions. In other words, cutting off EU funds to a government for flouting democracy, the rule of law, and fundamental rights would require a change to the treaties, which is almost an unbreakable obstacle. Here I support the interpretation of Leonard Besselink, who argues that in principle sanctions could concern any «right deriving from the application of the Treaties» to the Member State concerned. This means that the suspension of EU funding without changing the treaties can be among the possible sanctions (Besselink 2016). But as we know by now, the «nuclear option», as former Barroso used to call Article 7 was never used, so the more realistic question is, whether EU law allows economic sanctions without triggering Article 7. In this respect one can argue that the Common Provision Regulation<sup>67</sup>, that regulates the European Structural and Investment Funds, which combine five funds, including the Cohesion Fund require governments to respect the rule of law as a condition of getting the money<sup>68</sup>. These rules require governments to provide institutions to ensure that funds are spent in accordance with EU and national law.

But even if economic sanctions could be used according to the current EU law, it is also true, that economic sanctions should be backed by a strong regional consensus and strong domestic support, and neither of these conditions are present in Poland or in Hungary currently (Bugarič and Ginsburg 2016). At the end of the day, the use of spending conditionality depends on the political will of the EU institutions, as well as on the future of the EU. In

<sup>65</sup> <http://www.foederalist.eu/2017/05/kein-geld-regelbrecher-politische-bedingungen-eu-struktur-fonds-ungarn-polen.html>.

<sup>66</sup> Cf. (Vita 2017). Vita refers to Joseph Weiler's objections towards the Rule of Law Framework. Weiler, while acknowledging the mostly noble intention of the Commission by framing the states' violation of the Union's core values as one concerning the rule of law, suggests to replace the formalist notion of the rule of law with a substantive and not merely procedural content, which entails an insistence on democratic legitimation. And since neither of the two primordial features of democratic legitimation – accountability and representation – operate in the EU, Weiler concludes that although the Union should take robust actions within its competences and jurisdictional limits against Member States violating the rule of law, it should also eliminate its own democratic deficit. (Weiler 2016).

<sup>67</sup> Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1303>.

<sup>68</sup> See a similar argument I. Butler, *To Halt Poland's PiS, Go for the Euros*, in *LibertiesEU*, August 2, 2017. <https://www.liberties.eu/en/news/to-halt-polands-pis-go-for-euros>.

regard to the political will, in the last years we had to experience that despite the availability of Article 7, it was not triggered neither against Hungary nor against Poland, and the Rule of Law Mechanism was initiated only against Poland and not against Hungary, where the illiberal system is more entrenched. Concerning the future of the EU, the scenarios of the European Commission's White Paper on the Future of Europe<sup>69</sup> published on 1 March 2017 neither regarding general oversight mechanisms, nor particularly regarding financial sanctions seem to provide institutional guarantees against illiberal member states within the EU. Similarly, the Commission's Reflection paper on the deepening of the economic and monetary union<sup>70</sup> suggests to strengthen the Eurozone governance, and leave the rest, including Hungary and Poland with their rule of law, democracy and fundamental rights deficits behind. Commission President Juncker in his State of the Union 2017 speech seemed to go to the opposite direction by saying that «Now is the time to build a more united, stronger and more democratic Europe for 2025»<sup>71</sup>. But do not forget that Juncker was also the one, who argued that sanctioning, including spending conditionality for backsliding member states can divide Europe, therefore it isn't desirable.

## **6. CONCLUSION**

During the fight over the rule of law with the Hungarian and Polish governments the EU institutions so far have proven incapable of enforcing compliance with core European values. After coming to the conclusion that the traditional mechanism of the infringement procedure does not work, and in the fear from the unanimity requirement for sanctioning according to Article 7(2), the Commission duplicated the preventive mechanism of Article 7(1) by introducing the Rule of Law mechanism. Due to political considerations, it was not used against Hungary at all, and in the case of Poland despite the very strongly worded Commission recommendations and their disregard by the Polish government nothing really happened, which considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of law oversight. The fear from Hungary's veto in the case of Poland indicates that the desired oversight for the effective use of Article 7 would require Treaty amendment. The broader question, which this paper cannot address, is, if the Union wants to prepare itself for the tensions

<sup>69</sup> White Paper on the Future of Europe. Reflections and Scenarios for the EU27 by 2025. European Commission COM (2017) 2025 of 1 March 2017. [https://ec.europa.eu/commission/sites/beta-political/files/white\\_paper\\_on\\_the\\_future\\_of\\_europe\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf).

<sup>70</sup> [https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union\\_en](https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union_en).

<sup>71</sup> [https://ec.europa.eu/commission/state-union-2017\\_en](https://ec.europa.eu/commission/state-union-2017_en).

between its own constitutional order and that of the East Central European Member States, and probably later also of some of the more established liberal democracies it should also deal with the mentioned democratic deficit of the EU as a precondition of any legitimate oversight. Unfortunately, the scenarios of European Commission's White Paper on the Future of Europe<sup>72</sup> published on 1 March 2017 do not aim at Treaty changes and do not seem to provide institutional guarantees against illiberal member states within the EU. Similarly, the Commission's Reflection paper on the deepening of the economic and monetary union<sup>73</sup> suggests to strengthen the Eurozone governance, and leave the rest, including Hungary and Poland with their rule of law, democracy and fundamental rights deficits behind. Commission President Juncker in his State of the Union 2017 speech seemed to go to the opposite direction by saying that «Now is the time to build a more united, stronger and more democratic Europe for 2025»<sup>74</sup>. But do not forget that Juncker was also the one, who argued that sanctioning backsliding member states can divide Europe.

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<sup>73</sup> [https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union\\_en](https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union_en).

<sup>74</sup> [https://ec.europa.eu/commission/state-union-2017\\_en](https://ec.europa.eu/commission/state-union-2017_en).



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**How the EU Can and Should Cope with Illiberal Member States.** This paper deals with the ways in which the European Union cope with recent deviations from the shared values of rule of law and democracy in some of the new Member States in East-Central Europe, especially in Hungary and Poland. The paper argues that during the fight over the compliance with the core values of the EU pronounced in Article 2 TEU with the Hungarian and Polish governments the EU institutions so far have proven incapable of enforcing compliance, which considerably undermined not only the legitimacy of the Commission, but also that of the entire rule of law oversight.

*Keywords:* Article 2 and 7 TEU; infringement procedure; rule of law mechanism

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