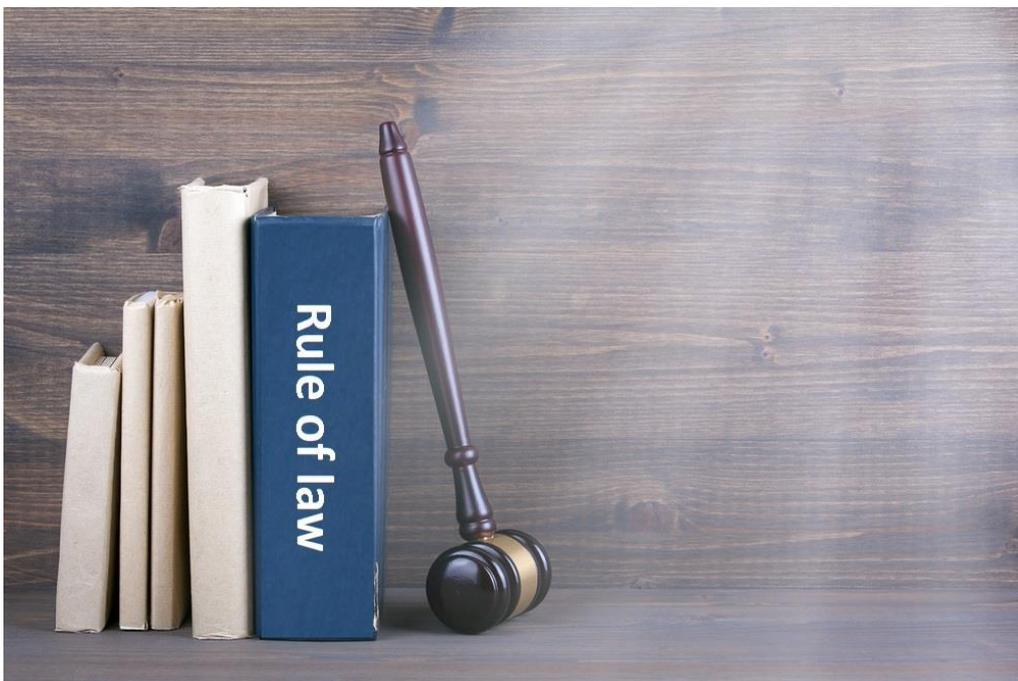


# The EU framework for enforcing the respect of the rule of law and the Union's fundamental principles and values





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## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the EU founding values and principles set out in Article 2 TEU and the instruments at the EU's disposal to uphold them, in particular Article 7 TEU and Article 258 TFEU, as well as the Rule of Law Framework launched by the European Commission. Focusing on rule of law, the study also examines how these instruments have been used, in particular, in the cases of Poland and Hungary.

The study also looks into the proposals put forward by the European Parliament and the Commission and gives recommendations: It proposes, in particular, the signing of the European Convention on Human Rights by the EU, as well as the introduction of economic conditionality into EU Cohesion Policy and its funds as a sanction mechanism.

## **ABOUT THE PUBLICATION**

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## LIST OF ABBREVIATIONS

<b>AFSJ</b>	Area of Freedom, Security and Justice
<b>CEAS</b>	Common European Asylum System
<b>CJEU</b>	Court of Justice of the European Union
<b>CPR</b>	Common Provisions Regulation
<b>CVM</b>	Cooperation and Verification Mechanism
<b>ECHR</b>	European Convention of Human Rights and Fundamental Freedoms
<b>EMU</b>	Economic and Monetary Union
<b>EU</b>	European Union
<b>EURODAC</b>	European Asylum Dactyloscopy Database
<b>QMV</b>	Qualified Majority Voting
<b>TFEU</b>	Treaty on the functioning of the European Union
<b>TEU</b>	Treaty on the European Union
<b>VAT</b>	Value Added Tax

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## EXECUTIVE SUMMARY

The rule of law, democracy and fundamental rights are all key values among those listed in Article 2 of the Treaty on European Union (TEU). They have a “constitutional” nature. The EU pledges to promote these values (Article 3 TEU) and to protect them through various instruments, in particular through the two-phase mechanism laid down in Article 7 TEU: Firstly, Article 7 (1) TEU provides for a prevention mechanism which can be initiated by the Parliament, the Commission or one third of the EU Member States if the Council determines that there is a risk of a serious and persistent breach of EU values. Secondly, Article 7 (2–3) TEU provides for a sanction mechanism which can be triggered by the Commission or one third of the Member States.

In addition to Article 7 TEU mechanism – which could lead to the withdrawal of the voting rights of a Member State in the community institutions – there is another Treaty-based mechanism to safeguard the respect of the founding values and principles: according to the infringement procedure (Article 258–260 TFEU), the Commission, as the “guardian of the Treaties”, can report a breach of the EU law by a Member State to the Court of Justice of the European Union. If the Court finds that the Member State concerned has failed to fulfil its obligations under the Treaties, the Member State must “take the necessary measures to comply with the judgment”.

To complement the above-mentioned mechanisms, in 2014, the Commission adopted the so-called Rule of Law Framework “to resolve future threats to the rule of law in Member states before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met”<sup>1</sup>. The mechanism is based on a prior dialogue with the Member State concerned with the aim of avoiding any recourse to Article 7 TEU.

This study offers an overview and analytical approach of these mechanisms, also in light of the recent Polish and Hungarian cases where there has been a breach of the Treaty values.

In addition, it examines the proposals made by the European Parliament and the Commission to improve the situation. It concludes that all initiatives have been positive. However, they either represent relatively insignificant advances on the measures already adopted by the EU or imply reforms of the Treaties that are highly unlikely to be undertaken now.

In our view, two truly useful measures could be taken without modifying the Treaties. First, the signing by the EU of the European Convention on Human Rights, submitting to the jurisdiction of the European Court of Human Rights in Strasbourg; and second, establishing an economic conditionality in the Cohesion Policy as a coercive means towards those States that seriously, flagrantly and repeatedly violate the rule of law, democracy or fundamental rights, once Article 7(1) TEU has been applied to them or in the event of a final decision from the Court of Justice of the European Union.

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<sup>1</sup> European Commission, Communication “A New EU Framework to strengthen the Rule of Law” of 19 March 2014, COM(2014)158 final-2, p. 2.

The rule of law and other values and principles such as democracy and fundamental rights set out in Article 2 TEU are the true “constitutional” principles of the EU. Hence the importance of promoting and safeguarding them. No state can join the EU without respecting these founding values and principles, and a Member State can be sanctioned if it violates them.

However, over the last few years, there have been cases in which, unfortunately, some Member States have violated in a serious and persistent manner the founding values and principles of the EU, particularly the rule of law. Therefore, it is urgent to ensure that there are efficient mechanisms available to guarantee their respect within the EU.

This study aims to examine the legal framework of the founding values and principles of the EU and the instruments to safeguard them, and look into the specific cases that have arisen.

Chapter 1 studies the concept of the rule of law as well as the place of the rule of law and other founding values of the EU (Article 2 TEU) in the legal and constitutional makeup.

Chapter 2 analyses the instruments at the EU’s disposal to uphold the founding values and principles of the European project and, in particular, the impact of the mechanisms laid down in Article 7 TEU and Article 258 TFEU, as well as the Rule of Law Framework adopted by the Commission and the Annual Rule of Law Dialogue with the Member States launched by the Council.

Chapter 3 focuses on the most relevant and topical cases to have challenged respect for the rule of law in the Union: Poland and Hungary. At the same time, it looks into the interpretation of Article 2 in relation to Article 4 TEU.

Lastly, Chapters 4 and 5 list out the proposals put forward by the Parliament and the Commission to improve respect for the rule of law, democracy and fundamental rights and introduces policy recommendations addressed to the most relevant actors, including the Parliament.

# 1. THE FOUNDING VALUES AND PRINCIPLES OF THE EUROPEAN UNION

## 1.1. The founding values and principles

Article 2 of the Treaty on European Union (TEU) reads as follows:

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

Article 2 TEU provides that “the Union is founded” on values that become the parameter by which to judge Member States, both at the time of their admission into the Union and at the time of their possible sanction or suspension in view of a violation of those values.

Article 49(1) TEU provides that “(a)ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”.

The founding values and principles are the basic test for the membership of the Union. Article 7 TEU provides for the possible suspension of certain rights deriving from membership of the Union of a State that has seriously violated the values set out in Article 2 TEU.

Therefore, referring in the Treaty to the values as the foundation of the Union is not just a rhetorical expression. This provision can have concrete practical implications and is of extraordinary importance. Respect for the values is a prerequisite for belonging to the Union and the failure to observe them is a ground for the suspension of a Member State's rights in the Union.<sup>2</sup>

The essential values or principles in the Treaties are fundamental rights, democracy and the rule of law. On a different note, the Treaty of the European Union is the first EU primary law act referring to “human dignity” as a value of the Union. Dignity is the foundation of all rights, which is why it also takes first place in the Charter of Fundamental Rights of the European Union (Article 1), along with “freedom, equality and solidarity” (Preamble of the Charter)<sup>3</sup>.

The EU's commitment to fundamental rights is enshrined in Article 6 TEU, in its triple reference to the common constitutional tradition, the Charter of Fundamental Rights of the European Union itself and the provision to accede to the European Convention of Human Rights and Fundamental Freedoms (ECHR).<sup>4</sup> The fundamental rights guaranteed by the ECHR and those resulting from the constitutional traditions common to the Member States form part of the

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<sup>2</sup> See López Garrido (Director), *Lecciones de Derecho Constitucional de España y de la Unión Europea (Vol. I)*, Valencia, Tirant lo Blanch, 2018, pp. 199 ff. and López Castillo (director), *Instituciones y Derecho de la Unión Europea (vol. I)*, Valencia, Tirant lo Blanch, 2<sup>nd</sup> ed. 2018, pp. 42-58.

<sup>3</sup> In the European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights ( 2015/2254(INL)), the Parliament reminds that according to the Opinion 2/13 of the European Court of Justice of the European Union and its case-law, the rights recognized by the Charter of Fundamental Rights of the European Union are “at the heart of the legal structure of the Union and respect for those rights in a condition for the lawfulness of Union acts, so that measures incompatible with those rights are not acceptable in the Union” (recital C), p.162-177.

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Available at: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

general principles of the Union's law (Article 6 (3) TEU). As for democratic legitimacy, it is consolidated in Title II TEU (Articles 9 to 12).

## 1.2. Rule of law "government by laws not by men"<sup>5</sup>

The idea of the rule of law rests on one aim: to avoid arbitrariness in the use of power. The core of the rule of law lies in the principle of lawfulness. Citizens cannot be the object of any other administrative measures than those authorised by law (the principle of legal reservation). There is rule of law from the moment that the law defines the relations between State and citizens and they can turn to the courts in the event of a violation of the law.<sup>6</sup>

As regards the EU, the first judicial reference to the rule of law was made by the Court of Justice in its sentence *Les Verts v European Parliament*<sup>7</sup> in 1983. In its judgement, the Court stated that the Union (then Community) is "a community based on the rule of law":

*"It must first be emphasised in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles (230) and (241), on the one hand, and in Article (234), on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions".*

In 1993, the European Council adopted the well-known criteria for assessing whether an applicant State was eligible to accede to the EU. Copenhagen criteria include also **the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities** and are referred to in Article 49 TEU:

*"Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. [-- --] The conditions of eligibility agreed upon by the European Council shall be taken into account".*

The rule of law is one of those criteria. Subsequently, it would come to form part not only of the Union's "values", but also to be considered a "principle" in the Preamble of the Charter of Fundamental Rights of the EU.

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<sup>5</sup> Justice Marshall, *Marbury v. Madison*, The Supreme Court of the United States, 1803.

<sup>6</sup> On the evolution of the concept of the rule of law, please see: Orlandi, M.A., *Stato di Diritto e tutela dei diritti fondamentali nell'evoluzione costituzionale francese e dell'Unione Europea*, in *Il Diritto Costituzionale Comune Europeo. Principi e Diritti Fondamentali*, a cura di Michele Scudiero, Vol. primo, III Tomo, pp. 1,043 ff. Jovene Editore, 2002.

<sup>7</sup> Case 294-83, Judgement of the Court of 23 April 1986, *Les Verts v European Parliament*, ECLI:EU:166, paragraph 23.

The European Commission for Democracy through Law of the Council of Europe (the Venice Commission) has identified the following intrinsic components of the notion<sup>8</sup>:

- i) Legality, which includes transparent, accountable and democratic processes for enacting laws;
- ii) Legal certainty, which is deemed essential to ensure confidence in the judicial system, and includes accessibility and 'foreseeability';
- iii) Prohibition of arbitrariness on the part of the State and its authorities;
- iv) Access to justice for those subject to administrative action before independent and impartial courts, including judicial review of administrative acts;
- v) Respect for human rights by State authorities and the guaranteeing of human rights for everyone within the State authorities' jurisdiction; and finally,
- vi) Non-discrimination and equality before the law guaranteed and assured by the State.

In 2013, the then Vice-President of the European Commission and Commissioner for Justice Viviane Redding provided a suitable and complete definition for the concept of "rule of law" in 2013<sup>9</sup>:

*"By 'rule of law', we mean a system where laws are applied and enforced (so not only 'black letter law') but also the spirit of the law and fundamental rights, which are the ultimate foundation of all laws. The rule of law means a system in which no one – no government, no public official, no dominant company – is above the law; it means equality before the law. The rule of law also means fairness and due process. It means guarantees that laws cannot be abused for alien purposes, or retrospectively changed. The rule of law means that justice is upheld by an independent judiciary, acting impartially. It means ultimately a system where justice is not only done, but it is seen to be done, so that the system can be trusted by all citizens to deliver justice".*

This is what Article 19 TEU means. It enshrines the principle of legal protection as an obligation not only for the Union through the Court of Justice of the European Union (CJEU), but also of the Member States themselves in their domestic legislation, through the appropriate remedies.

*"For the European Union, the rule of law is of particular importance. The Union is a unique construction, as it is not bound together by force, by a common army or a common police force, but only by the strength of the rule of law. Very rightly, Walter Hallstein, the Commission's first President, called the European Community a 'Community based on the rule of law', 'Rechtsgemeinschaft' in German, 'Communauté de droit' in French".<sup>10</sup>*

According to Walter Hallstein, the European Community is a Community of law in three senses: it is a creation of law (**Rechtsschöpfung**); it is a source of law; and it is a legal order. Despite its

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<sup>8</sup> *The Triangular relationship between Fundamental Rights, Democracy and Rule of Law in the EU-Towards an EU Copenhagen Mechanism*, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2013, pp. 26-27. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE\\_ET\(2013\)4930\\_31\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)4930_31_EN.pdf)

<sup>9</sup> Redding, V., "The EU and the Rule of Law – What next?", Centre for European Policy Studies /Brussels, 4 September. 2013 (Speech/13/677).

<sup>10</sup> Pernice, I., *Der Beitrag Walter Hallsteins zur Zukunft Europas*, WHI-Paper 9/01 (pdf), available at: <https://www.rewi.hu-berlin.de>

basic economic orientation, the relationship between the Member States and the Community is governed by the law.

European public power, therefore, is under the law. Always within the framework of its powers and in accordance with the procedures laid down for that purpose (cf. Articles 288 and 296 TFEU), it only acts, or preferably acts, through legal instruments, through the law.<sup>11</sup>

With regard to international organisations such as the EU, it is essential to highlight the foundational and decisive nature for the exercise of public power that the rule of law possesses.

In its resolution of 25 October 2016,<sup>12</sup> the Parliament rightly states that “respect for the rule of law within the Union is “a prerequisite” for the protection of fundamental rights, as well as for the upholding of all rights and obligations deriving from the Treaties and from international law, and is a precondition for mutual recognition and trust as well as a key factor for policy areas such as the internal market, growth and employment, combatting discrimination, social inclusion, police and justice cooperation, the Schengen area, and asylum and migration policies, and as a consequence, the erosion of the rule of law, democratic governance and fundamental rights are a serious threat to the stability of the Union, the monetary union and the common area of freedom, security and justice and prosperity of the Union”.

The rule of law is a true constitutional principle in the Union. It is inherent in its existence as a Community of Law. The EU Institutions, just like its Member States, are, therefore, subject to judicial control. The Court of Justice has stated this on repeated occasions.

The rule of law and the other founding values and principles are common to the Member States. Thus, these constitutional values and principles contribute to making EU primary legislation a true “material” Constitution, even if it is not formally so, given that law takes the shape of international treaties. That ensures that the Member States trust, and recognise, all the legal systems of the other Community members.

The European Court of Human Rights has stated that the rule of law, insofar as it is inherent in the European Convention on Human Rights, is the basic condition for the exercise of human rights and even for the relations on which coexistence in a civil society is legally based (Caracciolo).<sup>13</sup>

The importance of the rule of law in the Union is clearly reflected, in short, in the famous **Van Gend & Loos judgement** (1962) of the Court of Justice of the then European Community: “The Community constitutes a new legal order... for the benefit of which the (Member) States have limited their Sovereign rights.”<sup>14</sup>

Laurent Pech is right to view the content of Article 2 TEU on European values – including the rule of law – as a positive development that enables connecting the **constitutional** system of

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<sup>11</sup> Tuori, K, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge, 2014.

<sup>12</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0409+0+DOC+XML+V0//EN>

<sup>13</sup> Caracciolo, I., *La rilevazione dei valori democratici nell'Unione Europea. Una proiezione internazionale per l'identità giuridica occidentale*, Napoli, Editoriale Scientifica, 2003, p. 76.

<sup>14</sup> See the interpretation of this that Lord Mackenzie Stuart makes in *The European Communities and the Rule of Law*, London, Sterens and Sons, 1977.

the EU to the key principles of Western constitutionalism. In the era of globalisation, says Pech, quoting Tridimas, when there are serious challenges to the democratic legitimacy of the nation-state, the rooting of those values in constitutional treaties seeks to secure legal protection and certainty. At the heart of that European constitutionalism lies the aspiration that a new social and political order will take hold and that the transfer of powers to supranational organisations will be accepted as it will be accompanied by ideals that characterise liberal democracies<sup>15</sup>.

In the case C-127/07, Advocate General Poiares Maduro has interpreted that the Article 2 TEU expresses the respect for national constitutional values. Consequently, the Member States are reassured that the EU law will not threaten the fundamental values of their constitutions. At the same time, Member States have transferred the task of protecting those values to the CJEU. Thereby a common European identity is successfully forged in practice<sup>16</sup>. In fact, the Member States' courts have contributed to strengthening the value (or constitutional principle) of the rule of law while interpreting the EU law in the light of that principle.

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<sup>15</sup> Pech, L. *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09, 2009, p. 50.

<sup>16</sup> Opinion of the Advocate General in Case C-127/07, *Arcelor* (2008), para. 16, *Ibidem*, p. 51.

## 2. THE EFFECTIVENESS OF THE EU MECHANISMS AIMED AT PROMOTING AND SAFEGUARDING VALUES AND PRINCIPLES

### 2.1. EU mechanisms on enforcing the rule of law and other founding values and principles

The proclamation of the EU's "values" by Article 2 TEU in the wording of the Treaty of Lisbon (the Treaty of Amsterdam had called them "principles") would be no more than a mere empty assertion if it were not accompanied by effective mechanisms for making those values real and concrete.

There are several mechanisms, but the most prominent in a regulatory and political sense is the one laid down in Article 7 TEU, which is particularly important in relation to the value of the rule of law.

#### 2.1.1. Article 7 TEU

Article 7 TEU gives the Union the power to ensure respect for and adherence to the common values of the Member States. It does so by establishing two mechanisms – a prevention mechanism and a sanction mechanism – that can lead to a suspension of "certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of the Member State in the Council" (Article 7 (3) TEU). The suspension is, in any case, reversible and modifiable (Article 7 (3 to 4 TEU):

##### *Article 7 TEU*

- 1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2.*
- 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.*
- 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.*
- 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.*
- 4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.*
- 5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.*

Since Article 7 contains measures with theoretically severe consequences, there are certain provisions to soften it. First, the Council (by a majority of four fifths of its members and after obtaining the consent of the Parliament) has to begin by “determining that there is a **clear risk** of a serious breach” of the values – one or several – enshrined in Article 2 TEU by a Member State, always on a reasoned proposal by one third of the Member States, by the Parliament or by the Commission (Article 7(1) TEU).

The next phase, which is the determination – not only the “risk” now – of an actual **serious and persistent breach** of the values referred to in Article 2 TEU, leading to the very severe sanction of the suspension of rights, has to be piloted and decided by the European Council by **unanimity** (with the exception of the Member State concerned) (Article 7 (2) TEU).

The determination of the breach of Article 2 TEU by the European Council must also be on the proposal of one third of the Member States or of the Commission and after obtaining the consent of the Parliament (Article 7(2) TEU).

A similar procedure exists in other international organisations. Article 6 of the United Nations Charter provides for the expulsion by the General Assembly – on the proposal of the Security Council – of a Member State that has **persistently** violated the principles of the Charter. However, there are five states on the Security Council that have the right of veto<sup>17</sup>.

As regards the Council of Europe, Article 8 of its Statute<sup>18</sup> allows the Committee of Ministers to suspend the rights of representation of any of its 47 Member States that has **seriously violated** the principles of the rule of law and of fundamental rights and to invite that Member State to withdraw from the organisation. This authority has never been exercised.

According to the Commission Communication on Article 7 of the Treaty on European Union, the Article 7 TEU procedure is not intended to resolve individual cases – as is the case with the ECHR –, but to remedy a breach of the values expressed by the precept by means of a “comprehensive political approach”<sup>19</sup>:

“The procedure laid down by Article 7 of the Union Treaty aims to remedy the breach through a comprehensive political approach. It is not designed to remedy individual breaches. A combined reading of Articles 6(1) and 7 of the Union Treaty shows that there must be a breach of the common values themselves for the existence of a breach within the meaning of Article 7 to be established. The risk or breach identified must therefore go beyond specific situations and concern a more systematic problem. This is in fact the added value of this last-resort provision compared with the response to an individual breach. This is not, of course, to say that there is a legal void. Individual fundamental rights breaches must be dealt with through domestic, European and international court procedures. The national courts, the Court of Justice, in the field covered by Community law, and the European Court of Human Rights all have clearly defined and important roles to play here.”

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<sup>17</sup> Charter of the United Nations, 1945, Article 23(1). Available at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

<sup>18</sup> Statute of the Council of Europe, 5 May 1949. Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001>

<sup>19</sup> Communication from the Commission to the Council and the European Parliament of 15 October 2003 on Article 7 of the Treaty on European Union COM(2003) 606 final. Respect for and promotion of the values on which the Union is based. Available at: <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf>

The risk and confirmed breach of the rule of law and the other values of Article 2 TEU are concepts that afford the Council a broad framework of discretion and have to reach the dimension of a systemic problem. In other words, very visible and profound infringements of principles embedded in the rule of law, such as the independence of the judiciary and the irremovability of judges and courts, or repeated contempt for the principle of legality.

The Article 7 TEU procedure may even lead to the suspension of the non-compliant Member State's right to vote to stop its decisions contaminating the other EU bodies mentioned in Article 2 TEU. It is an entirely political decision by the Council, in which, paradoxically, the CJEU cannot intervene, except to monitor the merely formal regularity of the procedure on the basis of Article 269 TFEU:

*"The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article. Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request".*

In Chapter 3, we shall look in detail into the two cases in which Article 7 TEU has been activated:

- On 20 December 2017, the Commission, for the first time, determined that there was a clear "risk" of a serious breach of the rule of law in Poland and invoked Article 7(1) TEU, submitting a reasoned proposal for a Decision of the Council on the matter<sup>20</sup>;
- The same thing has happened in the case of Hungary: After successive European Parliament resolutions on the political situation and fundamental rights in the country<sup>21</sup>, in the Resolution of 12 September 2018<sup>22</sup>, the Parliament approved a proposal in which it called 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.

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<sup>20</sup> See Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, of 20.12.2017, COM (2017) 835 final. It is entitled: "Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland". Available at : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0835>

<sup>21</sup> See, in particular:

- European Parliament resolution of 16 February 2012 on recent developments in Hungary (2012/2511(RSP)), available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0053&language=EN>,

- 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) (2012/2130(INI)), available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0315&language=EN&ring=A7-2013-0229>, and

- European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P8-TA-2015-0227%200%20DOC%20XML%20V0//EN>.

<sup>22</sup> 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)). Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN&language=EN>

### 2.1.2. The Commission and the Court of Justice: the infringement procedure

Along with Article 7(1) TEU, also Article 258 TFEU procedure can be used to control and, where appropriate, sanction a Member State that breaches the rule of law and other founding values and principles:

#### *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.*

According to Article 258 TFEU, the Commission may take legal steps against a Member State in case of a breach. The first step is to deliver a reasoned opinion on the matter after giving the Member State concerned the opportunity to submit its observations (by letter of formal notice). If the Member State does not comply with the opinion within the period laid down by the Commission, the Commission can launch a legal action against the Member State before the CJEU.

Similarly, any Member State can appeal to the CJEU should it consider another Member State has failed to comply with any of its obligations under the Treaties.

If the CJEU finds that the defendant Member State indeed failed to fulfil its obligations under the Treaties, the state must, according to Article 260(1) TFEU, “take the necessary measures to comply with the judgment”. However, not all Member States comply with a judgment declaring its infringement. Therefore, Article 260(2) TFEU provides that the Commission – if it believes that the judgment has not been complied with – may bring the case back to the CJEU. Before doing so, it must give the Member State the opportunity to submit its observations.

The Commission has used the infringement procedure with regard to the situation in Poland. This will be examined further in Chapter 3.

### 2.1.3. Rule of law Framework

The Article 7 TEU mechanisms have existed since the Treaty of Amsterdam, but they have proved difficult to apply. The punitive consequences of Article 7, combined with the somewhat abstract nature of the situations that would allow using the Article, has led the Commission to put forward an alternative – yet compatible – way of addressing the problem of a Member State that repeatedly infringes the values set out in Article 2 TEU. In March 2014, in its **Communication on a new EU Framework to strengthen the Rule of Law**<sup>23</sup>, the Commission argued that the infringement procedure under Article 258 TFEU could only be launched when a specific provision of community law was breached. However, there were situations where it was not possible to consider an infringement of a specific EU law provision yet they still posed a “systemic threat” to the rule of law. Hence, Article 258 TFEU was

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<sup>23</sup> Communication from the Commission to the European Parliament and the Council - A new EU Framework to strengthen the Rule of Law (COM(2014) 0158 final).

insufficient and it was necessary to create another complementary way to prevent the breach by a Member State of the values of the Union and to strengthen the rule of law.

The new mechanism established by the Commission sought to prevent the activation of Article 7 TEU and to do so it moved to take early intervention measures. According to the communication<sup>24</sup>, the Rule of Law Framework can be activated in situations where the Member State's authorities take measures or tolerate situations which are **"likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law"**. The main purpose is to address those threats to the rule of law which are of a **systemic nature**.

Consequently, there needs to be a threat towards the political, institutional and/or legal order of a Member State as such or its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists. This can happen, for example, as a result of adopting new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework is activated when **national rule of law safeguards** do not seem capable of effectively addressing those threats.

In the case of clear indications of a systemic threat to the rule of law, the Commission will initiate a "structured exchange" with the Member State concerned, with the following principles:

- focusing on finding a solution through a dialogue with the Member State concerned;
- ensuring an objective and thorough assessment of the situation at stake;
- respecting the principle of equal treatment of Member States; and
- indicating swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.

There are three stages in the process:

- 1) Commission assessment;
- 2) Commission recommendation; and
- 3) Follow-up to the recommendation.

Each stage is based on a continuous dialogue between the Commission and the Member State concerned, keeping the Parliament and the Council regularly informed.

The Commission turned to the Rule of Law Framework in the case relating to the situation in Poland, simultaneously applying Article 7(1) TEU. The Commission opened a dialogue with the Government of Poland in January 2016, under that Rule of Law Framework. It was precisely the lack of progress in that dialogue that prompted the Commission to invoke the Article 7(1) procedure on 20 December 2017 and submit the accompanying Reasoned Proposal for a Council Decision on the determination of an unequivocal "risk" of a serious breach of the rule of law by Poland.

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<sup>24</sup> See paragraph 4.1. of the Communication.

## 2.2. Other instruments for promoting and protecting the values of the EU

In addition to the three main mechanisms of an executive or judicial nature, the EU has developed other instruments which are more proactive and promote European values. These are only referred to in this study<sup>25</sup>:

- Cooperation and Verification Mechanism (CVM)<sup>26</sup> ;
- EU Anti-Corruption Report;
- Justice Scoreboard, which is part of the European Semester for economic policy coordination;
- EU inter-institutional annual reporting on fundamental rights and the EU Charter of Fundamental Rights.

Along with those instruments, we must point out that the EU's foreign policy is clearly geared to promoting EU values, as is the security and defence policy.<sup>27</sup>

## 2.3. The enforcement of the law in the fields of immigration and tax policies

### 2.3.1. Immigration

The Maastricht Treaty (Treaty on European Union) which entered into force on 1 November 1993, established a "three-pillar structure" for the EU. The third 'pillar' was cooperation in the fields of justice and home affairs which included migration and asylum policies. With the Amsterdam Treaty<sup>28</sup> which entered into force on 1 May 1999, asylum, migration and external border controls were moved into the first pillar. Consequently, decisions by the Council and the Commission now had to be taken by unanimous vote.

Since the abolition of the third pillar by the Lisbon Treaty, provisions on border checks, asylum and immigration (Chapter 2 of Title V TFEU) are adopted by Qualified Majority Voting (QMV) and codecision procedure. In fact, the Lisbon Treaty put a formal end to the issue of whether or not the EU is competent to legislate on both common asylum and immigration policy<sup>29</sup>.

The Lisbon Treaty introduced full jurisdiction to the Court of Justice over the whole "Area of Freedom, Security and Justice" (Title V of the TFEU). The Commission and Member States are allowed to bring infringement actions and the Parliament and individuals are allowed to bring actions before the CJEU for annulment (Articles 257 ff. TFEU).

In addition, on 1 May 1999 the Schengen area of free movement of people was incorporated into the Treaties by the Treaty of Amsterdam. The Treaty of Lisbon maintained the situation

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<sup>25</sup>European Parliament, Policy Department Citizens' Rights and Constitutional Affairs, 2013. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE\\_ET\(2013\)493031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf)

<sup>26</sup> *Assessment of the 10 years' Cooperation and Verification Mechanism for Bulgaria and Romania*, European Parliament, Policy Department for Budgetary Affairs, 2018. Available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2018\)603813](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)603813)

<sup>27</sup> Please see, for example, *Value for money: EU programme funding in the field of democracy and rule of law*, European Parliament, Policy Department for Budgetary Affairs, 2017. Available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2017\)5727](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)5727)

<sup>28</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997.

<sup>29</sup> Sabina Anne Espinoza and Claude Moraes, *The law and politics of migration and asylum: The Lisbon Treaty and the EU in the European Union after the Treaty of Lisbon*, edited by Ashiagor, D., Countouris, N. and Lianos, I., New York, Cambridge-University Press, 2012, p. 184.

(Article 20, para. 4 TEU and Article 7 of Protocol 19), so that today the Schengen area consists of 22 EU Member States and three non-Members (Iceland, Norway and Switzerland)<sup>30</sup>.

The problem of the effectiveness of the rule of law in the field of immigration and asylum lies not in law, but in its non-application by the States. The communitarisation of the right to asylum – the “so-called Dublin System” or the Common European Asylum System (CEAS) –, which is a fundamental right under the Charter of Fundamental Rights of the EU (Article 18), has been a step forward, especially as of 2013, but it has not managed to prevail over national systems of asylum. The situation deteriorated with the humanitarian crisis of 2015. The response of some Member States – particularly the Visegrad Group and Italy – has been to close their borders to refugees, in flagrant violation of the Geneva Convention of 1951 and the Protocol of 1967, as well as the EU’s own Treaties. Presently, there are 40 infringement procedures by the European Commission underway against Member States for not applying the CEAS.

The process of reform of the Dublin Regulation and the European Asylum Dactyloscopy Database (EURODAC) and transformation of the European Asylum Support Office into a European Asylum Agency announced by the Commission on 6 April 2015 is currently at a standstill for strictly political, not legal, reasons. Border checks have been extended to May 2019 in countries such as Germany, Austria, Denmark, Norway or the Visegrad Group.

### 2.3.2. Tax Policies

The EU’s powers on taxation are clear, legally speaking. Direct personal and corporate taxes are the jurisdiction of the Member States. Laws on indirect taxes can be harmonised, but always by unanimous decision of the Council, after consulting the Parliament and the Economic and Social Committee (Article 113 TFEU).

As a result, except in the case of VAT, there is no harmonisation of taxes in the EU, despite it being called “Economic and Monetary” (EMU). In view of the conduct of some Member States, engaging in “fiscal dumping” to attract capital to their territories, the Commission has had to turn to community rules on competition (prohibition of state aid) to combat that unfair competition<sup>31</sup>. Tax harmonisation is a pending issue of the Union.

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<sup>30</sup> See, on Schengen, Piris, J-C, *The Lisbon Treaty. A Legal and Political Analysis*, New York, Cambridge University Press, 2010, pp. 192 ff.

<sup>31</sup> Vid. Lopez Garrido, D., *The Ice Age. Bailing out the Welfare State.*, London Publishing Partnership, London, 2015. Chapter 5.

### 3. THE REAL ENFORCEMENT OF THE RULE OF LAW FRAMEWORK

#### 3.1. Overview and analytical approach

The following section will attempt to summarise the complex reaction of the EU legal framework in the face of the two examples of claimed illiberalism at the heart of the EU: Poland and Hungary. These countries caused greatest concern during the course of the current legislature that is now drawing to a close<sup>32</sup>, and the manner in which these two difficult cases are handled may have a determining influence on the next legislature. It is therefore essential that the EU pursue a clear constitutional policy, one that takes account of the existing examples (discussed in detailed below) and clarifies the shared commitments that underpin the Union's constitutional basis, without which the legitimacy of the EU itself will be at risk.

It is in this context that we should understand the explicit call in the Parliament resolutions with regard to the situations in Poland and Hungary, emphasising the requirement for cooperation in good faith as an essential element of the articulation of powers within a Member State of the EU.

The rising illiberal currents within Europe show no signs of receding<sup>33</sup>. If we look at the latest trends we cannot rule out the possibility that the Polish and Hungarian examples could be emulated by other proponents of national-populism at the next Parliament elections<sup>34</sup>. Although these movements have progressed at different speeds and their programmes vary in ways that reflect the economic and political scenarios in which they operate, such political movements already hold government positions in some countries (most strikingly, in Austria and Italy) or occupy a significant portion of the political spectrum, with their support measured in double digits.<sup>35</sup>

We will now analyse the details of the European political response in defence of the EU's constitutional foundations, upon which the integration process depends, looking at the actions announced and implemented with respect to the cases of Poland (3.2) and Hungary (3.3).

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<sup>32</sup> See, in particular, European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)). Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0442&language=EN> and European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/ 2656 (RSP)),. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0216+0+DOC+XML+V0//EN>

<sup>33</sup> See, for example, European Parliament resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (2017/2125(INI)), available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0056+0+DOC+XML+V0//EN>

<sup>34</sup> See, for example, European Parliament resolution of 14 March 2018 on the next MFF: preparing the Parliament's position on the MFF post-2020(2017/2052(INL)) where the Parliament urges the Union to demonstrate that it stands together and is able to address political developments such as the rise of populist and nationalist movements (paragraph 7). Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0075+0+DOC+XML+V0//EN&language=EN>

<sup>35</sup> There is, of course, a background to the current illiberal episode. These range from the inclusion of Joerg Haider's Freedom Party in an Austrian coalition government in 2000, an event which was met by a diplomatic boycott although there were no provisions in the Treaty for official action, through the political confusion in Italy under Berlusconi (and Buttiglione), to the more recent revolt against the presidency of Traian Băsescu in Romania (cf., among others, Michael Blauberger and R. Daniel Kelemen, "Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU", in *Journal of European Public Policy*, 24, 2017, pp. 321–336.)

## 3.2. The case of Poland

### 3.2.1. Background

Events in Poland, in particular the political and legal dispute concerning the composition of the Constitutional Tribunal, and a new law relating to the functioning of the Supreme Court, has raised concerns regarding the respect of the rule of law. The table below gives a brief overview of the key developments in 2016 and 2017.

**Table 1 : Timeline in 2016 and 2017**

<b>2016</b>	
	<ul style="list-style-type: none"> <li>• <b>On 13 January</b>, the Commission launched a dialogue with the Polish authorities in order to seek solutions to its concerns regarding the Constitutional Tribunal.</li> <li>• <b>Between February and July</b>, the Commission and the Polish Government exchanged a number of letters and met on several occasions.</li> <li>• <b>On 13 April</b>, the Parliament voted for a resolution urging the Polish Government to respect, publish and fully implement the judgments of the Constitutional Tribunal.</li> <li>• <b>On the 1st of June</b>, in the absence of solutions from the Polish authorities, the Commission formalised its concerns by sending a Rule of Law Opinion to the Polish Government.</li> <li>• <b>On 27 July</b>, the Commission adopted a Rule of Law Recommendation, stating that there was a systemic threat to the rule of law in Poland. It invited the Polish authorities to address its concerns within three months, but the Polish Government informed the Commission that it disagreed on all the points raised.</li> <li>• <b>By 21 December</b>, important issues had remained unresolved, and the Commission adopted a second Rule of Law Recommendation, concluding that there continued to be a systemic threat to the rule of law in Poland. The Polish authorities again disagreed with the Commission's assessment.</li> </ul>
<b>2017</b>	
	<ul style="list-style-type: none"> <li>• <b>On 20 January</b>, the Polish Government announced a comprehensive reform of the judiciary in Poland.</li> <li>• <b>On 16 May</b>, the Commission informed the Council on the situation in Poland. There was broad support among Member States for the Commission's role and efforts to address the issue. Member States called upon Poland to resume the dialogue with the Commission.</li> <li>• <b>On 13 July</b>, the Commission wrote to the Polish authorities expressing its concerns about the pending legislative proposals on the reform of the judiciary, underlining the importance of refraining from adopting the proposals as they were drafted at that time, and calling for a meaningful dialogue. The Commission explicitly invited the Polish Foreign Minister and Polish Justice Minister to meet at their earliest convenience. These invitations were ignored.</li> <li>• <b>By 26 July</b>, the Polish Parliament had adopted four judicial reform laws; two of the laws had been signed into force by the President, and two of the laws were vetoed by the President and</li> </ul>

subject to further legislative discussions. The Commission adopted a third Rule of Law Recommendation, reiterating its existing concerns about the Constitutional Tribunal and setting out in addition its grave concerns about the judicial reforms. The Recommendation set out a list of proposed remedies, and urged the Polish authorities in particular not to take any measure to dismiss or force the retirement of Supreme Court judges.

- **On 29 July**, the Commission launched an infringement procedure on the Polish Law on Ordinary Courts, also on the grounds of its retirement provisions and their impact on the independence of the judiciary. The Commission referred this case to the Court of Justice on 20 December 2017. The case is pending before the Court.
- **On 25 September**, the Commission again informed the Council of the situation in Poland, and there was again broad agreement on the need for Poland to engage in a dialogue with the Commission.
- **On 26 September**, the President of the Republic transmitted to the Sejm two new draft laws on the Supreme Court and on the National Council for the Judiciary.
- **On 15 November**, the Parliament adopted a Resolution expressing support for the Recommendations issued by the Commission, and considering that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU.
- **On 8 December**, the two new draft laws proposed by the President of the Republic were adopted by the Sejm, the lower house of the Polish Parliament. On the same day, the Venice Commission of the Council of Europe adopted two opinions on the judicial reforms in Poland, concluding that they enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to judicial independence.
- **On 15 December**, the two laws were approved by the Polish Senate, the upper house of the Polish parliament.
- **On 20 December**, the Commission adopted its Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland which included a Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law

**Source:** extracts from the reasoned proposal<sup>36</sup> and the Commission press release from 24 September 2018<sup>37</sup>

### 3.2.2. Recent development-Infringement procedure

The new Polish Law on the Supreme Court entered into force on 3 April 2018. It lowers the retirement age for Supreme Court judges from 70 to 65. The law affects 27 of the Court's 72 judges and gives the President of the Republic the power to increase the number of judges.

The new age limit applies as from the date of entry into force of that Law. The Supreme Court judges may continue in active judicial service beyond the age of 65 with the consent of the

<sup>36</sup> Idem.

<sup>37</sup> [http://europa.eu/rapid/press-release\\_IP-18-5830\\_en.htm](http://europa.eu/rapid/press-release_IP-18-5830_en.htm)

President of the Republic of Poland in case the judge concerned provides a health certificate and a statement confirming his/her will to continue in active service.

Consequently, according to the Law, serving Supreme Court judges who reached the age of 65 before the Law entered into force on 3 July 2018 were required to retire on 4 July 2018, unless they had submitted the necessary documents by 3 May 2018 and the President granted them permission to continue in active service.

The President is not bound by any criteria when deciding whether a judge can continue or not, and the President's decision is not subject to any form of judicial review. The Law on the Supreme Court also gives the President the power to increase freely the number of Supreme Court judges until 3 April 2019.<sup>38</sup>

On 26 June 2018, at the General Affairs Council hearing on the rule of law in Poland on 26 June 2018 in the context of Article 7(1) TEU, the Polish authorities did not provide an adequate response to the need to take measures on the matter. In view of that, and with no progress in the dialogue with Poland, the College of Commissioners decided on 27 June 2018 to empower Vice President Frans Timmermans to launch an infringement procedure as a matter of urgency.

The Commission began with a Letter of Formal Notice on 2 July 2018. The Polish authorities replied to the Letter of Formal Notice on 2 August 2018, rejecting the Commission's concerns.

Next, on 14 August 2018, the Commission sent a Reasoned Opinion to the Polish authorities whose response did not satisfy the Commission. The Commission still considered the law being incompatible with the rule of law, in particular with the principles of legal protection and of judicial independence. The independence of the judicial bodies, and, therefore, the irremovability of judges, are essential if judicial cooperation among Member States of the EU is to function. Therefore, Poland failed to fulfil its obligations under Article 19(1) TEU<sup>39</sup> in connection with Article 47 of the Charter of Fundamental Rights of the EU.

In view of the Polish Government's unsatisfactory response, on 24 September 2018, the Commission agreed to refer the matter to the Court of Justice of the EU and to ask the Court of Justice for interim measures to restore Poland's Supreme Court to its situation prior to 3 April 2018, when the contested law on the Supreme Court took effect.

On 2 October 2018, the Commission brought an action for failure to fulfil obligations before the Court of Justice. The Commission considered that Poland has infringed EU law by, first, lowering the retirement age and applying that new retirement age to judges appointed to the Supreme Court up until 3 April 2018 and, second, granting the President of the Republic of Poland the discretion to extend the active judicial service of Supreme Court judges.<sup>40</sup>

It also requested provisional measures, which the Vice-President of the CJEU, Judge Silva Lapuerta, accepted by an Order of 19 October 2018<sup>41</sup>.

For the first time, provisionally and with retroactive effect, the CJEU has blocked a reform of a constitutional body that, according to the Vice-President of the CJEU, entails a "profound and

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<sup>38</sup> <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180159en.pdf>

<sup>39</sup> According to Article 19(1), "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

<sup>40</sup> Case: C-619/18, ECLI:EU:C:2018:910.

<sup>41</sup> ECLI: EU: 2018: 852.

immediate" change in the composition of the Supreme Court. They are "urgent interim" measures that will have to be ratified by the CJEU Vice-President herself. The Court has the possibility of executing the interim measures (Article 260 TFEU) through penalty payments or financial penalties.

At the time of writing, the CJEU has not yet given its decision on the case. However, 21 November 2018, the Polish Parliament went back on its initial agreement and complied with the CJEU's interim measure.

We should recall that on 29 July 2017 the Commission had already launched an infringement procedure on the Polish Law on Ordinary Courts for going against judicial independence. The Commission referred the case to the Court of Justice of the EU on 20 December 2017. It remains pending resolution.

It is worth noting that, in the aforementioned Order of its Vice-President (19 October 2018),<sup>42</sup> the CJEU resolved that Poland must immediately suspend the application of national provisions relating to the reduction in the age of retirement of its Supreme Court judges.<sup>43</sup>

This precautionary decision, *inaudita altera parte*, under the provisions of Article 160(7) of the Procedural Regulations of the CJEU, is designed to safeguard the effective impact of a potential decision in favour of the Commission (if the appeal were to be accepted, the immediate application of the provisions in question could irretrievably undermine the fundamental right to an independent judge).<sup>44</sup> The decision postpones any decision as to the basis of the claims submitted by the Commission, lodged on 2 October 2018 on the basis that the reduction in the retirement age of judges of the Supreme Court and the faculty conferred on the President of the Republic, granting him the power to extend the active juridical function of Supreme Court judges on a discretionary basis, would infringe Union law in so far as it would weaken the guarantees of effective judicial oversight clearly established in Article 19(1) TEU, and set out as a fundamental aspiration in Article 47 of the Charter of Fundamental Rights of the EU.)

The Order of 19 October 2018 ordered immediate suspension of the regulations in question, and the adoption of the necessary measures to ensure that the Supreme Court judges concerned continue to perform their functions, that no measures are taken with the purpose of appointing new judges to replace them, and that the Commission is provided with monthly reports of all measures taken to conform fully with the provisional measures in this Ruling.

As noted above, the Polish Parliament complied with the CJEU Order by amending its Supreme Court Law on 21 November 2018<sup>45</sup>.

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<sup>42</sup> ECLI: EU: 2018: 852.

<sup>43</sup> That not any alteration to the conditions under which judges perform their juridical function would constitute a similar threat, in particular if the modifications consisting in reduced payment for national public service reflect objectifiable criteria, in accordance with other relevant constitutional requirements (austerity measures linked to the suppression of excessive budget deficit and a European Union financial aid programme) was clarified in the recent CJEU Ruling of 27 February 2018, as. C-64/16, ASJP and Court of Auditors (ECLI: EU: C: 2018: 117).

<sup>44</sup> *Ordonnance* of the Vice-President of the Court, 19 October 2018, as. C-619/18 R, request for provisional measures. ECLI:EU:C:2018:852.

<sup>45</sup> Finally, by Order of the Court of Justice of the European Union, Grand Chamber, of 17 December 2018, the measures previously agreed, by the aforementioned Order of 19 October, are hereby confirmed. Moreover, by Order of the President of the ECJ of 15 November 2018, it would be decided to deal with the action for failure to

We should also remember that Preliminary Ruling of 25 July 2018<sup>46</sup>, issued at the request of the Irish High Court, provided the CJEU with the opportunity to give an opinion with respect to European arrest warrants issued by Polish juridical bodies, based on the proven systemic undermining of the rule of law in Poland. On that occasion, the CJEU, while stating that the rejection of a European warrant should be considered as an exception to the principle of mutual recognition that underpins the simplified extradition instrument in the Area of Freedom, Security and Justice (AFSJ), did not pass up the opportunity to expressly state that the judicial authorities of a Member State should refrain from handing over the individual concerned if that person could be at risk of suffering the violation of their fundamental right to an independent tribunal and, thus, the essential basis of their fundamental right to a fair trial, as a consequence of failings that could affect the independence of the judicial authorities of the Member State issuing the warrant.

The opposition of the subject of the extradition order, based in particular on the aforementioned proposal of the Commission of 20 December 2017, forced the Court to consider whether the threat to the rule of law in Poland raises the need for additional checks, (ruling *Aranyosi and Caldaru*<sup>47</sup>), and, should this be the case, to ask whether the judicial authority issuing the warrant should be asked for additional information and, if so, what guarantees should be offered.

The response was that, with respect to the systemic undermining of the rule of law on which this proposal is based, the judicial authority “must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State (...) there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State.”<sup>48</sup>

### 3.2.3. Article 7 TEU procedure

As already noted in Chapter II, the Commission, by means of the Reasoned Proposal of 20 December 2017<sup>49</sup>, initiated a procedure to confirm the clear risk of serious breach of the rule of law by the Republic of Poland, in accordance with the provisions to this effect deriving from Article 7(1) TEU.<sup>50</sup> This initiative was the consequence of a fruitless dialogue between the Commission and the national authorities, starting in November 2015:

*“During the last two years, the Commission has made extensive use of the possibilities provided by the Rule of Law Framework for a constructive dialogue with the Polish authorities. Throughout this process the Commission has always substantiated its concerns in an objective and thorough manner. The Commission has issued a Rule of Law Opinion and three Rule of Law Recommendations. It has exchanged more than 25 letters*

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fulfil obligations in this case under the accelerated procedure, in accordance with Article 23a of the Statute of the ECJ and Article 133 of its Rules of Procedure.

<sup>46</sup> CJEU Ruling, Grand Chamber, 25 July 2018, case C-216/18 PPU. ECLI:EU:C:2018:586.

<sup>47</sup> CJEU Ruling, Grand Chamber, 5 April 2016, joined cases C-404/15 and C-659/15 PPU. ECLI:EU:C:2016:198.

<sup>48</sup> With respect to the preliminary ruling (ECLI: EU: C: 2018: 586), cf. Conclusions of AG *Tanchev*, presented 28 June 2018.

<sup>49</sup> Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, of 20.12.2017, COM (2017) 835 final. It is entitled: “Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland”.

<sup>50</sup> Council Decision proposal from the Commission, 20 December 2017, COM 2017, 835 final.

*with the Polish authorities on this matter. A number of meetings and contacts between the Commission and the Polish authorities also took place, both in Warsaw and in Brussels, mainly before the issuing of the first Rule of Law Recommendation. The Commission has always made clear that it stood ready to pursue a constructive dialogue and has repeatedly invited the Polish authorities for further meetings to that end.”<sup>51</sup>*

Also the Parliament has highlighted the fact that the constitutional policies pursued by the Polish authorities are in clear violation of the basic requirements of the system upon which the EU is founded. It has given numerous statements on a matter. On 15 November 2017, it adopted a resolution on the situation of the rule of law and democracy in Poland where it “believes that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and instructs its Committee on Civil Liberties, Justice and Home Affairs to draw up a specific report [-- --] with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU.<sup>52</sup> On 1 March 2018, the Parliament also adopted a resolution on the Commission’s decision to activate Article 7(1) TEU as regards the situation in Poland. In its resolution, the Parliament welcomes the Commission’s decision of 20 December 2017 to activate Article 7(1) TEU as regards the situation in Poland and supports the Commission’s call on the Polish authorities to address the problems. It calls on the Council to take swift action in accordance with the provisions set out in Article 7(1) TEU, and asks the Commission and the Council to keep the Parliament fully and regularly informed of progress made and action taken at every step of the procedure.<sup>53</sup>

The proposal of 20 December 2018 for a Council Decision provides the following:

*Article 1*

*There is a clear risk of a serious breach by the Republic of Poland of the rule of law.*

*Article 2*

*The Council recommends that the Republic of Poland take the following actions within three months after notification of this Decision:*

*(a) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed, by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected;*

*(b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016;*

*(c) ensure that the law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the National*

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<sup>51</sup> Cit. point 8, of the Proposal (COM 2017, 835 final).

<sup>52</sup> European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931RPS)), paragraph 16. Available at :

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0442&language=EN>

<sup>53</sup> (2018/2541(RSP)).

*School of Judiciary are amended in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty;*

*(d) ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission;*

*(e) refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.*

It is worth noting the language used in this text, which ranges from the implicit instruction in the call to restore the independence and legitimacy of the Constitutional Tribunal as a guarantor of the Polish Constitution to the more explicit requirement to publish and implement fully the judgments of the Constitutional Tribunal, calling on the Polish authorities on the basis of the principle of loyal cooperation between state organs, (“a constitutional precondition in a democratic state governed by the rule of law” (Reason 14)) – to “refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole”. It also includes the exhortation to ensure that the required reforms of the legal framework are conducted in close cooperation with, among others, “the judiciary and all interested parties, including the Venice Commission” (d), “in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty”.

### 3.2.4 Rule of Law procedure

On the same date, on 20 December 2017, the Commission also adopted a recommendation (EU) 2018/103 regarding the rule of law in Poland, complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.<sup>54</sup> In its recommendation of 20 December, it reiterated the importance of the rule of law as a shared value of the EU, and expressly appealed to the obligation of public institutions to cooperate loyally (Reason 4).

In this Recommendation, which supplemented the previous ones adopted as part of the Framework to strengthen the Rule of Law<sup>55</sup> and the numerous occasions on which the Commission has stated its concern at the worrying trends in constitutional politics in Poland (set out in the recitals), it denounces the “threats to judicial independence” and confirms the existence of a systemic threat to the rule of law, before urging the Polish authorities to urgently adopt a whole set of “appropriate actions to address this threat as a matter of urgency”.

The Commission declared itself ready to enter into dialogue without delay, and urged the Polish authorities to act to achieve the objectives set out in the following recommendations, on the basis of loyal cooperation:

“46. In particular, the Commission recommends that the Polish authorities take the following actions with regard to the newly adopted laws in order to ensure their compliance with the requirements of safeguarding the independence of the judiciary, of separation of powers and of legal certainty as well as with the Polish Constitution and European standards on judicial independence:

(a) ensure that the law on the Supreme Court is amended so as to: not apply a lowered retirement age to the current Supreme Court judges; remove the discretionary power of the

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<sup>54</sup> Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520. C/2017/9050 (OJ L 17, 23.1.2018, p. 50–64).

<sup>55</sup> COM 2014, 158 final.

President of the Republic to prolong the active judicial mandate of the Supreme Court judges; remove the extraordinary appeal procedure;

(b) ensure that the law on the National Council for the Judiciary is amended so that the mandate of judges-members of the National Council for the Judiciary is not terminated and the new appointment regime is removed in order to ensure election of judges-members by their peers;

(c) refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.

47. In addition, the Commission recalls that none of the following actions, contained in its Recommendation of 26 July 2017, relating to the Constitutional Tribunal, the law on Ordinary Courts Organisation and the law on the National School of Judiciary, have been taken and therefore reiterates its recommendation to take the following actions:

(d) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed and by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015, which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected;

(e) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016;

(f) ensure that the law on Ordinary Courts Organisation and on the National School of Judiciary is withdrawn or amended in order to ensure its compliance with the Constitution and European standards on judicial independence; concretely, the Commission recommends in particular to: remove the new retirement regime for judges of ordinary courts, including the discretionary power of the Minister of Justice to prolong their mandate; remove the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts and remedy decisions already taken;

(g) ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence, and is prepared in close cooperation with the judiciary and all interested parties.”

### 3.3. The case of Hungary

#### 3.3.1. Background

Events in Hungary, concerning in particular the functioning of the constitutional and electoral system, the independence of the judiciary and other institutions and the rights of judges or with respect to the corruption and conflicts of interest and a broad spectrum of fundamental freedoms and rights, such as data protection and privacy, freedom of expression, association, religion and others (academic freedom, the right to equal treatment, the rights of persons belonging to minorities, the rights of migrants, asylum-seekers and refugees or economic and social rights). The table below gives a brief overview of some key EP Resolutions adopted in last years.

**Table 2 : Timeline up to 2018**

- **On 12 September 2018**, the Parliament has passed 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<sup>56</sup>
- **On 17 May 2017**, the Parliament had already adopted a resolution on the situation in Hungary, after a previous hearing held on 27 February 2017 by its Committee on Civil Liberties, Justice and Home Affairs and the plenary debate of 26 April 2017.<sup>57</sup>
- **On 16 December 2015**, the Parliament, follow-up a previous Resolution of 10 June 2015<sup>58</sup> having regard to the Council's first annual rule of law dialogue (held on 17 November 2015), had adopted a Resolution on the situation in Hungary.<sup>59</sup>
- **On 3 July 2013**, the Parliament, pursuant a previous resolution of 16 February 2012<sup>60</sup> had adopted a resolution on the situation of fundamental rights: standards and practices in Hungary.<sup>61</sup>
- **On 5 July 2011**, the Parliament had adopted a resolution on the revised Hungarian Constitution.<sup>62</sup>
- **On 10 March 2011**, the Parliament had adopted a resolution on media law in Hungary.<sup>63</sup>

In summary, over the last eight years, as well as other European bodies and EU institutions, the European Parliament has also had to deal with the situation of constitutional degradation in Hungary. Through a programme of illiberal changes in a line of weakening of fundamental values and principles. The common pattern of all these changes was that the executive of legislative powers had been systematically enabled to interfere significantly with the composition, powers, administration and functioning of these bodies.

<sup>56</sup> on the situation in Hungary (2017/2131 (INL)).

<sup>57</sup> on the situation in Hungary (2017/2656 (RPS)).

<sup>58</sup> on the situation in Hungary (2015/2700 (RSP)).

<sup>59</sup> on the situation in Hungary (2015/2935 (RSP)).

<sup>60</sup> on the recent political developments in Hungary. (2012/2511(RSP)).

<sup>61</sup> OJ C 75, 26.2.2016, p. 52 (cf. 2012/2130 (INI)), having regard to such political developments in Hungary (a.e., the Council and Commission statements presented, or the statements of the Hungarian Prime Minister addressed, at the plenary debate held in the EP on 18 January 2012).

<sup>62</sup> OJ C 33 E, 5.2.2013, p. 17.

<sup>63</sup> European parliament resolution on media law in Hungary calling on the hungarian authorities to review the media law especially on the basis of the comments and proposals made by European institutions and the case law of the ECHR. Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+20110310+ITEMS+DOC+XML+V0//EN&language=EN>

### 3.3.2. Recent development and their analysis

The scope of Article 7 TEU would not be limited to situations of non-compliance with specific European obligations and provisions, unlike remedies for non-compliance with Article 258 TFEU. So that, without prejudice to the safeguarding of the Member States political and constitutional autonomy, the EU values and principles would in any event prevail.

The situation in Hungary was addressed by European Parliament resolution of 12 September 2018, requesting that the Council, in accordance with the provisions of Article 7(1) TEU, confirm the existence of a clear risk of serious violation of the founding values of the Union.

The Parliament, which has been gradually monitoring the deteriorating constitutional situation in Hungary<sup>64</sup>, has highlighted developments which undermine the values recognised in Article 2 TEU, generating mistrust in the country's relationship with other Member States and has condemned (by a sizeable majority)<sup>65</sup> the threat that this poses both to the EU and to the rights of that country's own citizens.

The resolution of 12 September 2018 also stresses this point, in emphasising the continuity of the commitments entered into as a result of membership of the Union, regardless of subsequent elections and their outcomes. In other words, the Member State, upon joining, makes a commitment to observe these values, and subsequent governments, whatever discretion they have to develop their own policies, remain bound by this commitment.

If we look in detail at the worrying issues mentioned in the resolution, we can summarise our concerns as focusing on fundamental rights (freedom of expression, in all its diversity, the right to privacy, and the situation of foreigners, among others), the independence of the judiciary, the climate of corruption, and the operation of the electoral system and of the constitutional system in general. These are, in short, a series of democratic anomalies with regard to the values and principles underlying the constitutional rule of law, which, taken as a whole, go beyond the question of the rule of law.

In Hungary, although the overblown national-populist discourse of its leaders is expressed in legal terms, successive constitutional reforms and an unending stream of legislative modifications are the cause of great concern.<sup>66</sup> It is against this background that the Parliament adopted its resolution of 12 September 2018, reflecting the debates which have taken place in various EP committees and, looking outwards, expressing the growing concern among the European public. The concerns set out in this resolution on the situation in Hungary point to nothing less than an emergency threatening those democratic values and principles which are embodied more clearly in the Parliament than in other EU institutions, such as the Commission. The prominence of concerns as to the operation of the constitutional and electoral system is not arbitrary.

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<sup>64</sup> In this respect, cf. successive EP Resolutions (see Table 2). In addition, with references, cf. European Parliament resolution of 14 November 2018 on the need of a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886 (RSP)). Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0456+0+DOC+XML+V0//EN&language=EN>

<sup>65</sup> To date, it has passed 448 in favour, compared to almost 200 against.

<sup>66</sup> Annex to the 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)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN&language=EN>

The Parliament, as the chamber representing the peoples of the Member States (and voted for by resident EU citizens) feels that it has the authority to denounce a repeated violation of the rule of law, which, despite having been implemented through a process of constitutional reform endorsed by the electorate, and legislative changes, is not thereby exempt from the requirements deriving from the conventional/constitutional paradigm clearly established in Article 2 TEU.

Otherwise, these shared values and principles would cease to be available either for the EU or for its Member States (on the assumption that they remain within the Union). Although the Parliament does not go so far as to explicitly say so, an implicit consequence of the logic contained in the Resolution is that, in light of the democratic principles contained in Articles 9 to 12 TEU, if Hungary continues along its current path it will undermine the democratic foundations on which the institutional and legislative system of the EU rest. What is at issue here, then, is not federalist constitutional uniformity but, rather, the need to safeguard constitutional democracy throughout the system, both at the EU level and in each and every one of its Member States.

### 3.4. Hypothetical assumptions

#### 3.4.1. Direct and indirect breach of Article 6 TEU

We need to start with a systematic interpretation of Article 4(2), with respect to Article 2 TEU. The Treaty clause explicitly guarantees the basic function of the State which, within the framework of its constitutional autonomy – “ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security” – must coexist with the observance of “values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” upon which the Union is founded.

In this respect, the values identified in Article 2 TEU (and referred to and specified as principles and/or rules in other TEU provisions), provide a paradigm for membership of the EU. And this applies not just to those countries wishing to become new Member States of the EU (cf. Article 49 TEU), but also to violation of the obligations deriving from the TEU, not just as a result of the occasional breach or failure to observe these obligations (which can be sanctioned through the EU’s infringement procedure, with the attendant remedies and penalties), but as the result of systemic violation of EU values, due to unresolved structural shortcomings, or as a result of open violation of the constitutional order of the Member State. In such cases, contravening the constitutional order would generate grave harm to the general interest of the country, both as a sovereign state and as a Member State of the EU.

Firstly, because this would entail the immediate and direct subversion of the constitutional order. And secondly, in an indirect and less immediate manner, any breach of the fundamental shared values of the EU also seriously undermines the effectiveness of the EU values set out in Article 2 TEU. Insofar as it detracts state support of legitimacy from the constitutional common embodied on this provision.<sup>67</sup>

In other words, violating the fundamental values and principles of the constitution of an EU Member State could be considered to constitute a violation of the constitutional law of the EU. Although the institutions of the EU have, with the passage of time, understood the anti-constitutional aspect of a course of action which flatly contravenes the legal system of a Member State, they appear as yet to be unaware that, as part of our shared foundations, threatening these values within one Member State gives rise, over time, to a violation of Article

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<sup>67</sup> Cf. López Castillo, *The European Union in crisis. Or, how to advance integration without disintegrating as a result of national-populism*, in *European Papers*, 2019, *in print*.

2 TEU. This could result lead not easy to implementation of the procedure established in Article 7 TEU.

### 3.4.2 Loyalty among Member States

The very existence of a Union of constitutional states implies a requirement of mutual aid and assistance, and this is made explicit in the calls for solidarity among Member States in a number of Articles (for example, in Article 3 TEU, on the objectives of the EU).

In the current version of the TEU, the duty of solidarity among Member States has been raised to the level of a structural and relational principle, designed to enable the development of specific policies such as those articulated in the Area of Freedom, Security and Justice, or with regard to a common foreign, security and defence policy. This could be raised, *de conventione ferenda*, through a proposed addition to Article 4(3) TEU, adding something along the following lines at the end of paragraph 4(3) or as a new Article 4(4): "The Member States of the Union shall mutually respect and assist one another with the purpose of safeguarding the conventional paradigm and objectives of the Union." In any event, until such a clause is included, there needs to be effective mutual respect and assistance between Member States as one of the fundamental assumptions of the EU.

## 4. WAYS TO IMPROVE THE PROTECTION OF RULE OF LAW IN THE EU

Since the Treaty of Lisbon came into force, there have been various proposals from the Parliament, the Commission and the Council designed to strengthen the protection of EU values. These proposals differ from the ones discussed in Chapter 2 of this study, which are already in force and have been applied in practice (Article 7 procedure; the Rule of Law Framework and the infringement procedure of Article 258).

The Commission and Parliament proposals discussed here have not yet been implemented. We will start by explaining what these proposals are (1.1), and will then go on (1.2) to consider those proposals which, in our opinion, should be implemented and do not require Treaty reform.

### 4.1 Proposals to safeguard the rule of law and values of the EU put forward by the EU Institutions

In recent years, European Institutions have put forward a large number of proposals designed to safeguard the founding values and principles of the EU, in particular, the rule of law, democracy and fundamental rights. In listing them, we are following and summarising the study entitled "The triangular relationship between Fundamental Rights, Democracy and Rule of Law in the EU. Towards an EU Copenhagen Mechanism"<sup>68</sup>. Normally, the Parliament proposals seek to avoid modifications to the Treaties.<sup>69</sup>

#### 4.1.1 Proposals of the Parliament

Drawing on the Parliament's resolutions on Hungary (Tavares Report, July 2013<sup>70</sup>), on the situation of fundamental rights in the EU (December 2010 and December 2012), and on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886/RSP)<sup>71</sup>, we can summarise the following proposals<sup>i</sup>:

- the need to ensure a more coherent and comprehensive interinstitutional framework cooperation at Union level in the annual monitoring of fundamental rights with bodies like the Council of Europe's Venice Commission and the High Commissioner of Human Rights;<sup>72</sup>

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<sup>68</sup>European Parliament, Policy Department Citizens' Rights and Constitutional Affairs, 2013. Available at: [http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2013/493031/IPOL-LIBE\\_ET\(2013\)493031\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf)

<sup>69</sup> See In this respect, the analysis of Wouter van Ballegoij and Tatjana Evas: *An EU mechanism on democracy, the rule of law and fundamental rights*. European added value Assessment, European Parliament, European Parliamentary Research Service, October 2016. Available at:

[http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS\\_IDA\(2016\)579328](http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2016)579328)

<sup>70</sup> Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), (2012/2130(INI)), 25 June 2013 also known as the Tavares Report. Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0>

<sup>71</sup> Report on the situation of fundamental rights in the European Union (2010 – 2011), December 2010 (EP Fundamental Rights 2012 Report); Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon, December 2010 (EP Fundamental Rights 2012 Report); 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 (2018/2886/RSP).

<sup>72</sup> Paragraph 35 of the EP 2012 Fundamental Rights Report and paragraph 74 of the Tavares Report.

- the European fundamental rights policy cycle, which would deal on a “multiannual and yearly basis [with] the objective to be achieved and the problems to be solved”;<sup>73</sup>
- the Tavares Report suggested the creation of an “Article 2 TEU alarm agenda” or “new Union values monitoring mechanism”, which would be dealt with by the Commission; the setting up of a Copenhagen Commission or high-level group of wise men, which would be independent of any political influence and could issue recommendations to the EU on how to respond to and remedy any infractions, complemented by a “scoreboard” of Member States and under the leadership of the Commission<sup>74</sup>.
- the Parliament has also recommended that the fundamental rights implications of EU proposals and their implementation by EU Member States are included in the Commission evaluation (transposition) reports, as well as its annual reporting on the application of EU law. The Parliament has recommended that the scope of these Annual Reports should be expanded to include an assessment of Member States’ situations as regards the implementation, promotion and protection of fundamental rights, and recommendations addressed to each of them;<sup>75</sup>
- the importance for the Commission to better ensure that infringement proceedings secure effective protection of human rights, “rather than aiming for negotiating settlements with Member States”. A key initiative relates to the setting up of a new freezing procedure to ensure “that Member States, at the request of the EU institutions, suspend the adoption of laws suspected of disregarding fundamental rights or breaching the EU legal order, and would complement current infringement and fundamental rights proceedings”;<sup>76</sup>
- the Parliament should set up an interdisciplinary platform of academics with proven in-depth expertise on Rule of Law, democracy and fundamental rights aspects and covering the 28 EU Member States to feed into the Parliament’s annual report on fundamental rights and other related policy and legislative works of the EP. The network would issue an annual scientific report on the situation of fundamental rights, democracy and rule of law across the Union;<sup>77</sup>
- The CJEU should better facilitate third-party interventions, in particular by human rights NGOs;<sup>78</sup>
- The EU Agency for Fundamental Rights (FRA): The limited scope of the FRA’s mandate has been particularly contested, with the EP recommending to expand it to also cover old EU third pillar matters (police and judicial cooperation in criminal matters), a comparative evaluation of Member States’ compliance with the EU Charter of Fundamental Rights and the regular monitoring of Member States’ compliance with Article 2 TEU. A critical issue that has also been highlighted is the need to strengthen the independence and transparency of the FRA, which is perhaps too vulnerable to Member State governments and their concerns.<sup>79</sup>

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<sup>73</sup> Paragraph 20 of the EP 2012 Fundamental Rights Report.

<sup>74</sup> Paragraph 69 of the Tavares Report.

<sup>75</sup> Paragraph 3 of the EP Fundamental Rights 2012 Report.

<sup>76</sup> Paragraphs 28 and 31 of the EP Fundamental Rights 2012 Report, and paragraphs 20 and 40 of the EP Fundamental Rights 2010 Report.

<sup>77</sup> Paragraphs 78 and 80 of the Tavares Report. See also paragraphs 2 and 3 of the European Parliament Resolution of 14 November 2018 on the need for a comprehensive mechanism for the protection of democracy, the rule of law and fundamental rights ( 2018 / 2886 / RSP ).

<sup>78</sup> EP Fundamental Rights Report, paragraph 33.

<sup>79</sup> Paragraphs 44, 45, 46 and 47 of the EP Fundamental Rights 2012 Report.

In our view, these Parliament recommendations, which do not require modification of the Treaties, are sensible and positive, but are not substantially different when compared to the instruments that already exist to protect the values of the EU, which we considered in Chapter 2 of this study. In other words, Treaty reform would unquestionably lead to qualitative progress.

#### 4.1.2 Commission and Parliament proposals amending the Treaties

In September 2013, the Vice President of the European Commission Viviane Reding highlighted in a speech mentioned above the Commission's policy options<sup>80</sup>. These include a reform of the Treaties, in order to entail a more far-reaching rule of law mechanism, which would require:

- "More detailed monitoring and sanctioning powers for the Commission, in an amendment of the Treaty";
- Expanding the CJEU competences and creating a new procedure to enforce the rule of law principles enshrined in Article 2 TEU " by means of an infringement procedure brought by the Commission or another Member State before the Court of Justice";
- Treaty amendment to lower the existing thresholds for activating the first stage of Article 7 TEU;
- Expanding the mandate of the FRA and a Treaty amendment that puts the legal basis of the FRA into the ordinary legislative procedure, and
- Abolishing Article 51 of the EU Charter, so as to allow "the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law".

The Commission has put forward some perfectly sensible proposals to protect the values of the EU – the Rule of Law, democracy and fundamental rights,<sup>81</sup> and we would also endorse the proposals of the Parliament included in the Resolution of 25 October 2016<sup>82</sup>, paragraph 20:

- Article 2 TEU and the Charter of Fundamental Rights of the European Union should become the legal foundation of the legislative measures that should be adopted in the next ordinary legislative procedure;
- by virtue of Article 2 TEU and the Charter, national courts may refer appeals to the Court of Justice with regard to the legality of the actions of Member States;
- Article 7 should be revised in order to establish the penalties applicable, determining which rights of non-compliant Member States (other than the right to vote in the Council) may be suspended: for example, financial penalties or the suppression of EU funds;
- following the adoption of EU legislation and before its application, a vote by one third of the deputies of the Parliament may initiate an appeal to the Court of Justice;

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<sup>80</sup> Reding, V., "The EU and the Rule of Law – What next ?", 4 September 2013, Speech / 13 / 677.

<sup>81</sup> See "Towards a comprehensive EU protection system for minorities", European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2017, available at:

[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2017\)596802](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)596802)

<sup>82</sup> European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)). Available at:

[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0409+ 0+DOC +XML +VO //P8\\_TA\(2016\)0409\\_paragraph 20.](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0409+ 0+DOC +XML +VO //P8_TA(2016)0409_paragraph 20.)

- the rights of individuals and organisations directly or indirectly affected by the action of institutions or a Member State be protected by modification of Articles 258 and 259 TFEU;
- Article 51 of the Charter of Fundamental Rights should be deleted, and the Charter should become a Declaration of Rights of the Union; and
- the requirement for unanimity in spheres related to the respect for, and protection and promotion of fundamental rights, such as equality and non-discrimination, should be reviewed.

## 5 RECOMMENDATIONS

The proposals put forward here are specific, precise and effective and do not require a modification of the Treaties, which could be very difficult and highly unlikely at present.

First, the Union should sign the European Convention on Human Rights of 1950, as Article 6(2) TEU prescribes. The monitoring action of the European Court of Human Rights constitutes the highest form of supranational control over violations of essential human rights.

Second, the EU should introduce a conditionality clause into its budget in the implantation of Cohesion Policy, so that the allocation of funds is subject to the benefiting State not infringing the Union's values, including the rule of law<sup>83</sup>. The determination of such an infringement must be as objective as possible. We suggest that the conditionality clause we propose can only be applied if the procedure under Article 7(1) TEU has been formally launched, or in the event of a final judgement from the CJEU.

It is worth pointing out that this recommendation by the authors is not the same as the Proposal coming from the Commission for the European funds of the European Cohesion Policy. The Commission launched it on 29 May 2018, with a view to the next EU budget, covering the period 2021–2027. The proposal for a Common Provisions Regulation (CPR) sets out common provisions for seven shared management funds: the European Regional Development Fund, the Cohesion Fund, the European Social Fund Plus, the European Maritime and Fisheries Fund, the Asylum and Migration Fund, the Internal Security Fund, and the Border Management and Visa Instrument.<sup>84</sup>

The proposal for a regulation refers to social policy, implementing the European Pillar of Social Rights. In its Explanatory Memorandum (para. 5), it links the Cohesion Policy with Fundamental Rights by demanding respect for people with disabilities and for gender equality. Similarly, it calls on the Member States and the Commission to combat all forms of discrimination or segregation. It also proposes protection of the environment as a goal of the Funds.

However, what is most significant for our purposes is that in paragraph 6, and on the basis of Article 322 TFEU (financial regulations), the Commission proposal puts forward as a goal the protection of the Union's budget in case of "generalised deficiencies as regards the rule of law in the Member States, as the respect for the rule of law is an essential precondition for sound financial management and effective funding". In that event, the Commission can take action against the Member State, suspending the application of the regulations on the funds, if it jeopardises the EU's finances through a generalised degradation of the rule of law.

We must take into account that the goal of this Commission proposal is not so much to defend the rule of law as to protect the financial interests of the Union.

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<sup>83</sup> See *Research for REGI Committee-Conditionalities in Cohesion Policy*, European Parliament, Policy Department for Structural and Cohesion Policies, 2018.

Available at: [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU\(2018\)617498](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)617498)

<sup>84</sup> Proposal for a regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument (COM/2018/375 final - 2018/0196 (COD)).

Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A375%3AFIN>

That same philosophy underpins the proposal for a regulation that the European Commission had made on 2 May 2018 “on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States”<sup>85</sup>. Article 1 states that the purpose of the Regulation is “the protection of the Union’s budget in the case of generalised deficiencies as regards the rule of law in the Member States”. Article 3 makes it clear that a series of measures will be taken – such as the suspension of payments – when a generalised deficiency as regards the rule of law in a Member State “affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union”.

Therefore, only if the financial interests of the Union are at risk because of serious deficiencies as regards the rule of law in a Member State of the EU can the EU Institutions – the Commission, primarily – intervene. However, they cannot do so if the violation of the Union’s values (Article 2 TEU) does not affect the financial or budgetary interests of the Union.

Our recommendation is not exactly what the Commission proposes. We propose establishing an economic conditionality on the Cohesion Policy of the EU *in any case* of serious violation of the rule of law and the values of the EU in the sense that it appears in Articles 2, 7 and 19 TEU (legal protection). As Scheppele, Pech and Kelemen say, not only Article 7 TEU defends the rule of law<sup>86</sup>. There are other means. We have pointed to some of them (Article 258 TFEU, for instance), with good results so far in Poland.

We have to increase the mechanisms for defending the rule of law in the EU. Our recommendations move in that direction. In particular, we propose the instrument of economic conditionality in the Cohesion Policy as a coercive means of combating the generalised and serious violation of the values of the EU in any Member State, without any need for the financial interests of the Union to be affected.

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<sup>85</sup> Proposal for a Regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM/2018/324 final - 2018/0136 (COD)). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0324>. See also paragraph 5 of the European Parliament resolution of 14 November 2018 on the need for comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886/ RSP). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0456+ 0+ DOC +XML +V0 //EN&language=EN>

<sup>86</sup> Scheppele, K.L., Pech, L. and Keleman, R.D., *Never missing an opportunity to miss an opportunity: The Council Legal Service opinion on the Commission's EU budget-related rule of law mechanism*, Verfassunblog, 2018/11/12.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the EU founding values and principles set out in Article 2 TEU and the instruments at the EU's disposal to uphold them, in particular Article 7 TEU and Article 258 TFEU, as well as the Rule of Law Framework launched by the European Commission. Focusing on rule of law, the study also examines how these instruments have been used, in particular, in the cases of Poland and Hungary.

The study also looks into the proposals put forward by the European Parliament and the Commission and gives recommendations: It proposes, in particular, the signing of the European Convention on Human Rights by the EU, as well as the introduction of economic conditionality into EU Cohesion Policy and its funds as a sanction mechanism.

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