

# The genesis of the EU's rule of law mechanisms applied against Central European Member States

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## Abstract

European rule of law criticism towards some Central and Eastern European Member States led European institutions to put in place several instruments which aim at controlling EU countries in the name of the rule of law. The analysis of each instrument as well as of their interaction shows that their structure and workings differ depending on the institution which created them, and generally tend to increase the political and institutional power of the creating institution.

## Keywords

rule of law, European Union, Central Europe, European institutions, institutional power

## Introduction

During the last decade, European institutions have developed a wide range of tools which help them to exercise generalised control over Member States in the name of the rule of law. In this article I shall analyse the major institutional milestones of the creation of such European policy on the rule of law which have been mainly applied against Central European Member States.

On 6<sup>th</sup> March 2013, foreign ministers of Germany, Denmark, Finland and the Netherlands sent a joint letter to the President of the European Commission in which they asked for the creation a rule of law mechanisms in the EU.<sup>2</sup> In a resolution of 3<sup>rd</sup> July 2013, the European Parliament also requested the creation of a Union values monitoring mechanism.<sup>3</sup>

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2 Letter from the German, Dutch, Finnish and Danish foreign ministers to the President of the European Commission, 6<sup>th</sup> March 2013.  
[https://www.eerstekamer.nl/eu/documenteu/\\_brief\\_nederland\\_duitsland/f=/vji8oh6slx9o.pdf](https://www.eerstekamer.nl/eu/documenteu/_brief_nederland_duitsland/f=/vji8oh6slx9o.pdf)  
Accessed on 30<sup>th</sup> December 2020.

3 *European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)*. Strasbourg, 2013  
<https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-315+0+DOC+XML+V0//EN>  
Accessed on 30<sup>th</sup> December 2020.

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After such antecedents, the Commission presented its first rule of law mechanism in its communication entitled “*A new EU Framework to strengthen the Rule of Law*”, published on 11<sup>th</sup> March 2014.<sup>4</sup> Back then, the Council’s Legal Service expressed serious legal concerns related to the mechanism recommended by the Commission.<sup>5</sup> The Council subsequently created its own alternative rule of law monitoring instrument, in the form of an annual “rule of law dialogue” between Member States. The European Parliament also voiced reservations about the Commission’s Rule of Law Framework – although for different reasons. On the one hand it argued that the instrument recommended by the Commission was not ambitious enough, and on the other hand that it did not adequately minimise the risk of double standards being applied to various countries. The Parliament therefore produced a third recommendation for an EU rule of law mechanism, with its resolution of 25<sup>th</sup> October 2016.<sup>6</sup> On 17<sup>th</sup> July 2019,<sup>7</sup> the Commission came up with the idea of the creation of an Annual Rule of Law Report.<sup>8</sup> We can therefore identify several competing rule of law mechanisms or proposals for mechanisms in the European Union.

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4 European Commission, Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*. Strasbourg, 11<sup>th</sup> March 2014.

5 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*. Brussels, 27<sup>th</sup> May 2014  
<http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en>  
 Accessed on 31<sup>st</sup> December 2020.

6 *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*, Strasbourg, 2016  
[https://www.europarl.europa.eu/doceo/document/TA-8-2016-0409\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2016-0409_EN.html)  
 Accessed on 30<sup>th</sup> December 2020.

7 European Commission, communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening the rule of law within the Union. A blueprint for action*, Brussels, 17<sup>th</sup> July 2019  
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2019%3A343%3AFIN>  
 Accessed on 31<sup>st</sup> December 2020.

8 European Commission press release, *Strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement rule of law cycle*, 17<sup>th</sup> July 2019  
[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4169](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4169)  
 Accessed on 6<sup>th</sup> January 2021.

In the following, I shall complement existing literature on the EU's rule of law toolbox<sup>9</sup> by examining the above mentioned instruments in detail as well as their connections with each other and their application to Central European Member States. Before starting this analysis, however, it is important to make some preliminary reflexion about the notion of the rule of law which helps understanding how it could become the centre of a new European policy.

## The vague political definition of the rule of law

For the sake of analysis, at the very beginning it is also crucial to state that the rule of law has no exact, generally accepted definition. The concept of the rule of law raises several issues, of which the two most challenging ones need to be emphasised.

The first challenge is that in the vernacular, the French "l'État de droit", the English "rule of law" and the German "Rechtsstaat" are considered to be translations into those languages of an identical notion. Nevertheless, the three terms have different legal meanings. The differences can be explained by the fact that historically each concept developed in a different legal system and in a different context.

Regarding the conceptual components of the English term, "rule of law", Albert Venn Dicey's work, published in 1885, is the standard reference.<sup>10</sup> According to Dicey, arbitrary power can only be contained by ensuring that law prevails over authority. In other words, one should ensure that people can only be judged on the basis of the law. Dicey's concept emphasises the importance of equality before the law and states that no person should be above the law. The concept of rule of law, based on the logic of common law assigns a significant role to courts and does not require a country to have a written constitution in order for the rule of law to prevail.<sup>11</sup>

9 Dimitry Kochenov–Amichai Magen–Laurent Pech, *Introduction: The Great Rule of Law Debate in the EU*, in *Journal of Common Market Studies*, 2016/5, pp. 1045–1049.

Ulrich Sedelmeier, *Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure*, in *Journal of European Public Policy*, 2016/3, pp. 337–351, p. 349.

Bernd Schlipphak–Oliver Treib, *Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding*, in *Journal of European Public Policy*, 2016/3, p. 361.

Erzsébet Kardosné Kaponyi, *Az alapvető jogok és a jogállamiság védelmének aktuális kérdései az Európai Unióban 1. [Current issues in the field of fundamental rights and the rule of law in the European Union 1]*, in *Köz-Gazdaság*, 2016/3, pp. 187–195 and.

Erzsébet Kardosné Kaponyi, *Az alapvető jogok és a jogállamiság védelmének aktuális kérdései az Európai Unióban 2. [Current issues in the field of fundamental rights and the rule of law in the European Union 2]*, in *Köz-Gazdaság*, 2017/1, pp. 135–163.

Petra Lea Láncoz: *A Bizottság közleménye a jogállamiság erősítésének új, uniós keretéről*. In: Pázmány Law Working Papers, 2014/5. szám.

Balázs Fekete: *Alternatív kommentár az EUSZ. 7. cikkéhez*. In: *Közjogi Szemle*, 2016/2. szám

Nóra Chronowski: *Jogállamiság-kontroll az uniós közjogban: üveggyöngyjáték? Értelmezési lehetőségek az Európai Tanács költségvetési konklúziói alapján*. In: *Jogtudományi Közlöny*, 75:9, 2020.

10 *Report on the Rule of Law Adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011)* Strasbourg, 4<sup>th</sup> April 2011, p.4

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)

Accessed on 18<sup>th</sup> January 2021 and.

András Zs. Varga, *From Ideal to Idol? The Concept of the Rule of Law* (Budapest: Dialóg Campus, 2019) p. 22.

11 Ibid.

By contrast, the German concept of the "Rechtsstaat" developed through written constitutions and focuses on the state itself, seeing legislative power as the primary guarantor of law enforcement.<sup>12</sup> As András Zs. Varga put it, Robert von Mohl, the main theoretician of the Rechtsstaat "thought that a state built on law (Rechtsstaat) is governed by reason; it sustains its legal order, gives its citizens the opportunity to attain their rational goals, and guarantees equality before the law and exercise of fundamental rights and freedoms."<sup>13</sup>

The French concept of "l'État de droit" also sets different criteria for the rule of law. On the one hand it places significant emphasis on the protection of fundamental rights, influenced by the 1789 Declaration of the Rights of Man and the Citizen.<sup>14</sup> On the other hand, because French constitutional thinking is strongly influenced by administrative law, l'État de droit presupposes the protection of citizens' rights not only by regular courts, but also by special administrative courts.

Therefore, even though the three concepts are close to one another, they differ in terms of content and criteria. This is not the only problem, however. The second issue related to the concept of the rule of law is that it can be approached in two ways: formally, in an approach based on positive law; and in a second, substantive approach. According to the formal approach, one should consider a state to be governed by the rule of law if the state subjects itself to the law it creates: if it respects its own laws. The advantage of this definition is that it is simple and can be measured by objective standards. Its significant disadvantage, however, is that under this definition an authoritarian regime that oppresses its citizens could be considered to be upholding the rule of law, provided that all its measures comply with its own legal system. By contrast, in a substantive approach to the rule of law the main criterion is whether in a given country there is guaranteed protection of an individual's fundamental freedoms. Thus in this second conception the emphasis shifts from a rules-based notion to individual freedoms. This transforms the question of the rule of law into a much more subjective issue.

However, the difficulties of the legal definition do not mean that the basic legal content of the rule of law cannot be identified. Both legal literature and the Venice Commission tried to draw together the main factors of a state based on the Rule of Law. In 2011 the Venice Commission listed the following rule of law criteria:

- "Legality, including a transparent, accountable and democratic process for enacting law
- Legal certainty
- Prohibition of arbitrariness
- Access to justice before independent and impartial courts, including judicial review of administrative acts
- Respect for human rights
- Non-discrimination and equality before the law."<sup>15</sup>

<sup>12</sup> Venice Commission, *Report on the Rule of Law Adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011)*. Strasbourg, 4<sup>th</sup> April 2011, p. 4.

<sup>13</sup> András Zs. Varga, *op. cit.* p. 23.

<sup>14</sup> Venice Commission, *Report on the Rule of Law Adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011)*. Strasbourg, 4<sup>th</sup> April 2011, p. 4.

<sup>15</sup> Venice Commission, *Report on the Rule of Law Adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011)*. Strasbourg, 10<sup>th</sup> April 2011, p. 14.

Since the basic legal content of the concept rule of law can be identified, the real problem is much more the fact that in European political debates, political bodies such as the European Parliament, the Commission or the Council define case by case on a political basis what situation should be considered as a breach of the rule of law.

Since the concept of the rule of law is very general, all actors wishing to use it politically are provided with the opportunity to interpret its content flexibly and according to their own taste – whether that interpretation is somewhat looser or somewhat stricter, depending on the situation at hand. In this way, everyone can support the “common rule of law project” in the hope of their own imagined political advantage (or avoidance of political disadvantage), without any clear agreement on the project’s aims or objectives. If a clear rule of law concept with exactly defined political content existed, the interests of various players – and, above all, the contradictions between them – would come to the surface much sooner, and so it would be much harder to achieve the necessary political majority. If one needed to enact specific European legislation on the nature of laws on higher education, churches or the media in the Member States – or, to go even further, what Member States’ constitutions should contain – it is likely that negotiations on that legislation would never even get started. In such a situation each country would protect its own practices and existing systems, which in these basic, constitutional areas could be quite different from one Member State to the next. As an example, one only has to think of an EU country where there is an official state religion,<sup>16</sup> while in another country the state and the church are rigidly separated.<sup>17</sup> When one refers to the rule of law in general terms, however, one can avoid all the difficulties posed by such specific cases. Furthermore, it may even allow one to criticise certain provisions in relation to “Country A”, while considering the same to be acceptable in “Country B”. A vague political concept of the rule of law is therefore one of the basic preconditions for a “political consensus” between different political actors, which is necessary for the continuous development of EU policy on the rule of law.<sup>18</sup>

16 “The religion of Malta is the Roman Catholic Apostolic Religion.” Constitution of Malta, Article 2.  
<https://legislation.mt/eli/const/eng/pdf>  
 Accessed on 3<sup>rd</sup> April 2021.

“The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ.” Constitution of Greece, article 3.

<https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>  
 Accessed on 3<sup>rd</sup> April 2021.

“The Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State.” Constitution of Denmark, article 4.

<https://fngeneve.um.dk/news/newsdisplaypage/?newsid=0dd0574f-ba8d-416b-aec3-a36eb60c82f7>  
 Accessed on 3<sup>rd</sup> April 2021.

“The Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the State.” Constitution of Island, article 62.

[https://www.government.is/library/01-Ministries/Prime-Ministrers-Office/constitution\\_of\\_iceland.pdf](https://www.government.is/library/01-Ministries/Prime-Ministrers-Office/constitution_of_iceland.pdf)  
 Accessed on 3<sup>rd</sup> April 2021.

17 “La France est une République indivisible, laïque, démocratique et sociale.” Consitution of France, article 1.  
<https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur>  
 Accessed on 3<sup>rd</sup> April 2021.

18 Michel Dobry, *Le jeu du consensus [The Nuclear Consensus Game]*, in *Pouvoirs*, nr. 38, September 1986 pp. 47–66 <http://www.revue-pouvoirs.fr/Le-jeu-du-consensus.html>  
 Accessed on 7<sup>th</sup> January 2021.

## The European Commission's Rule of Law Framework

To this day a defining element in European policy on the rule of law is the so-called “new EU Framework to strengthen the Rule of Law”, outlined in the Commission’s communication of 11<sup>th</sup> March 2014 (hereinafter, the Rule of Law Framework of the Commission, or Rule of Law Framework). According to the Commission, the Rule of Law Framework had become necessary because of “recent events in some Member States”,<sup>19</sup> which had “demonstrated that a lack of respect for the rule of law [...] can become a matter of serious concern.”<sup>20</sup> The communication made reference to the “public” and to the “requests” that the Council and the European Parliament had made to it; it presented the rule of law framework as a response to such expectations.

As was the case in the European Parliament’s resolution on 3<sup>rd</sup> July 2013 and the mentioned joint letter from the German, Danish, Finnish and Dutch foreign ministers, the Commission’s communication also argued that a new mechanism was necessary because there were “situations [in Europe] where threats relating to the rule of law could not be effectively addressed by existing instruments”;<sup>21</sup> thus, the Communication made an implicit reference to ongoing rule of law criticisms against Hungary at that time. Among existing rule of instruments mentioned in the communication were the EU’s infringement procedures and Article 7 of the TEU. The Commission sought to complement these EU instruments and the “existing mechanisms already in place at the level of the Council of Europe”, in order to address and resolve a situation “where there is a systemic threat to the rule of law”.<sup>22</sup>

In essence the Commission’s Rule of Law Framework comprises two instruments. The first instrument is the classic infringement procedure, which the Commission also intends to use in connection with issues related to the rule of law. Article 258 of the TFEU<sup>23</sup> enables the Commission to initiate an infringement procedure against a Member State if the latter violates certain provisions of EU law. An infringement procedure is the usual legal instrument that the Treaties provide for the Commission to enforce European law as “the guardian of the Treaties”. For example, if the Commission finds that a Member State is violating the EU’s competition law or trade rules, it can use an infringement procedure to take action against that Member State.

Without going into too much detail about the EU’s procedural law, in order to understand the following analysis it is important to recognise and bear in mind the functioning of infringement procedures. In essence, if the Commission considers a Member State to be violating EU law, it will reach out to the government of that Member State and initiate

19 European Commission, communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, Strasbourg, 11<sup>th</sup> March 2014.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 Under Article 258 TFEU, “if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”

a dialogue to clarify the situation. There is a semi-official phase before the start of official procedures, in which the Commission notifies the Member State and seeks to remedy the problem within the framework of structured dialogue. If this fails to resolve the situation, an official procedure is initiated. The Commission sends a letter of formal notice including its suggestions and asking for information from the Member State within a given timeframe – usually within two months. If, having received the Member State's answers, the Commission still considers the latter to be violating EU law, the Commission will explain its position in a so-called "reasoned opinion" sent to the Member State, and repeat its call for the latter to remedy the situation. If within a given timeframe – which again is usually two months – the Member State does not provide a satisfactory answer, the Commission can bring the matter before the Court of Justice of the European Union to settle the dispute.<sup>24</sup> Such procedures are part of the European Union's daily routine, and in fact at present there are many underway against various Member States, concerning various areas of EU law. The majority of these procedures are technical in nature, of little interest to the public, and so in general one hears little about them. Incidentally, in terms of the number of infringement procedures initiated against it, Hungary used to be somewhere around the average among Member States.<sup>25</sup>

In some rule of law disputes the Commission was able to use an infringement procedure, because there were certain legal areas, also linked to the topic of rule of law, that at least partly fell within the remit of the European Union. For example, in 2012 the Commission had conducted investigations – via infringement procedures – into the independence of the Hungarian National Bank, the judiciary and the data protection authority,<sup>26</sup> and more recently into transparency requirements for civil society organisations receiving financial support from abroad<sup>27</sup> and regulations applying to the Central European University (CEU).<sup>28</sup> These cases all received a significant amount of attention in the rule of law debates surrounding Hungary.

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24 See Article 258 TFEU and the official description of the Commission on the following website: [https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure\\_en](https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en)  
Accessed on 31<sup>st</sup> December 2020.

25 See for example the number of ongoing infringement proceedings on 31<sup>st</sup> December 2016 in the 2016 Annual Report entitled *Monitoring the application of European Union law*, European Commission, Brussels, 2017, p. 29.

<https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-370-F1-EN-MAIN-PART-1.PDF>  
Accessed on 31<sup>st</sup> December 2020.

or the relevant statistics in the Commission's 2018 Single Market Scoreboard

[http://ec.europa.eu/internal\\_market/scoreboard/\\_docs/2018/infringements/2018-scoreboard-infringements\\_en.pdf](http://ec.europa.eu/internal_market/scoreboard/_docs/2018/infringements/2018-scoreboard-infringements_en.pdf)

Accessed on 31<sup>st</sup> December 2020.

26 European Commission, press release nr. IP/12/24, 17<sup>th</sup> January 2012

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_12\\_24](https://ec.europa.eu/commission/presscorner/detail/en/IP_12_24)

Accessed on 31<sup>st</sup> December 2020.

27 European Commission, press release nr. IP/17/1982, 13<sup>th</sup> July 2017

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1982](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1982)

Accessed on 31<sup>st</sup> December 2020.

28 European Commission, press release nr. IP/17/1952, 13<sup>th</sup> July 2017

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_1952](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1952)

Accessed on 31<sup>st</sup> December 2020.

It is important to note, however, that the Commission may only initiate an infringement procedure on an issue that falls within the European Union's competence. And according to the principle of conferral laid down in article 5 of the TEU, the Union only has competence in areas conferred to it by Member States, as laid down in the Treaties. Every area in which the European Union has not been conferred competences remains within the competence of the Member States, and in such areas the European Commission cannot initiate infringement proceedings. The Commission admits the truth of this, albeit reluctantly, stating that *"There are situations of concern which fall outside the scope of EU law and therefore cannot be considered as a breach of obligations under the Treaties"*,<sup>29</sup> and therefore infringement proceedings are not applicable to them, *"but still pose a systemic threat to the rule of law."*<sup>30</sup>

In essence the Commission tried to override this division of competences between Member States and the European Union by creating its Rule of Law Framework. Through this mechanism it found a way to investigate issues in which it would not otherwise be competent to act. Bypassing Member States and interpreting the Treaties as it saw fit, the Commission invented a tool for itself which now allowed it to act not only in matters of EU competence, but in virtually any matter that it could somehow link to the topic of the rule of law.

The Commission needed this because in matters related to the rule of law falling outside the Union's competence, up until now it could only take action against a Member State under Article 7 of the TEU. Under this, however, the Commission is only allowed to initiate one of the two political procedures fixed in the Treaty: to ask Member States to determine either the "clear risk of a serious breach" of European values under Article 7(1), or the "serious and persistent breach" of those same values under Article 7(2). Under Article 7 the role of the Commission officially ends at that point. Today we know from the ongoing Article 7 proceedings against Hungary and Poland that the Commission has managed to remain present throughout the proceedings laid before the Council, even after activation of the Article. At this later stage, however, it can only influence the process with its expert opinions, as it has no official decision-making powers.

If Article 7 of the Treaty on European Union is activated, direction of the procedure is taken over by the European Council and the Council, with the European Parliament – which needs to give its consent – in a supporting role. In order for a Member State "accused" by the Commission to actually be subjected to sanctions at the end of an Article 7 procedure, exceptionally high voting thresholds must be achieved in the European Council and the Council. For this reason, there is a relatively low probability of the procedure ending with a decision that the Commission can truly consider a victory. Therefore until recently it has been in the Commission's political interest not to activate Article 7 of the TEU, but to use the threat of activating Article 7 tactically – as a "sword of Damocles" hanging over a Member State's head, forcing its government to change its policies.

29 Under article 5 TEU "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

30 European Commission, communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*. Strasbourg, 11<sup>th</sup> March 2014.



The Commission created its Rule of Law Framework in order to increase its political leeway, which in practice meant the creation of a new procedural phase preceding initiation of Article 7. An idiosyncratic interpretation of Article 7 led it to claim the right to actively participate in debates on the rule of law. By claiming that it is among the institutions that can initiate Article 7, it has developed a completely new procedure preceding initiation of Article 7, in which the main role will hereafter be played by the Commission itself, and not the other European institutions. Below I shall explain in detail how the new Rule of Law Framework is a multi-step process dominated by the Commission, perfectly suited for applying political pressure on a Member State.

The Rule of Law Framework consists of three stages. As a first step, the Commission assesses whether there are any obvious signs of the rule of law being threatened in a Member State. *"This assessment can be based on the indications received from available sources and recognised institutions, including notably the bodies of the Council of Europe and the European Union Agency for Fundamental Rights. If, as a result of this preliminary assessment, the Commission is of the opinion that there is indeed a situation of systemic threat to the rule of law, it will initiate a dialogue with the Member State concerned, by sending a 'rule of law opinion' and substantiating its concerns, giving the Member State concerned the possibility to respond."*<sup>31</sup> The Commission informs the public about the initiation of the procedure but at this point keeps the contents of the proceedings and hearings confidential, in order to make it easier to find a compromise and a successful solution together with the Member State. If no solution satisfactory to the Commission can be reached at this stage, the procedure enters a second phase.

In the second phase the European Commission gives more publicity to the ongoing dispute with the Member State. It addresses a so-called "rule of law recommendation" to the Member State, the main elements of which are also made public. "In its recommendation the Commission will clearly indicate the reasons for its concerns and recommend that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect. Where appropriate, the recommendation may include specific indications on ways and measures to resolve the situation."<sup>32</sup>

The third stage is the "follow-up to the Commission's recommendation", in which "the Commission will monitor the follow-up given by the Member State concerned to the recommendation addressed to it. This monitoring can be based on further exchanges with the Member State concerned and could, for example, focus on whether certain practices which raise concerns continue to occur, or on how the Member State implements the commitments it has made in the meantime to resolve the situation. If there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU."<sup>33</sup>

The newly created mechanism was not met with universal acclaim. Legal experts from the Council argued that in introducing this new procedure in the European Union

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31 *Ibid.*

32 *Ibid.*

33 *Ibid.*

the Commission had exceeded its competences and acted without the required authorisation. The Commission tried to pre-empt any criticism by stating from the start in its communication that it had not created a new EU instrument, but had merely augmented its own internal procedures in order to fulfil its obligations under Article 7 of the TEU.

If one examines the question from a political scientific point of view, however, it immediately becomes clear that the new Rule of Law Framework cannot be considered merely an internal procedural issue within the Commission. Analysis of the structure of the Rule of Law Framework quickly reveals that in reality the Commission increased its own capacity to exercise political pressure in areas in which, under EU law, it would otherwise have no power to intervene.

With its Rule of Law Framework the Commission essentially took control of the European rule of law policy. This is despite the fact that legally the Commission cannot force its own will onto a Member State in any of the stages of the new Rule of Law Framework, with the latter being able to accept or refuse the Commission's rule of law opinion or recommendations. Ostensibly, the fact that the Commission may initiate Article 7 after the completion of the Rule of Law Framework does not represent a bigger threat to Member States either, since it had the power to do that anyway, without the Rule of Law Framework. In practice, however, the Rule of Law Framework has significantly increased the powers of the Commission, since it has created a new political theatre of operations for that body's dealings with Member States, which by its design favours the Commission. Using the new Rule of Law Framework, the Commission has gained the ability to steer Member States into a political arena in which it has an inbuilt advantage.

For example, unlike earlier EU practice, the new procedure allows the Commission to drive the development of protracted European and international debate on whether or not a Member State is violating European values. This in itself constitutes a significant degree of power, as such a dispute can be used to isolate a country in European and international arenas. By their nature, accusations regarding the rule of law are extremely damaging, because they directly seek to undermine political trust in the targeted country. They can create prejudices against a country that make cooperation with its European and international partners more difficult, even in questions unrelated to the rule of law. This is well reflected by newspaper titles one can read about some Central and Eastern European Member States in international media.<sup>34</sup>

Incidentally, the Commission is using the Rule of Law Framework in direct attempts to mobilise the maximum possible number of international actors. According to its communication on the Rule of Law Framework, the Commission may, for example, "seek advice and assistance from members of the judicial networks in the EU, such as the networks

34 "Is it time the EU took on Hungary and Poland over 'illiberal democracy'?", *The Week*, 19<sup>th</sup> November 2020. <https://www.theweek.co.uk/108714/is-it-time-european-union-took-on-hungary-poland-illiberal-democracy> Accessed on 18<sup>th</sup> May 2021.

„The Guardian view on Poland and Hungary: obstacles to progress ... again“, *The Guardian*, 17<sup>th</sup> November 2020. <https://www.theguardian.com/commentisfree/2020/nov/17/the-guardian-view-on-poland-and-hungary-obstacles-to-progress-again> Accessed on 18<sup>th</sup> May 2021.

„Poland and Hungary Use Coronavirus to Punish Opposition“, *The New York Times*, 22<sup>nd</sup> April 2020. <https://www.nytimes.com/2020/04/22/world/europe/poland-hungary-coronavirus.html> Accessed on 18<sup>th</sup> May 2021.

of the Presidents of Supreme Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU or the Judicial Councils".<sup>35</sup> It may also involve the European Union Agency for Fundamental Rights, the Council of Europe, the Venice Commission and other external experts. In practical terms this means that the Commission may rapidly trigger an unpleasant international chain reaction against an EU country if it does not agree with that country's political leadership.

The Commission is also the "timekeeper" for the Rule of Law Framework. Timing is just as important in politics as it is in competitive sport. This is why it is so advantageous for the Commission to have created its own arena, where it can play on its home turf and set its own agenda. It can freely decide whether or not to initiate a rule of law investigation against a Member State, and when to move the procedure forward and to which stage. Since the communication from the Commission presenting the Rule of Law Framework does not set exact procedural deadlines, these can be determined by the Commission at its own discretion. According to its own interests, it can keep a dispute on a given Member State's supposed failings in terms of the rule of law on the agenda for as long as it chooses to, and it can shape the scenario as it pleases.

The structure of the Rule of Law Framework shows many similarities with classic infringement procedures. The exertion of pressure through structured dialogue is a feature of both, and the Commission is a "grandmaster" in this technique. Statistics show that in the majority of classic infringement procedures the Commission manages to persuade the Member State in question to change the criticised measures during the initial negotiation phase.<sup>36</sup> Only a fraction of infringement procedures go before the Court of Justice of the European Union. So whenever the Commission can initiate a structured dialogue it acquires significant influence; and this is also true for the Rule of Law Framework.

Two important distinctions must be made between the Rule of Law Framework and infringement procedures, however. The first is that if the Commission and the Member State cannot come to an agreement in an infringement procedure, the dispute is settled by the relevant judicial body: the Court of Justice of the European Union (CJEU). This element is entirely missing from the Commission's Rule of Law Framework, in which the CJEU plays no role whatsoever. Within the Rule of Law Framework, if the Commission and the Member State cannot come to an agreement the Commission does not have the option of bringing the matter to the CJEU – but it can activate Article 7 of the TEU. In other words, it does not bring the matter before a judicial body, but under Article 7 it can refer it to the Council or the European Council – and in part to the European Parliament, which in such cases has the power to give or withhold consent. A huge difference is that while one can at least assume the independence and impartiality of the CJEU as a judicial body, this is not even theoretically true for the Council, the European Council or the European Parliament, which are all political institutions comprising politicians. This is another reason for not considering the EU's rule of law procedures as objective and apolitical.

The other main difference between infringement procedures and the Rule of Law Framework

35 European Commission, communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*. Strasbourg, 11<sup>th</sup> March 2014.

36 European Commission, information on infringement proceedings:  
[https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure\\_en#financial-penalties](https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en#financial-penalties)  
Accessed on 2<sup>nd</sup> January 2021.

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is in the sanctions applicable at the end of the procedure. In infringement procedures the CJEU may impose a financial penalty,<sup>37</sup> either in the form of a lump sum or a daily fine. Therefore such proceedings may have direct financial ramifications. The aforementioned letter of 6<sup>th</sup> March 2013 of the Danish, German, Dutch and Finnish foreign ministers suggested that the prospective EU rule of law mechanism should make provision for the imposition of financial penalties – in the form, for example, of suspension of payment of EU funds to the country in question. However, such penalties were not mentioned in the Commission's 2014 communication on the Rule of Law Framework. Establishing a link between EU funding and the rule of law became a political topic only after 2 May 2018 when the Commission presented a proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.<sup>38</sup> At this point, it is worth underlying that any attempt that would enable cutting EU funds because of alleged rule of law violations, could potentially have a much more negative impact on Central and Eastern European countries than on their Western European counterparts. The main beneficiaries of these funds are the Central and Eastern European countries, which acceded to the Union relatively recently, and so revocation of such funding would primarily affect those countries. In this way, the introduction of such sanctions within policy on the rule of law would be asymmetrical in nature: in practice it would represent a much bigger threat to Central European Member States than to Western European ones. In the absence of financial sanctions in the Rule of Law Framework, the only threat the Commission may make to a Member State is activation of Article 7 of the TEU at the end of the procedure. For this reason, the real power of the Rule of Law Framework is not derived from formal sanctions, but from the protracted exertion of political pressure in the European and international arenas.

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<sup>37</sup> *Ibid.*

<sup>38</sup> European Commission, *Proposal for a regulation nr. 2018/0136 (COD) of the European Commission on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States*, 2<sup>nd</sup> May 2018

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0324>

Accessed on 2<sup>nd</sup> January 2021.

## The “rule of law dialogue” of the Council

Other European institutions also felt compelled to react to the Commission’s Rule of Law Framework presented on 11<sup>th</sup> March 2014. The Council’s Legal Service<sup>39</sup> has produced a detailed legal critique of the new mechanism.<sup>40</sup> According to the Legal Service, the Commission had neither the legal basis nor the competence to create the new mechanism described above.

The Legal Service of the Council pointed out that “According to Article 5 TEU, ‘the limits of Union competences are governed by the principle of conferral’”. Its consequence is that “competences not conferred upon the Union in the Treaties remain within the Member States”. (Clause 15) According to the expert opinion “Article 2 TEU does not confer any material competence upon the Union but, similarly to the Charter provisions, it lists certain values that ought to be respected by the institutions of the Union and by its Member States when they act within the limits of the powers conferred on the Union in the treaties, and without affecting their limits. Therefore, a violation of the values of the Union, including the rule of law, may be invoked against a Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions. (Clause 16) [...] Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU.” (Clause 17).

In other words, the Legal Service of the Council clearly determined that the Commission had created its Rule of Law Framework in breach of the bases of EU law, since it sought to act in an area in which the European Union has no competence whatsoever. As I have presented earlier, the Commission’s main counterargument to this was that it had not created a new European procedure, but had come up with an internal decision-making mechanism, which now allowed it to properly weigh the activation of Article 7 of the TEU against a Member State. The Commission also emphasised that its recommendations made within the context of the proceedings were not binding. The Legal Service was not convinced by this argument, however. According to the Legal Service, “the non-binding nature of a recommendation does not allow the institutions to act by issuing such type of acts in matters or subjects on which the Treaties have not vested powers on them.” Furthermore, “even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not without any legal effect. (Clause 19) The Legal Service added that “to build a permanent mechanism for a rule of law study and proposal facility operated

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39 This body, part of the General Secretariat of the Council, gives opinions to the Council in order to ensure that its acts are lawful and well-drafted both in form and content. The Legal Service also represents the Council in judicial proceedings before the European Court of Justice, the General Court and the Civil Service Tribunal. <https://www.consilium.europa.eu/en/general-secretariat/>  
Accessed on 2<sup>nd</sup> January 2021.

40 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*. Brussels, 27<sup>th</sup> May 2014  
<http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en>  
Accessed on 2<sup>nd</sup> January 2021.

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by the Commission on the combined bases of Article 7 TEU and Article 241 TFEU<sup>41</sup> would undermine the specific character of the procedure of Article 7(1) – particularly concerning the way it can be initiated.” (Clause 21).

The Legal Service came to a conclusion that was clearly rather uncomfortable for the Commission: “there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abused its powers by deciding without a legal basis.” (Clause 24).

The Legal Service only left open a small legal window to allow for more emphasis to be put on the state of rule of law in Member States inside the Union. According to its expert opinion, the only solution consistent with the Treaties would be if “Member States – and not the Council – agree on a review system of the functioning of the rule of law in the Member States, which may allow for the participation of the Commission and of other institutions if necessary”. (Clause 26) Therefore the Legal Service thought that any kind of European Union procedure for auditing Member States in terms of the rule of law can only be created with an intergovernmental agreement, and not on the basis of current European law.

Following the opinion of the Legal Service, the Council also developed its own rule of law control mechanism, which was far more moderate than the Commission’s Rule of Law Framework. In a press release on 16<sup>th</sup> December 2014 the Council announced that in order to promote and protect the rule of law it would organise political dialogue between Member States every year. It underlined that “this dialogue will be based on the principles of objectivity, non-discrimination and equal treatment of all Member States”. It also stated that its mechanism “will be without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States inherent in their fundamental political and constitutional structures, [...] and their essential State functions”.<sup>42</sup>

From the Council’s statement one can also deduce that it did not find the Commission’s Rule of Law Framework to be an adequate instrument for control of the rule of law. According to the statement, the “dialogue established by the conclusions [of the Council] complements the existing means which the EU might use in the field of rule of law, namely the infringement procedure in the case of a breach of EU law and the so-called article 7 procedure of the Lisbon Treaty”. From the above it is clear that the Council did not consider the Commission’s new rule of law framework to be one of the European Union’s legitimate rule of law instruments.

Not surprisingly, the advocates of a more ambitious European rule of law policy were quite sceptical about the Council’s moderate, diplomatic proposal. This proposal, according

41 Under Article 241 of the TFEU, the Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of shared objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons.

42 Council of the European Union, *Press release nr. 16936/14, 3362<sup>nd</sup> Council meeting, General Affairs*. Brussels, 16th December 2014, p. 21

<http://data.consilium.europa.eu/doc/document/ST-16936-2014-INIT/en>

Accessed on 3<sup>rd</sup> January 2021.

to which the Member States would engage in general consultation with one another on the rule of law year by year, is much less suited to exerting political pressure than the Commission's lengthier solution targeting one country at a time. At the same time, rule of law dialogue should not be underestimated, as with it the Council joined the line of institutions which have introduced regular, permanent mechanisms for monitoring the rule of law. No matter how moderate the Council's rule of law dialogue might seem originally, it has been a further element in the developing, comprehensive European rule of law policy.<sup>43</sup> What is more, since 2019, this instrument has also developed towards a more specific rule of law control targeting Member States.<sup>44</sup> This tendency has started during the Finnish Presidency of the Council and has been institutionalized during the German Presidency, which made the Commission's Annual Rule of Law Report the basis of the exchanges of views in the Council.<sup>45</sup>

## The European Parliament's rule of law mechanism proposal

While the Legal Service of the Council felt that the Commission went too far with its Rule of Law Framework, the European Parliament declared that the Commission's solution was not comprehensive enough, and started work on its own, third, rule of law mechanism. On 25<sup>th</sup> October 2016 the European Parliament adopted a resolution comprising recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.<sup>46</sup> The resolution was prepared by Sophia in 't Veld, Vice-President of the European Parliament's ALDE Group (Alliance of Liberals and Democrats for Europe).<sup>47</sup>

In this resolution the Parliament put forward its own ideas on the European rule of law policy. Unlike earlier reports, such as the one submitted by Rui Tavares and voted on 3 July 2013, it does not censure a particular EU Member State, but – seemingly regardless of political developments in Member States – maps out a general European rule of law mechanism which is theoretically applicable to all Member States. Therefore the text does not mention

43 Pech Laurent: The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox. Reconnect, Working Paper No. 7, 30<sup>th</sup> March 2020  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3608661](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608661)  
Accessed on: 4<sup>th</sup> August 2021.

44 Presidency Conclusions – Evaluation of the Annual Rule of Law Dialogue. Brussels, 19<sup>th</sup> November 2019  
<https://www.consilium.europa.eu/media/41394/st14173-en19.pdf>  
Accessed on: 5<sup>th</sup> August 2021.

45 Wahl, Thomas: Council Launches Rule of Law Dialogue. Eucrim, 8<sup>th</sup> December 2020  
<https://eucrim.eu/news/council-launches-rule-law-dialogue/>  
Accessed on: 5<sup>th</sup> August 2021.

46 *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*, Strasbourg, 2016.

47 Sophia in 't Veld, *Report with recommendations to the Commission on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*. European Parliament, Committee on Civil Liberties, Justice and Home Affairs. Brussels, 2016  
[https://www.europarl.europa.eu/doceo/document/A-8-2016-0283\\_EN.pdf?redirect](https://www.europarl.europa.eu/doceo/document/A-8-2016-0283_EN.pdf?redirect)  
Accessed on 3<sup>rd</sup> January 2021.



Hungary or Poland by name, and one only finds some indirect references to “recent developments in some Member States” and “some Member State governments”. The text explicitly stresses that the new mechanism should prevent the rule of law instruments being “perceived as politically motivated or arbitrary and unfairly targeting certain countries”.

By avoiding reference to specific countries, this resolution shows that, five years after the debates in connection with Hungary that erupted in 2011, the rule of law has become an independent European policy topic. This more cautious approach, avoiding direct confrontation with specific countries, contributed to the report garnering support not only from left-wing politicians, but also from the majority of the European People's Party.<sup>48</sup> This more neutral approach helped to lure the European right into accepting the rule of law policy platform, which was devised and constructed by the European left, and systematically used by it against governments of the right.

The Parliament envisaged “a comprehensive Union mechanism for democracy, the rule of law and fundamental rights” in the form of an “interinstitutional agreement” until there is “a possible Treaty change”. By doing so, it also partially admitted that development of the mechanism is legally constrained by current EU Treaties; nevertheless, it saw a loophole for the mechanism, in the form of an interinstitutional agreement.

As with the Commission's Rule of Law Framework proposal, the Parliament's mechanism would be the precursor to an Article 7 TEU procedure, and would acknowledge and complement both the Commission's Rule of Law Framework and the Council's rule of law dialogue. At the same time, the resolution emphasised “the key role that the European Parliament and the national parliaments should play in measuring the progress of, and monitoring the compliance with, the shared values of the Union, as enshrined in Article 2 TEU”, as well as in “maintaining the necessary continuous debate [...] on democracy, rule of law and fundamental rights”. In contrast to the Commission's Rule of Law Framework, the Parliament's mechanism would in theory not only conduct rule of law audits of Member States, but also of European institutions such as the Parliament itself, the Commission and the Council. This position reveals itself to be more nuanced, however, when one notices that the resolution only emphasises and gives detailed explanation of action against Member States.

A further difference in comparison to the Commission's framework is that the rule of law mechanism proposed by the Parliament would not only be activated “when necessary”, i.e. for individual cases against certain countries, but every Member State would be audited annually. In other words, according to the Parliament, all EU Member States should be monitored continuously. The Parliament decided that this would avert a situation in which a specific Member State felt it was being discriminated against. The Parliament saw the key to neutrality as establishing an “*expert panel on democracy, the rule of law and fundamental rights*” (the Expert Panel). According to the resolution, the Expert Panel would prepare the analyses necessary for reports on democracy, the rule of law and fundamental rights (DRF) and for country-specific recommendations.

48 See the results of the plenary session by name in *report nr. A8-0283/2016*

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+PV+20161025+RES-RCV+DOC+WORD+V0//EN&language=EN>

Accessed on 3<sup>rd</sup> January 2021.



It is worth noting at the outset that the Parliament's proposal would involve a massive mechanism, the realisation of which would require significant increases in human and financial resources. The Parliament set itself the goal of summarising the Union's various instruments on fundamental rights and the rule of law within a rule of law policy that is unified and politically more consequential.

The first stage of the mechanism suggested by the Parliament – the same way as the Commission's Rule of Law Framework – would consist of an assessment of the situation. However, the assessment of the situation would not only take place if the Commission considered this to be necessary for a given country, but – similarly to the European Semester<sup>49</sup> – it would have to be conducted automatically every year and for every Member State. With this measure, the Commission would lose its wide discretionary autonomy regarding the political situation of Member States. Firstly, it would no longer be in a position to decide whether or not to launch an investigation. Secondly, the assessment would first have to be done by the independent Expert Panel, to whom the Commission would only provide assistance.

The national parliaments of the Member States would each nominate an independent expert to sit on the Expert Panel. Such people would have to be "qualified constitutional court or supreme court judges, not currently in active service". In addition, the European Parliament would also nominate ten other experts by a two-thirds majority, using a method that would in reality grant significant influence to various international organisations and civil society networks. The resolution lists the organisations which would be empowered to draw up the list of candidates on behalf of the Parliament. These organisations with powers to nominate candidates would be the following: the federation of All European Academies (ALLEA); the European Network of National Human Rights Institutions (ENNHRI); the Council of Law and Bar Societies Europe (CCBE); the Venice Commission of the Council of Europe; the Group of States against Corruption (GRECO) created by the Council of Europe; the Council of Europe Human Rights Commissioner; the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ); the United Nations (UN); the Organization for Security and Co-operation in Europe (OSCE); and the Organisation for Economic Cooperation and Development (OECD).

The influence of international and civil society organisations would also be increased by the fact that, in order to evaluate the situation of the rule of law in various countries, the Expert Panel would need to rely on material prepared by them. According to the Parliament's resolution, on the one hand the Expert Panel would have to rely on representatives from civil society, such as experts, scientists, civil society organisations and professional and sector-specific organisations of judges, lawyers and journalists.

49 The European Semester is a system for the coordination of economic and fiscal policies of the Member States within the EU. Its focus is on the 6-month period from the beginning of each year, hence its name: "semester". Within the framework of the Semester the Member States receive EU-level advice ("guidance"), and then submit their policy plans to be assessed at EU level. After evaluation of these plans, the Member States are given individual, "country-specific recommendations" for their national budgetary and reform policies. The Member States are expected to take into account these recommendations when they define their budget for the following year and when they take decisions related to their economic, employment, education and other policies.

<https://www.consilium.europa.eu/en/policies/european-semester/>

<https://www.consilium.europa.eu/en/policies/european-semester/how-european-semester-works/>

Accessed on 4<sup>th</sup> January 2021.

On the other hand, the Expert Panel would have to use as a starting point the indicators and benchmarks developed by NGOs. In addition, they would have to use documents prepared by the Venice Commission, GRECO, the Congress of Local and Regional Authorities of the Council of Europe, the CEPEJ, the UN, the OSCE and the OECD. The Expert Panel would also need to use documents prepared by European institutions. According to the resolution, they would have to take into consideration "all resolutions or other relevant contributions by the European Parliament", as well as documents issued by the European Union Agency for Fundamental Rights (FRA) and the European Fundamental Rights Information System (EFRIS), along with the official documents issued by "other specialised agencies of the Union, in particular the European Data Protection Supervisor, the European Institute for Gender Equality (EIGE), the European Foundation for the Improvement of Living and Working Conditions (Eurofound), and Eurostat". They would also have to keep in mind "the case-law of the Court of Justice and of the European Court of Human Rights and of other international courts, tribunals and treaty bodies". Another source to be used for analysis mentioned in the resolution would be the "contributions from the Member States authorities regarding respect for democracy, the rule of law and fundamental rights". Even though this phrasing is very vague, it probably refers to various state agencies for the protection of rights, rather than institutions or ministries that might represent governmental views.

All this demonstrates that the dominant input for the Expert Panel's rule of law assessments would come from international organisations and NGOs. By contrast, in the early stages of the mechanism there would be practically no room for a given country's official governmental position. Therefore Member State governments could only "defend their credentials" at a later stage, since their point of view would not be included from the beginning.

Even though in several places the Parliament's resolution emphasises that the rule of law mechanism should be neutral, that neutrality would be hard to achieve without the involvement of official national sources of information. The mechanism's political neutrality is also called into question by the fact that several political institutions would be influencing the procedure from the very beginning, even though classic players in national politics (such as Member State governments, opposition representatives, political parties etc.) would not be officially participating in the assessment's first stage. As we have seen, when making their rule of law assessment of the situation the Expert Panel would build upon the Parliament's political resolutions and would also closely cooperate with the Commission – a body that at that time was labelled as a political body by its own President, Jean-Claude Juncker.<sup>50</sup> Even though they do not carry out any political activities in the classic sense of party politics, the professional and civil society organisations listed above – who play a key role in the mechanism – cannot be considered to be neutral either, since each and every one of them represents certain interests. Furthermore, in the debates surrounding the rule of law in Hungary it became apparent that numerous Hungarian and international NGOs, which have significant influence in European decision-making,

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<sup>50</sup> Jean-Claude Juncker, opening statement in the European Parliament plenary session in Strasbourg, *A new start for Europe*, 15<sup>th</sup> July 2014.

consistently represent an anti-government position. All these aspects of the Parliament's proposal would result in the players representing national government policy being at a disadvantage from the beginning of the mechanism's procedure.

At the end of the assessment stage the Commission would prepare its report and country-specific recommendations, based on the drafts prepared by the Expert Panel. Following this there would be parallel debates in the European Parliament and the Council. At the end of its debate the European Parliament would adopt a resolution. The debate in the Council would take the form of a year-long dialogue on the rule of law, which would end with the Council's conclusions.

Depending on the results of the investigation, the mechanism could lead to a variety of subsequent procedures. If the report found a Member State to be in compliance with rule of law requirements, the procedure would be terminated and no further measures would be taken. If shortcomings were found, however, the procedure would continue in one of several ways.

One option would be that, "on the basis of the European DRF Report, in consultation with the European Parliament and the Council, the Commission may decide to submit a proposal for an evaluation of the implementation by Member States of Union policies in the area of freedom, security and justice under Article 70 TFEU".

A second option would involve the Commission deciding to launch a so-called "systemic infringement action" under "Article 2 TEU and Article 258 TFEU, bundling several infringement cases together". Thirdly, if a Member State were found to display one or more shortcomings, the Commission could initiate dialogue with it. Fourthly, the European Parliament, the Council and the Commission would decide whether to invoke Article 7(1) of the TEU, "if the country-specific recommendation on a Member State includes the assessment by the expert panel that there is a clear risk of a serious breach of the values referred to in Article 2 TEU". Finally, if the Expert Panel were to determine that "there is a serious and persistent breach – i.e. increasing or remaining unchanged over a period of at least two years – of the values referred to in Article 2 TEU", the aforementioned EU institutions could decide on the activation of Article 7(2) TEU.

The Parliament's resolution does not give detailed information on the type of sanctions applicable if the above procedure determined that a particular Member State was violating the rule of law; indeed the Parliament itself actually admits that the current Treaties do not clearly allow for financial sanctions. The resolution expressly requests, in the event of a Treaty change, specific description of the type of Member State rights – in addition to voting rights – that could be suspended if a Member State is found to be endangering the rule of law. It mentions as examples financial sanctions or the suspension of EU funding. The rule of law mechanism proposed by the Parliament has never materialised in this form. The reason for this is its rejection by the Commission, the support of which is needed by the Parliament in order to create such a mechanism. In the next point, I shall explore the background to this in detail, and we shall also discover other interesting relationships which determine EU policy on the rule of law.

## Practical and theoretical questions raised by the first rule of law instruments

The approaches to the issue of EU-level control of the rule of law in Member States adopted by the European Commission, the Council and the European Parliament differ from one another on matters of principle. For this reason, European policy on the rule of law has embraced several mutually contradictory instruments that have, in practice, proved to be incompatible. In 2019 the Commission announced an innovation: from 2020 it would launch an annual rule of law report, for which it would monitor the rule of law situation in all the Member States every year. At the end of the article, I shall examine the consequences of this new development as well.

Returning to the situation in 2014, neither the critical legal expert report issued by the Legal Service of the Council, nor the official conclusions of the Council prevented the Commission from implementing its Rule of Law Framework in practice. The serious legal concerns raised in connection with the Commission's Rule of Law Framework were outweighed by the increasingly popular political view that it was imperative to act against certain Member States.

If we consider the Council's legal argumentation, the Commission created its "rule of law protecting" instrument by distorting EU law – absurdly, therefore, itself violating the EU's rule of law. This paradox has arisen several times in connection with EU policy on the rule of law, and can be explained by the fact that the EU institutions' rule of law mechanisms are procedures which are primarily not legal in their nature, but political. The relatively new European legal order, which has only existed for half a century and is constantly changing, is unable to form the kind of barrier against political will that is provided by nations' centuries-old, firmly-established constitutional legal systems. For this reason legal provisions such as Article 7, which have not yet been subject to interpretation, can be easily moulded by prevailing political will – even in contradiction of their spirit and letter. More recently, the debate on the adoption of the "Sargentini Report"<sup>51</sup> in September 2018 provided us with an example of legal uncertainty in the Union. With no comparable precedent, there were contradictory interpretations of how voting ratios in the European Parliament should be calculated when launching an Article 7 procedure. Hungary took the matter to the Court of Justice of the European Union, since adoption of the report submitted by Judith Sargentini and initiation of the Article 7 procedure against Hungary were effectively due to the way the voting had been calculated.<sup>52</sup>

Returning to the Commission's Rule of Law Framework, we have also been able to observe its practical application in relation to Poland. Debates on the situation of the rule of law in Poland arose, after the Law and Justice Party (PiS) entered office, in connection with

51 *European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).*

52 *About Hungary, Justice Minister: "Deceitful" Sargentini report was pushed through by the EP's "pro-migration majority", 29<sup>th</sup> June 2020*

<http://abouthungary.hu/news-in-brief/justice-minister-deceitful-sargentini-report-was-pushed-through-by-the-eps-pro-migration-majority/>

Accessed on 5<sup>th</sup> January 2021.

the composition of Poland's Constitutional Court and changes to the law on the country's public service broadcaster. On 13th January 2016 the College of Commissioners announced that it held an orientation debate on the situation in Poland.<sup>53</sup> Following this, several consultations took place between the Commission and Polish authorities, and a visit to Poland was made by Frans Timmermans, First Vice-President of the Commission in charge of Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights. On 1<sup>st</sup> June 2016 the Commission announced that it had adopted a rule of law opinion regarding Poland. With this measure the Commission's Rule of Law Framework formally began.<sup>54</sup>

In its opinion the Commission raised concerns over the rule of law in Poland in three areas. Firstly, it examined the appointment of constitutional judges, and the execution of the judgements in connection with this issue made by the Polish constitutional court (Constitutional Tribunal) between 3<sup>rd</sup> and 9<sup>th</sup> December 2015. Secondly, it analysed the Act of 22nd December 2015 amending the Act on the Constitutional Tribunal, together with the Constitutional Tribunal's decision of 9<sup>th</sup> March 2016 on the unconstitutionality of this Act, and also how decisions taken by the Constitutional Tribunal after that date had been implemented. Finally, it examined the effectiveness of constitutional control over new laws, including the media law, and called on the Polish authorities to remedy the concerns expressed in the opinion within a reasonable timeframe.

Barely two months after issuing its opinion, the Commission determined that Poland had not adequately remedied the situation, and therefore on 27<sup>th</sup> July 2016 it moved the procedure into the second phase by adopting a rule of law recommendation.<sup>55</sup> The Commission formulated recommendations regarding the aforementioned issues, also taking into consideration that on 22nd July 2016 a new law on the Constitutional Tribunal was adopted in Poland. It underlined that Polish authorities should refrain from any actions and public statements which could undermine the legitimacy and effectiveness of the Constitutional Tribunal.

Since disagreements between the Commission and Poland did not stop there, the Commission adopted a second rule of law recommendation on 21<sup>st</sup> December 2016.<sup>56</sup> It noted that even though Poland had managed to find solutions to certain problems, other issues had remained unresolved, and new threats to the rule of law had since arisen.

It is worth noting that by issuing a second, "complementary" rule of law recommendation,

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53 European Commission, press release, *College Orientation Debate on recent developments in Poland and the Rule of Law Framework: Questions & Answers*. Brussels, 13<sup>th</sup> January 2016.

54 European Commission, press release, *Commission Opinion on the Rule of Law in Poland and the Rule of Law Framework: Questions & Answers*. Brussels, 1<sup>st</sup> June 2016  
[http://europa.eu/rapid/press-release\\_MEMO-16-2017\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-2017_en.htm)  
Accessed on 5<sup>th</sup> January 2021.

55 European Commission, press release, *Rule of Law: Commission issues recommendation to Poland*. Brussels, 27<sup>th</sup> July 2016  
[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_2643](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2643)  
Accessed on 5<sup>th</sup> January 2021.

56 European Commission, press release, *Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland*. Brussels, 21<sup>st</sup> December 2016  
[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_16\\_4476](https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4476)  
Accessed on 5<sup>th</sup> January 2021.

the Commission deviated from the procedure it had itself laid down in its 2014 communication in connection with the Rule of Law Framework. According to that document, the opinion on the rule of law and the rule of law recommendation should have been followed by a follow-up phase, and finally by activation of Article 7. The Commission, however, was apparently in no hurry to activate Article 7. If one were to suppose that the Commission was afraid of initiating an Article 7 procedure, one might consider this a sign of weakness. But one could equally interpret it as the Commission keeping alive the prospect of a negotiated settlement with Poland for as long as possible. A third interpretation might be that, in line with my earlier observation, prolongation of the procedure with the deferred threat of activation of Article 7 was in the Commission's political interest, as it kept the rule of law debate within its own remit and the parameters of its own Rule of Law Framework for as long as possible. Such a tactic might be the best way of enabling it to exercise its own political influence over the Polish government.

Despite all this, the dispute between Poland and the Commission could still not be resolved a year and a half after the first orientation debate. On 19<sup>th</sup> July 2017 First Vice-President Frans Timmermans delivered a strongly-worded address on the situation in Poland. In this he emphasised that he wanted to send a clear political message, and menacingly stated that recent developments had led the Commission to come “*very close to triggering Article 7*”.<sup>57</sup> Finally, he announced that the Commission would issue a third recommendation on the rule of law in Poland – something which would simply prolong the procedure even further.

The recommendation of 26<sup>th</sup> July 2017 concerned four Polish legislative Acts which the Commission claimed were increasing the systemic threat to the rule of law and the independence of the judiciary: the new Act on the Supreme Court; the Act on the National Council for the Judiciary; the Act on the Organisation of the Ordinary Courts; and the Act on the National School of Judiciary.<sup>58</sup> The Commission highlighted its particular concern over the potential dismissal of Supreme Court judges. It urged the Polish authorities not to implement such measures, otherwise it would be obliged to immediately activate against Poland the mechanism set out in Article 7(1) of the TEU. On this occasion the Polish authorities had one month in which to comply with the Commission's requests. Furthermore, the Commission also announced that it would initiate a standard infringement procedure in relation to the Act on the Ordinary Courts. Finally, on 20<sup>th</sup> December 2017, the Commission announced that, after two years of attempting “to pursue a constructive dialogue”, it had concluded that there was a clear risk of a serious breach of the rule of law by Poland.<sup>59</sup> Its statement included the assertion that Polish courts had come under

57 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<sup>th</sup> July 2017  
[http://europa.eu/rapid/press-release\\_SPEECH-17-2084\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-17-2084_en.pdf)  
Accessed on 5<sup>th</sup> January 2021.

58 European Commission, press release, *European Commission acts to preserve the rule of law in Poland*. Brussels, 26<sup>th</sup> July 2017  
[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_2161](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2161)  
Accessed on 5<sup>th</sup> January 2021.

59 Opening remarks of First Vice-President Frans Timmermans, *Readout of the European Commission discussion on the Rule of Law in Poland*. Brussels, 20<sup>th</sup> December 2017  
[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_17\\_5387](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_5387)  
Accessed on 5<sup>th</sup> January 2021.

the rule of the governing majority. Therefore it decided to trigger an Article 7(1) procedure against Poland, simultaneously issuing its fourth rule of law recommendation. It also noted, however, that it would offer the Polish government a further three months to clarify the situation and, depending on the result of this, it would be ready to review its decision on launching an Article 7 procedure.

From a legal point of view it is not clear how the Commission could have revoked its decision to trigger an Article 7 procedure, since under the Treaties the matter had already been transferred to the competence of the Council. This gesture by the Commission may have been a demonstration of its flexibility, but it also indicated that the Commission wanted to remain part of the rule of law process regarding Poland, even after activating the Article 7 procedure. This is something it has managed to achieve: the Council regularly invites the Commission to its meetings on Poland within the Article 7 procedure. However, all this is only partially due to the lobbying power of the Commission. In reality, it also makes the life of the Council – a body composed of the Member States of the Union – easier if it can continue to share with the Commission part of the diplomatically uncomfortable tasks in connection with the examination of a given Member State. In spite of this, the final decision will have to be made by the Member States.

While the Commission has used the Polish case to inaugurate its Rule of Law Framework, the rule of law mechanism proposed by the Parliament has still not been realised. The reason for this is that in the legal system of the European Union only the Commission has the right of legislative initiative. Unlike the practice in national legal systems, the European Parliament cannot initiate legislation, but can only debate proposals that the Commission puts forward. This system is somewhat modified by the fact that the Parliament may adopt a so-called “own-initiative report”, in which it calls on the Commission to submit a legislative proposal on a given topic. In such reports the Parliament can define in detail the type of proposal it would like to see from the Commission. Nevertheless, the Commission is not obliged to actually put forward such a proposal. Therefore the expression “own-initiative report” tends to be misleading, since it does not provide the Parliament the real power to initiate, but only allows it to exert political pressure on the Commission.<sup>60</sup> The rule of law mechanism proposed by the Parliament in 2016 was also in the form of such an initiative, and so its entire fate depended on the Commission.

In its resolution of 25<sup>th</sup> October 2016 the Parliament called on the Commission to submit the rule of law mechanism proposal presented in the resolution’s annex before September 2017. Without even waiting for the deadline to expire, on 17<sup>th</sup> January 2017 the Commission announced that it was refusing the request on the legislative proposal. The following quotation from the Commission’s answer is a good illustration of the tensions between the two institutions:

“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

60 For more detailed information on legislative competences see the website of the European Parliament: <https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures/legislative-powers>  
Accessed on 5<sup>th</sup> January 2021.



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.”<sup>61</sup>

In other words, to date the Parliament's rule of law mechanism has been a failure. The Parliament has not given up on influencing the European rule of law policy, however. On 17<sup>th</sup> May 2017 it adopted a new resolution on the situation in Hungary, in which it tasked the Committee on Civil Liberties, Justice and Home Affairs (LIBE) to prepare a report that would enable the Parliament to trigger Article 7(1) TEU against Hungary.<sup>62</sup> Judith Sargentini, a Dutch Green politician was tasked with preparation of the report. Having lost its battle against the Commission by failing to ensure that the rule of law policy took the form of the mechanism it had proposed, the European Parliament turned to a good old solution: it put the issue of the rule of law in Hungary back on the agenda. This enabled the Parliament to once again become the centre of attention of EU policy on the rule of law. After the Commission had initiated Article 7 against Poland, certain forces in the Parliament felt justified in thinking that their turn had come to activate Article 7 against Hungary.

In triggering Article 7 against Hungary, however, the Parliament was also playing its highest political trump card.<sup>63</sup> With the activation of Article 7 the case was passed over to the Council, in which Member States had sole competence in making a decision on Hungary. From this stage on, the Parliament's role was limited to giving its consent to the Council's decision, the contents of which it could no longer officially influence. For MEPs trying to build the rule of law policy this was not necessarily an advantageous position, since they thus lost their decision-making power. For this reason, the Left in the Parliament started intensively lobbying the Council to allow MEPs to participate in Council meetings dealing

61 European Commission, *Follow up to the European Parliament resolution with recommendations to the Commission on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, adopted by the Commission on 17 January 2017. Brussels, 17<sup>th</sup> January 2017 <http://www.europarl.europa.eu/oeil/spdoc.do?i=27630&j=0&l=en>  
Accessed on 5<sup>th</sup> January 2021.

62 *European Parliament resolution of 17 May 2017 on the situation in Hungary*, Strasbourg, 2017 [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0216\\_EN.pdf?redirect](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0216_EN.pdf?redirect)  
Accessed on 5<sup>th</sup> January 2021.

63 This might be the reason, two months after triggering Article 7 against Hungary, for the Parliament adopting a new resolution on 14<sup>th</sup> November 2018, in which it reiterated its request for the Commission to present a proposal for a comprehensive EU Mechanism on Democracy, the Rule of Law and Fundamental Rights. *European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights*  
[https://www.europarl.europa.eu/doceo/document/TA-8-2018-0456\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0456_EN.html)  
Accessed on 5<sup>th</sup> January 2021.



with the ongoing Article 7 procedure against Hungary.<sup>64</sup> Incidentally, this attempt was very unusual, because current practice dictates that, as a competing legislator, the Parliament can never participate in the Council's meetings.

The Article 7 procedure initiated by the Parliament against Hungary has once again created a paradoxical situation in the European Union, showing the difficulty the Union has in objectively using legal standards to assess the situation of the rule of law in Member States. What we now see is that the Commission and the Parliament have each felt justified in activating an Article 7 procedure against a different Member State. While it is true that both EU bodies had the right to enforce Article 7, if they had used a neutral set of criteria as the basis of their action, there would not have been such inconsistencies in terms of the country targeted and the reasons for activation. This created a paradoxical situation: the Parliament initiated an Article 7 procedure against Hungary without the Commission seeing grounds for such an activation, or even auditing the country with its Rule of Law Framework; by contrast, the Commission monitored Poland through its Rule of Law Framework for two years before deciding on activation of Article 7.

Thus there are two countries currently under an Article 7 procedure, against which the procedure has been initiated in two different ways. The "boosters" of the rule of law policy will have to take account of the fact that the two countries will show solidarity to each other in the resultant political situation. This will be decisive if in the future the European Council votes on whether these Member States have been seriously and persistently breaching the rule of law. This is because Article 7(2) states that the vote will only be successful, and the Union will only be able to impose sanctions, if there is unanimity among the Member States. Legally speaking, a single dissenting Member State is enough for the vote to fail: Poland could veto the vote against Hungary, and vice versa. The forces backing EU policy on the rule of law have already had the idea of trying to merge the procedures against the two countries, in order to prevent them from exercising their veto rights. The logic behind this attempt to circumvent the veto would be to handle the two cases together and vote on the two Member States simultaneously in one round. Such a process would be complete legal nonsense, as it is not allowed for in the Treaties. As a result of the aforementioned EU rule of law paradox, however, some actors are concerned that EU law might be reinterpreted in this case also – even though it would contradict Treaty provisions.

Interactions between European institutions on the topic of the rule of law also clearly illustrate the complexity of the political system within the European Union. In this complex political system, it is not always clear who is influencing whom in a certain matter. Political pressure from certain Member States and the European Parliament surely had an influence

<sup>64</sup> See, for example, Judith Sargentini's speech in the European Parliament on 30<sup>th</sup> January 2019, during the debate entitled "*The rule of law and fundamental rights in Hungary, developments since September 2018*", in which she demands that the Council invite her to debates on Article 7:

<http://www.euoparl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20190130+ITEM-020+DOC+XML+V0//HU&language=HU&query=INTERV&detail=1-099-000>

Accessed on 5<sup>th</sup> January 2021

*EU Observer, EU action on Hungary and Poland drowns in procedure, 13 November 2018*

<https://euobserver.com/political/143359>

Accessed on 5<sup>th</sup> January 2021.

on the Commission developing its own Rule of Law Framework. After having developed a rule of law tool it considered to be the right one, however, the Commission categorically rejected any further guidance from the Parliament. Similarly, while certain Member States had clearly requested the Commission to introduce an EU-level rule of law control over Member States, the Council – consisting of Member States – did not want to recognise the Commission's Rule of Law Framework. Instead it created its own, more moderate, instrument in the form of a rule of law dialogue.

All this leads to conclude that the institutional competition that had characterised the European Union since the Treaty of Lisbon's entry into force in 2009 also had a strong influence on EU policy on the rule of law in the 2014 – 2019 legislative term. To a certain extent, both Hungary and Poland have been victims of this power struggle between EU institutions.

## The Commission's Annual Rule of Report

In 2019 the European Commission announced its plan to establish an "Annual Rule of Law Review Cycle", with an "Annual Rule of Law Report" at its core. It published its first Annual Rule of Law Report in 2020.<sup>65</sup> Since that time, the official communications of the Commission have referred to the Annual Review Cycle as the "Rule of Law Mechanism". This is a new milestone in the evolution of the European rule of law policy, which suggests that the rule of law debate will remain at the centre of the European political agenda in the 2019-2024 legislative term also.

By the creation of the Annual Rule of Law Report the Commission monitors the situation of the rule of law every year in each Member State. The 2020 report comprises several documents. The first is a 27-page communication on "The Rule of Law Situation in the European Union".<sup>66</sup> This document presents the context and the aim of the first Annual Rule of Law Report of the Commission. It then gives an overview of its assessment of the situation in the European Union in the four identified fields. The document is organised by topic and seeks to give a synopsis of the overall European situation, highlighting some practices from Member States as examples to illustrate its overall assessment. The second document is a 32-page abstract summarising the country-specific reports.<sup>67</sup> This document is organised by country, each one the subject of a one-page abstract describing the Commission's main findings. The third of the documents contains

65 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; 2020 Rule of Law Report; The rule of law situation in the European Union, COM/2020/580 final*. Brussels, 30 September 2020 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580> Accessed on 6<sup>th</sup> January 2021.

66 *Ibid.*

67 European Commission, *Rule of Law Country Reports 2020* [https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_2020\\_country\\_reports\\_2\\_web.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_2020_country_reports_2_web.pdf) Accessed on 8<sup>th</sup> January 2021.

the detailed country-specific reports,<sup>68</sup> the lengths of which vary considerably depending on the country under examination. The report on Luxembourg, for example, is only 14 pages long, while that on France covers 15 pages. Meanwhile the reports on Poland and Hungary are 26 and 28 pages long respectively, which suggests that these countries were examined more thoroughly than the others.

Analysing the country abstracts leads to the conclusion that the chapters on Hungary and Poland are by far the most negative. In this regard, there is no departure from the trend of the past decade: these two countries clearly remain the focus of European policy on the rule of law. Many international media outlets have also confirmed this tendency. Although all Member States received criticisms, their nature and gravity are not comparable to those levelled against Hungary and Poland. Most of the serious concerns raised in the report relate to corruption and the situation of the media and the judiciary in Hungary and Poland – and, to a less extent, in some other “new” Member States that joined the European Union in or since 2004.<sup>69</sup> The country abstract on Hungary, for example, contains only one positive sentence, acknowledging that “as regards efficiency and quality, the justice system performs well in terms of the length of proceedings and has a high level of digitalisation.”<sup>70</sup> All the remaining comments express negative assessments and concerns.

A careful reading of the country abstracts also shows that a great deal depends on the wording. For example, the section on Hungary observes with concern that “the independent National Judicial Council faces challenges in counter-balancing the powers of the President of the National Office for the Judiciary in charge of the management of the courts.”<sup>71</sup> This is conspicuously at odds with the preceding section on Luxembourg, where no such judicial council even exists. Nevertheless, Luxembourg’s judicial system is described as displaying a high level of independence, with a further positive development being that “a constitutional reform is being discussed in Parliament to further strengthen judicial independence [...] by establishing a council for the judiciary.”<sup>72</sup>

The Rule of Law Mechanism created by the Commission with a report regularly assessing

68 2020 Rule of Law Report – communication and country chapters  
[https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters\\_en](https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en)  
 Accessed on 8<sup>th</sup> January 2021.

69 For example, *Le Figaro*, *Bruxelles sonne l’alerte sur l’État de droit dans l’UE* [Brussels sounds the alarm on rule of law in the EU], 30<sup>th</sup> September 2020  
<https://www.lefigaro.fr/international/bruxelles-sonne-l-alerte-sur-l-etat-de-droit-dans-l-ue-20200930>  
 Accessed on 8<sup>th</sup> January 2021.  
 or politico.eu, *Commission report finds many EU nations fall short on rule of law*, 30 September 2020  
<https://www.politico.eu/article/european-commission-report-finds-many-eu-nations-hungary-poland-malta-bulgaria-falling-short-rule-of-law/>  
 Accessed on 8<sup>th</sup> January 2021.

70 European Commission, *Rule of Law Country Reports 2020, Abstract – Hungary*, p. 21  
[https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_2020\\_country\\_reports\\_2\\_web.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_2020_country_reports_2_web.pdf)  
 Accessed on 8<sup>th</sup> January 2021.

71 *Ibid.*

72 *Ibid.*, *Luxembourg*, p. 20  
[https://ec.europa.eu/info/sites/info/files/rule\\_of\\_law\\_2020\\_country\\_reports\\_2\\_web.pdf](https://ec.europa.eu/info/sites/info/files/rule_of_law_2020_country_reports_2_web.pdf)  
 Accessed on 8<sup>th</sup> January 2021.

the situation in all Member States is clearly similar to the EU Mechanism on Democracy, the Rule of Law and Fundamental Rights proposed by the European Parliament in 2016. Both mechanisms have at their core the idea of the continuous monitoring of all Member States in the name of the rule of law. It is important to recall that this idea was first mooted by the Parliament, and categorically rejected by the Commission in 2017.

Within a few years the Commission had undergone a conversion. In its first Annual Rule of Law Report it states that its new “rule of law mechanism further reinforces and complements other EU instruments that encourage Member States to implement structural reforms in the areas covered by its scope, including the EU Justice Scoreboard and the European Semester, and now the Next Generation EU instrument. [...] Other elements in the EU’s rule of law toolbox will continue to provide an effective and proportionate response to challenges to the rule of law where necessary”.

Yet one should not rush to the conclusion that in establishing the Annual Rule of Law Report the Commission had yielded to the demands of the European Parliament. If we take a closer look at the Parliament’s earlier proposal for a mechanism and compare it with the Commission’s Annual Rule of Law Report, we can observe some fundamental differences. The Parliament’s 2016 proposal called for the establishment of an inter-institutional agreement that would have given it much greater prominence. This inter-institutional agreement would have given a major role to an independent expert panel, tasked with assessing the situation of the rule of law in the Member States. In such a setup the Commission would have had much less freedom in assessing the situation in Member States. The Parliament, on the other hand, could have had more influence over the evaluation procedure, since it would have nominated several members to the Expert Panel. Such an expert body does not feature in the Commission’s design for the Rule of Law Mechanism. On this point the Commission remained consistent with its previous position by keeping the task of evaluation for itself, thus continuing to play the central role in the European rule of law policy – and even extending its power.

One might logically suppose that the European Parliament would not be completely satisfied with this new solution from the Commission. Fortunately we did not need to wait long to learn the Parliament’s position. On 7<sup>th</sup> October 2020, one week after the first Annual Rule of Law Report of the Commission was released, the European Parliament once again adopted a resolution on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights. This time the rapporteur was an MEP from Slovakia, Michal Šimečka, one of the vice-presidents of the European parliamentary group Renew Europe. In this resolution, the European Parliament “welcomes the Commission’s work on its annual Rule of Law Report”, and the fact that “corruption and media freedom is part of the annual assessment.” It notes, however, that the Commission’s annual report “fails to encompass the areas of democracy and fundamental rights”. The Parliament “particularly regrets that freedom of association and the shrinking space for civil society are not part of the annual assessment; underlines with concern that vulnerable groups, including women, persons with disabilities, Roma, LGBTI persons and elderly persons, continue not seeing [sic] their rights fully respected in some Member States and are not fully protected from hate and discrimination, in breach of Union values as provided for in Article 2 TEU”. In consequence, “it recalls that Parliament has repeatedly called

for a monitoring mechanism to cover the full scope of Article 2 TEU". It also reiterates "the need for an objective and evidence-based monitoring mechanism enshrined in a legal act binding the three institutions to a transparent and regularised process, with clearly defined responsibilities, so that the protection and promotion of all Union values becomes a permanent and visible part of the Union agenda." The Parliament also underlines that the EU's Rule of Law Mechanism "should contain country-specific clear recommendations, with timelines and targets for implementation, to be followed up in subsequent annual or urgent reports", and that "failure to implement the recommendations must be linked to concrete Union measures".

The Parliament suggests establishing a mechanism that "should consolidate and supersede existing instruments to avoid duplication, in particular the Commission's annual Rule of Law Report, the Commission's Rule of Law Framework [...]". It does not abandon the idea of establishing an independent expert panel, designed to advise the three institutions and the working group established by them. According to the draft inter-institutional agreement suggested by the Parliament, the Expert Panel should "identify the main positive and negative developments in each Member State". Even though the Commission would draft the annual report, if its assessment "diverges from the findings of the panel of independent experts, the European Parliament and the Council may request the Commission to explain its reasons to the Working Group".

In its Annual Rule of Law Report published on 30<sup>th</sup> September 2020, the Commission stated that it looked forward to "following up on the European Parliament resolution currently under preparation". The European Parliament resolution presented above makes it clear that there is still considerable divergence between the concepts of these two institutions. Finally, there is one interesting idea that was mentioned in the European Parliament's 2016 resolution, which is missing both from the Commission's Annual Rule of Law report and the latest European Parliament resolution. In 2016 the European Parliament recommended that "the EU Pact for DRF [democracy, the rule of law and fundamental rights] include preventative and corrective elements, and address all Member States equally as well as the three main Union institutions." Although at the time the resolution did not develop it in detail, the idea of subjecting the three main European institutions to rule of law monitoring appeared in the text. In 2020 neither the European Parliament nor the Commission mentions such an idea in their documents, although it would be relevant. As the Legal Service of the Council also underlined in 2014, the values enshrined in Article 2 of the TEU are primarily binding upon the European institutions. In consequence, the European rule of law policy should first of all monitor EU institutions' respect for the rule of law. Such a mechanism should be able to effectively address the concerns that arise over the functioning of European organs. The first Annual Rule of Law Report of the Commission foresees that "it will be complemented by a set of upcoming initiatives including the European Democracy Action Plan, the renewed Strategy for the Implementation of the Charter of Fundamental Rights." It remains to be seen whether the Commission will take the opportunity to address the lawful functioning of European institutions in these initiatives.

## Conclusion

During the 2010s, European institutions have put in place several instruments which aim at controlling Member States in the name of the rule of law. These instruments have developed in a context of EU criticism formulated against some Central and Eastern European Member States. This article first made a reflexion about the notion of the rule of law referring to which European institutions have put in place a completely new political toolbox. Then it analysed in detail the European Commission's 2014 Rule of Law framework applied against Poland, the rule of law dialogue of the Council, the European Parliament's proposal for an EU mechanism on democracy, the rule of law and fundamental rights, as well as the Commission's Annual Rule of Law Report introduced in 2019. The detailed examination of each instrument as well as of their interaction showed that their structure and workings differ depending on the institution which created them, and generally tend to increase the political and institutional power of the creating institution. Paradoxically, although these instruments label themselves as "rule of law protecting instruments", their legal basis is uncertain and therefore their existence is questionable from the very perspective of the rule of law as it has also been voiced by the Legal Service of the Council.

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