

Christophe Hillion\*

# Overseeing the rule of law in the European Union

## Legal mandate and means

### Abstract

Controversial changes in the laws of Poland and Hungary have deepened concerns about disregard for the rule of law in the European Union. This analysis discusses what the EU is legally entrusted to do to address the issue. It recalls that Member States have endowed the Union with a legal mandate to ensure respect for the rule of law. It also suggests that the EU has various means at its disposal to fulfil such mandate, which in many ways remain to be used.

### 1 Introduction

There is a deepening concern about some EU Member States' disregard for the rule of law, and understandably so. Such disregard not only hampers the trust between the Member States and in turn the Union's functioning, it directly strikes at the very heart of European integration. Various schemes have been put forth in an attempt to address the issue. After a call for a 'new and more effective mechanism to safeguard fundamental values in Member States',<sup>1</sup> the European Commission has established a 'EU framework to strengthen the rule of law',<sup>2</sup> which it has activated for the first time in relation to Poland.<sup>3</sup> For their part, the Council and Member States have initiated an annual 'dialogue to promote and

safeguard the rule of law',<sup>4</sup> the first of which took place under the Luxembourg Presidency of the Council.<sup>5</sup> This paper discusses the underlying question of what the Union is legally entrusted to do on this rather slippery terrain. What legal mandate does it have to ensure respect for the rule of law? And importantly, what are the means to fulfil such a mandate?

### 2 Mandate

The rule of law features prominently in EU primary law. It is listed both among the founding *values* of the Union (2.1), and as an *objective* that EU institutions are specifically mandated to pursue (2.2).

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<sup>1</sup> See the letter of the Foreign Ministers of Denmark, Finland, Germany and the Netherlands, of 6 March in the 2013, to the President of the European Commission. The letter can be found here: [<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aaneuropese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme.pdf>]

<sup>2</sup> Communication from the Commission to the Council and the European Parliament, *A new EU framework to strengthen the Rule of Law*, COM(2014)158 final.

<sup>3</sup> [http://europa.eu/rapid/press-release\\_SPEECH-16-71\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-16-71_en.htm)

<sup>4</sup> Conclusions of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law, General Affairs Council meeting, Brussels, 16 Dec. 2014. Different proposals have also been made within the European Parliament: see Tavares report on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)), 24.06.2013; and the 'EU democratic governance pact' proposed by the ALDE group (<http://www.alde.eu/event-seminar/events-details/article/an-eu-democratic-governance-pact-44603/>).

<sup>5</sup> General Affairs Council, *Ensuring the respect for the rule of law - Dialogue and exchange of views*, 17 November 2015, doc. 13744/15.

## 2.1 A value defining EU membership

According to Article 2 TEU, the EU is founded on a set of values, one of which is the rule of law. Further, the Preamble of the EU Charter of Fundamental Rights (EUCFR) mentions the rule of law as a founding *principle* of the Union, while Article 21(1) TEU establishes that it has inspired the EU's 'own creation, development and enlargement'.

The values of the Union are 'common to the Member States',<sup>6</sup> and as such they must be respected for states to keep their membership rights intact. Thus, a 'clear risk of a serious breach' of those common values may be reprimanded by the Council on 'a reasoned proposal' by the Commission, the Parliament or other Member States, while 'a serious and persistent breach' may lead to a suspension, by the Council, of 'certain' of the prevaricating state's 'rights deriving from the application of the Treaties (...), including the voting rights of the representative of the government of that Member State in the Council'.<sup>7</sup> Similarly, any country aspiring to become member of the Union must respect and promote these values, in accordance with Article 49 TEU.<sup>8</sup>

Two rationales stand out to explain why the Treaties make EU membership rights contingent upon states' observance of the common values. First, a Member State contravening such values would endanger the legitimacy of EU decision-making as a whole, and possibly impede the lawfulness of subsequent EU decisions.<sup>9</sup> Second, rule of law deficiencies potentially disrupt the very functioning of the Union legal order, based as it is on mutually legal interdependence and mutual trust among its members.<sup>10</sup> This argument has been made by both Member States and EU institutions,<sup>11</sup> including the European Court of Justice:

(...) essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.

This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.<sup>12</sup>

## 2.2 Respect for the rule of law as EU objective

The rule of law must not only be respected for a state to become and remain a member of the EU, it must also be actively promoted. Article 3(1) TEU foresees that the Union is to '*promote*... its values and the well-being of its peoples'. Article 13(1) TEU reiterates this broadly defined EU value-promotion *mandate*, by stating that the EU institutional framework '*shall aim to promote* [the Union's] values' (emphasis added). As in Article 3(1) TEU, value-promotion spearheads the list of institutions' duties, preceding that of advancing the Union's objectives, serving its interests, those of its citizens and those of its Member States.

In other words, ensuring respect for the rule of law in the EU legal order is not exclusively a judicial task.<sup>13</sup> It is

<sup>6</sup> Article 2 TEU.

<sup>7</sup> Article 7 TEU. The provision is further examined below.

<sup>8</sup> According to Article 49(1) 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.'

<sup>9</sup> Further on the all-affected principle: e.g. J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' 21 *ELJ* (2015) 141, esp 144-145; C Closa, D Kochenov and J H H Weiler, 'Reinforcing Rule of Law Oversight in the European Union' RSCAS 2014/25, p. 5.

<sup>10</sup> See a discussion of this argument in the chapter by Carlos Closa in C Closa and D Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016, forthcoming).

<sup>11</sup> See e.g. the Commission in its Communication to the Council and the European Parliament on *Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, COM(2003) 606; also: Note from the Presidency to the Council, 'Ensuring Respect for the Rule of Law in the European Union', doc. 15206/14, Brussels, 14 Nov. 2014.

<sup>12</sup> See Opinion 2/13 *ECHR II* EU:C:2006:81 at paras 167-168; Communication from the Commission to the Council and the European Parliament, *A new EU framework to strengthen the Rule of Law*, COM(2014) 158, p. 2. Communication from the Commission to the Council and the European Parliament on *Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, COM(2003) 606, p. 10.

<sup>13</sup> At the judicial level, guaranteeing the rule of law in the EU entails, as repeatedly held by the Court of Justice, that 'the acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights', see e.g. Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625.

mainstreamed into the activities of *all* EU institutions.<sup>14</sup> Thus, the protection and promotion of EU values (including the rule of law) inform and determine the way in which the EU pursues its objectives and uses its competences, and how its institutions exercise their powers.<sup>15</sup> The 2014 Conclusions of the Council and Member States, on ensuring respect for the rule of law, did recognise this when emphasizing ‘that the European Union and its institutions are *committed* to promoting EU values, including respect for the rule of law as laid down in the Treaties’ (emphasis added).<sup>16</sup>

As an objective of the Union, and as a cardinal aim of its institutional framework, respect for the values of Article 2 TEU in general, and of the rule of law in particular, entails obligations of conduct for the Member States. Following the principle of sincere cooperation enshrined in Article 4(3) TEU, they shall ‘facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives. Such an obligation of cooperation is all the more significant since the European Court of Justice acknowledges it as a self-standing requirement, which applies irrespective of the nature of EU and Member States’ competence.<sup>17</sup> In other words, even when Member States exercise their residual competence,

they should ascertain that their actions do not impede the EU’s fulfilment of its tasks. In practical terms, this entails not only that constitutional initiatives in the Member States cannot disregard EU values, but that they should also assist the Union in fulfilling its value promotion mandate.<sup>18</sup> Thus, it is arguable that national specificities, safeguarded under Article 4(2) TEU, cannot allow a member’s disrespect of the values of Article 2 TEU.<sup>19</sup>

EU institutions are equally bound to cooperate. According to the second sentence of Article 13(2) TEU they must ‘*practice mutual sincere cooperation*’. They shall therefore assist one another to ensure that the Union in general, and its institutional framework in particular, fulfil their value promotion aims. Here too, the obligation of cooperation is increasingly significant. It was recently codified in EU primary law, and, as a result, the Court of Justice has played an active role in enforcing it.<sup>20</sup>

The foregoing indicates that EU primary law provides a solid constitutional basis for an active EU *engagement* to ensure compliance with the values of Article 2 TEU in general, and the rule of law in particular. Member States are bound to respect EU values, not only to keep their membership

<sup>14</sup> On the involvement of political institutions in the safeguarding of EU fundamentals: see P Alston, and JHH Weiler, ‘An “ever closer Union” in need of a human rights policy’, in P Alston (ed.), *The EU and Human Rights* (Oxford: OUP, 1999), p. 627.

<sup>15</sup> See in this respect: Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights’ protection and promotion in the European Union, Justice and Home Affairs Council meeting, Luxembourg, 5 and 6 June 2014. Also, the guidelines on methodological steps to be taken to check fundamental rights compatibility in the Council’s preparatory bodies, 10140/11 FREMP 54 JAI 319 COHOM 132 JURINFO 31 JUSTCIV 129; and Communications from the Commission on the Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union (COM(2010)0573) and the Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments (SEC(2011)0567).

<sup>16</sup> Conclusions of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law, General Affairs Council meeting, Brussels, 16 Dec. 2014

<sup>17</sup> See e.g. Opinion 1/03 *Lugano* EU:C:2006:81, para 119, C266/03, *Commission v Luxembourg*, EU:C:2005:341, para 58; C433/03, *Commission v Germany*, EU:C:2005:462, para 64. Further: see e.g. E Neframi, ‘The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations’, 47 *CMLRev.* (2010), p. 323.

<sup>18</sup> The respective rule of law initiatives of the Commission and Council have indeed acknowledged the significance of the obligation of cooperation. Thus, the Commission expects ‘that the Member State concerned cooperates throughout the process and refrains from adopting any irreversible measure in relation to the issues of concern raised by the Commission, pending the assessment of the latter, in line with the duty of sincere cooperation set out in Article 4(3) TEU. Whether a Member State fails to cooperate in this process, or even obstructs it, will be an element to take into consideration when assessing the seriousness of the threat’. The Council and Member States conclusions on the Rule of Law dialogue emphasised, more ambiguously, that while respecting Member States’ national identity in line with Article 4(2) TEU, their dialogue approach ‘should be brought forward in light of the principle of sincere cooperation’.

<sup>19</sup> In this sense, see Frans Timmermans, First Vice-President of the Commission, ‘EU Framework for democracy, rule of law and fundamental rights’, European Parliament, 11 February 2015 ; and Editorial Comments : ‘Safeguarding EU values in the Member States - Is something finally happening?’, 52 *CMLRev.* (2015), pp. 619–628.

<sup>20</sup> See Case C-409/13, *Council v Commission*, EU:C:2015:217.

rights intact, but also because as Member States, they must assist the Union and its institutions effectively to fulfil their all-encompassing aims of value-promotion, as enshrined notably in Article 3(1) TEU.<sup>21</sup>

Having established this twofold EU mandate as regards the rule of law, the following sections turn to the question of Union's means to fulfil it. However prominent the mandate may be, its fulfilment is, like any other EU activity, governed notably by the principles of conferral, subsidiarity and proportionality, enshrined in Article 5 TEU. In the same vein, the way in which EU institutions achieve their aims (including the promotion of the rule of law) is subject to the general principle of institutional balance. Thus, as recalled in Article 13(2) TEU, each institution 'shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.

Section 2 discusses the EU competence to *sanction* Member States' breaches of the rule of law, while Section 3 examines possible *preventive* competence, namely to *promote* the rule of law, against the backdrop of the recent initiatives by the Commission and the Council, mentioned earlier.

### 3 Means to sanction breaches of the rule of law

Two complementary means may be used legally to compel Member States to respect the rule of law as value of the

Union: first the specific sanction mechanism of Article 7 TEU (3.1), and second, the general enforcement procedure of Articles 258-260 TFEU.

#### 3.1 Article 7 TEU

Introduced by the Treaty of Amsterdam, Article 7 (2)-(4) TEU endows the EU with a power to tackle situations where Member States are in 'serious and persistent breach' of EU values, including the rule of law.<sup>22</sup>

It is up to the European Council to determine that such a serious and persistent breach exists. The decision is made unanimously,<sup>23</sup> following a proposal by the Commission or one third of the Member States. The consent of the European Parliament is also required.<sup>24</sup> First, however, the Member State in question must be invited to submit its observations. If the European Council determines that a serious breach exists, the sanction foreseen in Article 7(3) TEU involves the suspension of 'certain of the rights deriving from the application of the treaties to the Member State in question'. The Council decides the suspension, acting by qualified majority.

This sanction mechanism is a particularly meaningful tool considering the function it plays in relation to the prominent EU value-promotion mandate, but also in view of its scope. The Council Legal Service regards it as a 'Union competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a

<sup>21</sup> It should be noticed that the aims of Article 3(1) TEU appear to have a distinct nature and function in the EU legal order. Declaration 41 on Article 352 TFEU, annexed to the EU treaties, points out that: 'the reference in Article 352(1) of the Treaty on the Functioning of the European Union to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) of the Treaty on European Union and to the objectives of Article 3(5) of the said Treaty with respect to external action under Part Five of the Treaty on the Functioning of the European Union. *It is therefore excluded that an action based on Article 352 of the Treaty on the Functioning of the European Union would only pursue objectives set out in Article 3(1) of the Treaty on European Union (...)* (emphasis added). Thus akin to CFSP objectives, those aims cannot *alone* activate the residual competence to the same degree as other EU tasks and objectives. Instead, they may only be pursued through other specific competence and legal basis expressly provided in or implied from treaty provisions, if any.

<sup>22</sup> On the background to the inclusion of this mechanism, and its early misfortunes, see B de Witte, 'The Impact of Enlargement on the Constitution of the European Union' in M Cremona (ed), *The Enlargement of the European Union* (Oxford: OUP, 2003), p. 209, esp. pp 227ff, W Sadurski, 'Adding a bite to a bark? A story of Article 7, the EU Enlargement, and Jörg Haider', 2010 *Columbia Journal of European Law*, 16(3), 385-426, F Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?' in A von Bogdandy and P Sonnevend (eds) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart publishing, 2015) 195; J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' 21 *ELJ* (2015) 141; L Besselink, 'the Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives' in A Jakáb and D Kochenov (eds), *The Enforcement of EU Law against the Member States: Methods against Defiance* (Oxford: Oxford University Press), forthcoming.

<sup>23</sup> Though without the participation of the Member State concerned, in line with Article 7(5) TEU and Article 354 TFEU.

<sup>24</sup> Rule 83 of the rules of procedure of the EP (July 2014) entitled 'breach by a Member State of fundamental principles foresee that the EP may vote on a proposal calling on the Commission or the Member States to submit a proposal pursuant to Article 7(2) TEU.

specific material competence or that exceeds its scope'.<sup>25</sup> In other words, contrary to the EU Charter of Fundamental Rights (EUCFR),<sup>26</sup> the mechanism is not circumscribed to situations where Member States 'implement EU law'. The fact that *all* actions or inactions of Member States can be considered for the purpose of the sanction mechanism may indeed explain its stringent procedural requirements and thresholds for sanctioning breaches.

### 3.2 Classical infringement mechanism

While Article 7 TEU establishes a *specific* EU competence to tackle certain rule of law breaches, the classical infringement mechanism of Article 258-260 TFEU arguably has a function in this respect too.

Legally, the Commission shall ensure the application of the EU Treaties and 'oversee the application of Union law under the control of the Court of Justice'.<sup>27</sup> Nothing in EU primary law appears to exclude the provisions of Article 2 TEU from this supervisory remit. Indeed, Article 258 TFEU refers to the 'treaties' denoting the horizontal scope of application of the procedure it establishes, in line with the 'depillarisation' of the EU initiated by the Lisbon Treaty.<sup>28</sup> The only express limitation to the Commission's enforcement powers concerns the Common Foreign and Security Policy (CFSP), as set out in Article 24(1) TEU.

In the same vein, the Treaties neither restrain nor exclude the European Court of Justice's jurisdiction over Article 2 TEU. Had such limitation been intended, the primary law-makers could have made it explicit, as they did in relation to the CFSP,<sup>29</sup> or indeed with respect to Article 7 TEU, when they circumscribed the Court's control to the provision's procedural stipulations.<sup>30</sup> Article 19 TEU has certainly been understood as entrusting the Court with general jurisdiction, from which derogations must be interpreted narrowly.<sup>31</sup>

In principle therefore, the EU should be able to enforce the provisions of Article 2 TEU through the classical infringement mechanism too.<sup>32</sup> Two general questions nevertheless arise when it comes to *exercising* either of the two sanctioning powers.

First, Article 2 TEU is substantively vague.<sup>33</sup> Some indeed doubt that it imposes obligations at all,<sup>34</sup> even if the EU specific competence to ensure its observance, discussed above, suggests otherwise.<sup>35</sup> It remains that the substantive and thus operative content of the 'EU values' is ambiguous. Thus, a serious and persistent *breach* of the rule of law for the purpose of the sanction mechanisms of Article 7(2) TEU, or a *failure* to comply warranting an enforcement procedure, is difficult to establish. This, in turn, makes the efficacy,

<sup>25</sup> Council Legal Service Opinion on Commission's Communication on a new EU Framework to strengthen the Rule of Law - compatibility with the Treaties (doc. 10296/14).

<sup>26</sup> It will be recalled that according to Article 51(1) EUCFR, 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and *to the Member States only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.' (emphasis added).

<sup>27</sup> Article 17(1) TEU.

<sup>28</sup> Indeed since 1 December 2014, the powers of the Commission under Article 258 TFEU, and the powers of the Court of Justice, have become applicable to EU acts in the field of police and judicial cooperation in criminal matters, adopted before the entry into force of the Lisbon Treaty. See Article 10 (3), Protocol 36 to the Treaties, on Transitional Provisions.

<sup>29</sup> Article 275(2) TFEU.

<sup>30</sup> Article 269 TFEU.

<sup>31</sup> See, in this respect, Case C-658/11, *European Parliament v Council*, EU:C:2014:2025, esp. paras 69-74.

<sup>32</sup> Similarly, any Member State could in principle activate the enforcement procedure envisaged in Article 259 TFEU if another Member State is deemed violating the provisions of Article 2 TEU.

<sup>33</sup> This was recalled at point 9 of the COREPER doc 10168 on Council Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental rights of the European Union, 6-7 June 2013. See also Address given by Ireland's Minister of State Disability, Older People, Equality and Mental Health, Kathleen Lynch TD at 4th Annual FRA Symposium: *Promoting the Rule of Law in the EU*, 7 June, Vienna, p. 6 – Ireland then held the Presidency of the EU Council.

<sup>34</sup> See J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' 21 *ELJ* (2015) 141.

<sup>35</sup> In its opinion on the Commission's Rule of Law Framework, the Council Legal Service recognised that 'a violation of the values of the Union, including the rule of law, may be invoked against a Member State [adding that] Article 7 TEU provides for a Union competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope', see doc. 10296/14, at paras 16 and 17.

and the very relevance, of these mechanisms questionable. A genuine EU oversight of Member States' observance of Article 2 TEU would therefore require a clarification of the latter's substance, for instance in the form of operative standards.<sup>36</sup> Surely, the rule of law must be monitored in accordance with rule of law standards, including legal certainty!<sup>37</sup>

In effect, EU values in general, and the rule of law in particular, have been incrementally articulated, notably in the context of the EU enlargement policy. This has been deemed necessary to ensure that the substantive conditions of Article 49(1) TEU are fulfilled. In particular, EU institutions and Member States have to ascertain that the candidate state respect and promote the values of Article 2 TEU, for its membership application to be admissible. Indeed, the content of Article 2 TEU has been further developed in the context of the constantly evolving 'pre-accession strategy', whereby the Commission reports to the Council and European Council on the candidates' progress in fulfilling the accession criteria.<sup>38</sup>

Articulated notably by reference to constitutional and international sources, EU membership conditions have been formally *endorsed* by the Member States. Recall for instance

that the latter must unanimously agree on the 'benchmarks' proposed by the Commission for opening and closing the accession negotiations regarding the rule of law (Chapter 23, Judiciary and Fundamental Rights), before they are presented to the candidate. In the same vein, the Commission's annual progress reports, which have elaborated the substance of i.a. the Copenhagen political criteria,<sup>39</sup> are submitted to, and subsequently discussed and upheld by the Council and European Council, while the candidate's eventual *qualification* as member, in the sense of its fulfilment of the membership requirements, must be approved by all Member States by ratifying the Accession Treaty on the basis of their domestic constitutional requirements.

With the blessing of the Member States, the Commission has thus elaborated the content of Article 2 TEU, substantively and normatively.<sup>40</sup> These conditions have become part of EU customary law on membership.<sup>41</sup> Since respect and promotion of the values of Article 2 TEU, including the rule of law, is an essential element of membership as argued above, these standards could equally be used as yardsticks for ascertaining states' *continuing* observance of Article 2 TEU *within* the EU, e.g. both for the purpose of Article 7 TEU and of Article 258 TFEU procedures.

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<sup>36</sup> The *Rule of Law Framework* Communication of the Commission does contain clues about the core meaning of the rule of law, making references to the case law of European Courts, and documents and expertise from the Council of Europe, and the Venice Commission. See COM(2014) 158, p. 4 and esp. Annex I.

<sup>37</sup> As recalled by the European Court of Justice's judgment in Case C-147/13, *Spain v Council*, EU:C:2015:299 at para 79: 'the principle of legal certainty requires that rules of law be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law', see also the judgments in cases C-81/10 P *France Télécom v Commission*, EU:C:2011:811, para 100 and C-643/11, *LVK – 56*, EU:C:2013:55, para 51.

<sup>38</sup> Thus Commission's 'Progress reports', 'Screening reports' have given some indications as to what the rule of law requirement may amount to, and how it may be operationalized. In normative terms, the Commission 2013 Strategy Report on enlargement, entitled 'Copenhagen twenty years on fundamentals first - Rule of law, democracy and the economy', clearly emphasised the significance of the rule of law in the accession process, notably by including 44 references to the notion. In substantive terms, several pages are specifically devoted to the rule of law in the 2014 progress report on Serbia; with the first sub-section under the heading 'political criteria' devoted 'democracy and rule of law' being one of the longest sub-sections of the entire document. One may also mention the so-called 'New Approach' introduced by the EU in relation to Chapter 23 of the accession negotiations, devoted to Fundamental Rights and Judiciary. Through this New Approach, EU institutions have articulated the specific EU *acquis* in those fields, which the candidate country has to adopt and implement before accession.

<sup>39</sup> Namely, stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. Further: M Cremona, 'Accession to the European Union: membership conditionality and accession criteria' 25 *Polish Yearbook of International Law* (2001) 219; C Hillion, 'The Copenhagen criteria and their progeny', in C Hillion (ed), *EU Enlargement: a legal approach* (Oxford: Hart publishing, 2004) pp. 1-23.

<sup>40</sup> While those membership conditions have been criticized: see eg D Kochenov, *EU enlargement and the Failure of Conditionality* (Kluwer, 2008); J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' 21 *ELJ* (2015) 141; cf K Smith, 'the Evolution and Application of EU membership conditionality' in M Cremona (ed), *The Enlargement of the European Union* (Oxford: OUP, 2003), p. 105. Indeed, their content, and use have been significantly adjusted in the light of experience.

<sup>41</sup> The principle introduced in Article 49(1) TEU by the Lisbon Treaty that the 'conditions of eligibility agreed upon by the European Council shall be taken into account' confirms the constitutional nature of such conditions.

One could also envisage that the EU judicature plays a role in clarifying the content of Article 2 TEU.<sup>42</sup> Given its jurisdiction as defined in Article 19 TEU, and informed by the aims of Article 13(1) TEU, the Court of Justice could progressively codify the membership standards discussed above. After all, the Court did spell out the whole body of General Principles of EU law. It did so without elaborate substantive foundations in EU primary law, but by reference to international, and other national constitutional sources.<sup>43</sup> This holds true also for the content of the Charter of Fundamental Rights, which partly finds its roots in the General Principles. The Court could thus use similar inspirations to articulate the rule of law as per Article 2 TEU. The Commission appears to support this reasoning in its Rule of Law Framework Communication:

the case law of the Court of Justice of the European Union (...) and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of [the] principles [and standards stemming from the rule of law] and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU (emphasis added)<sup>44</sup>

Indeed, the Annex to the Communication refers to several judgments of the European Court of Justice establishing

various General Principles, and touching on provisions of the Charter of Fundamental Rights, to spell out the core elements of the rule of law.<sup>45</sup>

This articulation exercise thus raises the thorny question of how the values of Article 2 TEU, binding Member States in all situations, interact with the General Principles of EU law and the Charter of Fundamental Rights, whose application is limited to Member States ‘acting in the scope of Union law’.<sup>46</sup> Given that the General Principles and the Charter cover aspects of the rule of law, could they inform the interpretation of the values of Article 2 TEU, despite their circumscribed application? Or should the values be interpreted differently, by reference to other sources, considering the distinct function of Article 2 TEU? In other words, should the Court introduce a differentiation between the values applicable to Member States in general, and founding principles applicable to Member States when implementing EU law? Alternatively, should one revisit the interpretation of the notions of ‘implementing EU law’ and ‘acting in the scope of Union law’?

These are not purely theoretical questions. Indeed, last year’s brief discussion about the possible reintroduction of the death penalty in Hungary illustrates well the difficulty resulting from the present system of differentiated application of the Charter<sup>47</sup> and of the General Principles, on the one hand, and of Article 2 TEU, on the other. Applied strictly, the current

<sup>42</sup> The ECJ has already been invited to do so, for instance, in Case C-505/13 *Levent Redzhep Yumer*, EU:C:2014:2129. In this case, the Court declined jurisdiction to interpret Art. 2 TEU not because it considered itself inapt in principle to provide such an interpretation, but because the referring court had failed to explain why that interpretation was relevant to the pending case. Article 2 TEU was also invoked by Spain, though unsuccessfully in Case C-146/13, *Spain v European Parliament and Council*, EU:C:2015:298 ; see also, Opinion of Advocate General Yves Bot of 18 November 2014, esp. paras 35-38.

<sup>43</sup> In this respect, see T Tridimas, *The General Principles of EU law* (Oxford: OUP, 2006).

<sup>44</sup> Communication from the Commission to the Council and the European Parliament, *A new EU framework to strengthen the Rule of Law* (COM(2014)158, p. 4.

<sup>45</sup> See Annex I of *Rule of Law Communication* (COM(2014)158): For instance, the Court referred to Joined cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 02859, establishing the protection against arbitrary or disproportionate intervention as a general principle of Union law, and to Case C-550/07 *P Akzo Nobel Chemicals and Akros Chemicals v Commission* [2010] ECR I-08301 on the principle of equal treatment, as general principle, enshrined in Articles 20 and 21 of the EUCFR.

<sup>46</sup> Article 51 EUCFR in the case of the Charter, and case law, in the case of the General Principles, see eg: C-555/07 *Küçükdeveci*, EU:C:2010:21

<sup>47</sup> According to the explanations relating the Charter of Fundamental Rights (OJUE 2007 C303/17), Article 51 (1) ought to be understood in the light of the following elements: As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules...’ (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.’

regime entails that one could have invoked the prohibition of the death penalty deriving from Article 2(2) EUCFR against Hungary only when 'acting in the scope of Union law'. As submitted by von Bogdandy, such a reading would deprive the EUCFR provision of actual meaning, in turn suggesting that the provisions of the Charter could be used as inspiration for interpreting Article 2 TEU<sup>48</sup> and as a yardstick for the purpose of its enforcement.<sup>49</sup> Indeed, the Preamble of the Charter points towards such a connection, when declaring that 'The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on *common values*' (emphasis added); in so far as the purpose of the Charter is arguably to articulate such values.

At the very least, the broad EU value promotion-mandate, evoked earlier, should inform the scope of application of the Charter and of the General Principles. In particular, the limits to their application should not be interpreted in such a way as to inhibit the fulfilment of the Union's aim of value promotion. In particular, Article 51(1) EUCFR should not be read and applied in a way that would frustrate the respect and promotion of the values of Article 2 TEU, and in turn make Article 7 TEU inoperative, nor should it be read and applied in a way that would deprive the provisions of the Charter of actual meaning.<sup>50</sup>

Besides the substantive vagueness of Article 2 TEU, the other question which arises in the exercise of EU sanctioning powers, is that of the interaction between the

specific procedures of Article 7 TEU and the general enforcement mechanism of Articles 258-260 TFEU. As rightly mentioned by Hoffmeister, 'there is nothing in the treaty which informs us about the relationship between the two procedures'.<sup>51</sup> Should Article 7 TEU operate as a *lex specialis* to sanction breaches of the rule of law as per Article 2 TEU, thereby excluding the application of the classical infringement procedure (Article 258 TFEU)?

On the one hand, one could consider that Article 7 TEU sets out a specific arrangement in relation to Article 2 TEU, given that the Court only has limited jurisdiction over its provisions.<sup>52</sup> One could also argue that the very relevance of Article 7 TEU could be questioned if the Commission were allowed to trigger the enforcement procedure to tackle alleged breaches of the rule of law. Indeed, it could lead to the circumvention of the specific limits to the Court's jurisdiction. On the other hand, it could be submitted that Article 7 TEU ought to be triggered only where the classic enforcement procedure of Articles 258-260 TFEU becomes inadequate to address what is becoming a *systematic* threat to the rule of law. In other words, the issue at stake would have to be something more than circumstantial failure to fulfil an obligation under the treaties. This, it seems, is the approach adopted by the Commission in its rule of law framework.<sup>53</sup>

Arguably, an exclusion based on the *lex specialis* argument of the classic enforcement mechanism to address breaches

<sup>48</sup> In this sense: 'Juncker droht Ungarn mit Rausschmiss', *Süddeutsche Zeitung* (31 May 2015) : <http://www.sueddeutsche.de/politik/europaeische-union-juncker-droht-ungarn-mit-rausschmiss-1.2501777>

<sup>49</sup> See A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', *Common Market Law Review* 37 (2000), p. 1307 at 1309 and 1319; F Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?' in A von Bogdandy and P Sonnevend (eds) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart publishing, 2015) 195.

<sup>50</sup> Another option would be to suppress Article 51 altogether: see speech by then Vice-President of the European Commission, EU Justice Commissioner Viviane Reding 'The EU and the Rule of Law – What next?' (CEPS/Brussels, 4 September 2013, Speech/13/677).

<sup>51</sup> F Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?' in A von Bogdandy and P Sonnevend (eds) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart publishing, 2015) 195.

<sup>52</sup> Article 269 TFEU foresees that: '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.'

<sup>53</sup> See *Rule of Law* Communication (COM(2014)158), p. 5. Further: F Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?' in A von Bogdandy and P Sonnevend (eds) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart publishing, 2015) 195 at 204; K Scheppele, 'What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions', [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45\\_princetonuniversityscheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45_princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf); see also Kim Scheppele in C Closa and D Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016, forthcoming).



of the rule of law enshrined in Article 2 TEU, would seem unjustified. First, and as recalled earlier, it finds no support in the text of the EU Treaties. Second, such an exclusion would sit uneasily with the institutional balance guaranteed under Article 13(2) TEU, in that it would encroach upon the general supervisory powers of the Commission. Third, preventing the Commission from exercising its supervisory task in relation to the rule of law would also depart from the aims of the EU institutional framework, of which it is part, to promote the values of Article 2 TEU (as per Article 13(1) TEU), and to assist the Union in fulfilling this cardinal objective in all its actions (as per Article 3(1) TEU read in combination with Article 13(2) TEU). Restricting the EU's ability to safeguard its values to the mechanisms of Article 7 (i.e. cases of *serious* breaches) would impede the fulfilment of the EU value promotion aim, especially in view of the Article's particularly demanding requirements. Conversely, the possibility to enforce Article 2 TEU through the classic infringement procedure would allow the EU to intervene at an earlier stage, i.e. before the breach becomes serious and persistent, and thus far more damaging for the EU legal order.

To be sure, the substantial differences between the two mechanisms reflect the distinct yet arguably *complementary* function they fulfil in the system of the Treaties. First, they are deemed to respond to different types of Member States' deviances from Article 2 TEU. While the infringement procedure purports to tackle *any* failure, the sanction mechanism of Article 7 TEU is crafted specifically to address a 'serious and persistent' breach of Article 2 TEU, whose effect is more corrosive on the EU legal order as a whole. In the case of the infringement procedure, the failure is more limited and circumstantial, whereas in the context of Article 7 TEU, the breach has become systematic, denoting that the State's contentious behaviour has an intentional systemic character.

Second, and as a result, the Union's responses vary under each mechanism. In the context of the infringement procedure, a state's failure to fulfil an obligation may lead to a judicial sanction, and eventually to the payment of a lump sum and/or a penalty payment, if the state concerned fails to comply with the Court's judgment. The purpose is to respond to a contentious *action* (or inaction). By contrast, the 'persistent and serious' breach under Article 7 TEU, if established by the European Council, leads to the suspension of some of the prevaricating state's membership rights, including its participatory rights. Thus, the target is the state's overall *behaviour*, by way of *quarantine*,<sup>54</sup> to protect the functioning of the Union.

The notion of complementarity of the procedures of Article 258 TFEU and of Article 7 TEU, respectively, appears to be endorsed by the Council and the Member States. Their joint Conclusions not only suggested that the rule of law could be safeguarded through both procedures; they also indicated that the infringement procedure is not excluded from the 'field of the rule of law', where it coexists with the Article 7 procedure.<sup>55</sup>

Provided the obligations deriving from Article 2 are articulate enough, as discussed above, the Commission should therefore be able to enforce the values of Article 2 TEU in case of a state's failure, *before* it becomes such as to qualify for an Article 7 procedure. Whether it would be an enforcement of Article 2 TEU alone, would depend on the specific factual situation, but also on the degree of intelligibility of Article 2 itself. Thus, it would be possible to invoke a failure of Article 2 alongside other, more specific failures, e.g. non-compliance with a directive, to indicate clearly that the latter also amount to a violation of an EU *value*. The recent infringement cases against Hungary would have been good candidates for such a combined approach.<sup>56</sup> In sum, the application of the classic enforcement procedure

<sup>54</sup> As aptly put by J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States' 21 *ELJ* (2015) 141 at 144.

<sup>55</sup> The dialogue established by the conclusions *complements* the existing means which the EU might use in the field of rule of law, namely the infringement procedure in the case of a breach of EU law and the so-called article 7 procedure of the Lisbon Treaty which allows for the suspension of voting rights in the case of a serious and persistent breach of EU values.' Conclusions, General Affairs Council, 16 December 2014, doc. 16936/14 at p. 21.

<sup>56</sup> See Case C-286/12 *Commission v Hungary* EU:C:2012:687; and Case C-288/12 *Commission v Hungary*, EU:C:2014:237. Other cases could also be mentioned e.g. against Romania: see F Hoffmeister 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?' in A von Bogdandy and P Sonnevend (eds) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart publishing, 2015) 195 at 210ff; K Scheppelle, 'What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions', [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversitysheppellesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversitysheppellesystemicinfringementactionbrusselsversion_en.pdf)

to Article 2 TEU may help *prevent* the deterioration of the situation pertaining to the rule of law.<sup>57</sup>

#### 4 Means to promote the rule of law

While the EU may sanction Member States' breaches of the rule of law, it is also entrusted to *prevent* them. This is the specific purpose of Article 7(1) TEU (4.1). As illustrated by several recent initiatives, EU institutions appear to be more active on this preventive front, as compared to sanctions, albeit mainly *outside* the particular framework of Article 7(1) TEU (4.2). This phenomenon is partly explained by the disagreement among institutions as to the role the Union should play on this terrain.

##### 4.1 Article 7(1) TEU

Introduced by the Treaty of Nice, the main preventive mechanism is contained in Article 7(1) TEU. It foresees that the EU may act in case of a 'clear *risk* of a serious breach', by a Member State, of the values of Article 2 TEU. The procedure is triggered by the submission from the Commission, the European Parliament, or by one third of the Member States, of a 'reasoned proposal' to the Council. The latter may then decide, by a majority of four fifth of its members and with the consent of the Parliament, that this 'clear risk' does exist. But it should first hear the Member State concerned, and possibly address recommendations to it, following the same procedure. Once the determination is made, the Council is then required to verify 'regularly' that 'the grounds on which such a determination was made continue to apply'.

This provision was introduced to 'giv[e] the Union the capacity to act preventively in the event of a clear risk of a serious breach of the common values, [thereby] greatly enhanc[ing] the operational character of the means already available under the Amsterdam Treaty, which allowed only remedial action after the serious breach had already

occurred'.<sup>58</sup> The mechanism has never been activated, although developments in some Member States could have justified it. One reason could be the unfortunate tendency to assimilate this *preventive* mechanism with the separate *sanction* device of paragraphs 2-4, under the repellent label of 'nuclear option'.<sup>59</sup>

Granted, the substantive and procedural requirements are also demanding for the Council to establish the 'clear risk', and to make recommendations. Yet the initial submission of a 'reasoned proposal' by the Commission or the European Parliament, in itself an important element to draw attention to a contentious situation, is by contrast uncomplicated. It is not dependent on Member States' support, and again it is distinct from the much more politically sensitive sanction device. Conversely, it is an express competence to fulfil the value-promotion mandate of Article 13(1) TEU, and should thus be exercised accordingly.

Following the entry into force of the Nice Treaty, the Commission argued that the new paragraph constituted a legal basis for the establishment of regular monitoring of the Member States' compliance with the founding principles of the Union, then enshrined in Article 6(1) TEU.<sup>60</sup> In its 2003 Communication on the amended Article 7 TEU, it considered that the provision 'confers new powers on the Commission in its monitoring of fundamental rights in the Union and in the identification of potential risks [adding that it] intends to exercise its new right in full and a clear awareness of its responsibility'. More generally, it pointed out that Article 7(1) TEU 'places the institutions under an obligation to maintain constant surveillance',<sup>61</sup> adding that 'the legal and political framework for the application of Article 7 [...] based on prevention, requires practical operational measures to ensure thorough and effective monitoring of respect for and promotion of common values'.<sup>62</sup> However, this dimension of Article 7(1) TEU

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<sup>57</sup> Several issues would need to be addressed for the Commission to oversee compliance with the values of Article 2 effectively: See C Hillion, 'Enlarging the European Union and its fundamental rights protection' in S Adam, P van Elsuwege, I Govaere, E Lannon (eds) *The European Union in the World* (Leiden/Boston, Brill, 2013) p. 557.

<sup>58</sup> See COM(2003) 606, p. 3. Further W Sadurski, 'Adding a bite to a bark? A story of Article 7, the EU Enlargement, and Jörg Haider', 2010 *Columbia Journal of European Law*, 16(3), 385-426; See eg L Besselink, 'the Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives' in A Jakáb and D Kochenov (eds), *The Enforcement of EU Law against the Member States: Methods against Defiance* (Oxford: Oxford University Press), forthcoming.

<sup>59</sup> See the 2012 State of the Union speech of then Commission President Barroso [[http://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm)]

<sup>60</sup> See COM(2003) 606, p. 3; cf European Parliament, Voggenhuber Report on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based (COM(2003) 606 – C5-0594/2003 – 2003/2249(INI)), 1.04.2004.

<sup>61</sup> COM(2003) 606, p. 7.

<sup>62</sup> COM(2003) 606, p. 8.

never materialised either, despite initial attempts,<sup>63</sup> and notwithstanding valid legal arguments to support such development.<sup>64</sup>

Since the Treaty of Lisbon, Article 7(1) TEU foresees that the Council ‘may address recommendations’ to the prevaricating state following a ‘reasoned proposal’, and *prior* to the determination of the ‘clear risk’. The EU is thus endowed with competence to monitor the state concerned *prior to* the risk determination.<sup>65</sup> The Council is also entrusted, after having established the ‘clear risk of a serious breach’, to ‘*verify regularly* that the grounds on which such a determination was made continue to apply’. That the Council should have this express power does not mean that the Commission and the European Parliament have no implied ability to undertake their own monitoring, notably to be able to produce a ‘*reasoned proposal*’. This would indeed be in line with their duty of sincere cooperation to provide the adequate assistance to the Council, as it has itself occasionally asked for.<sup>66</sup> For the Commission in particular, this derives from its general power to ensure the

application of the Treaties, and to oversee the application of Union law.<sup>67</sup>

To be sure, the Council could certainly invite the Commission to produce preliminary studies to assist it in the performance of its tasks, if need be using other legal empowerment. For instance, Article 337 TFEU foresees that the Commission may collect any information and carry out any checks required for the performance of the tasks entrusted to it. This must happen within the limits and under the conditions laid down by the Council acting by a simple majority in accordance with the provisions of the Treaties. In this context, the Commission could assess potential risks of serious breach, and if need, submit ‘*reasoned proposals*’ to the Council. Moreover, under Article 241 TFEU, the Council could also ask the Commission to undertake any studies it considers desirable for the attainment of common objectives. Given that promoting of EU values is a primary objective of the Union, the studies in question could be regular report on Member States compliance with the values of Article 2 TEU, the way it has been asked to do it

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<sup>63</sup> As analysed by W Sadurski in ‘Adding a bite to a bark? A story of Article 7, the EU Enlargement, and Jörg Haider’, 2010 *Columbia Journal of European Law*, 16(3), 385-426. Some degree of EU monitoring of Member States, partly related to the rule of law, has recently appeared in the form of the EU Anti-Corruption Report (eg Report from the Commission to the Council and the European Parliament, COM(2014)38) and the annual EU Justice Scoreboard (Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, and the Committee of the Regions, COM(2015) 116).

<sup>64</sup> Already in 2000, Armin von Bogdandy considered that the power to establish surveillance mechanisms of the general human rights records of Member States was inherent in the EU tasks and competences under Article 7 TEU, in its pre-Nice version: A von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’, *Common Market Law Review* 37 (2000), p. 1307 at 1309. See also e.g. F Hoffmeister, ‘Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?’ in A von Bogdandy and P Sonnevend (eds) *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart publishing, 2015) 195.

<sup>65</sup> L Besselink, ‘the Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives’ in A Jakáb and D Kochenov (eds), *The Enforcement of EU Law against the Member States: Methods against Defiance* (Oxford: Oxford University Press), forthcoming.

<sup>66</sup> See e.g. Council conclusions on the Commission 2013 report on the application of the EU Charter of Fundamental Rights and the consistency between internal and external aspects of human rights’ protection and promotion in the European Union Justice and Home Affairs Council meeting, Luxembourg, 5 and 6 June 2014; point 7 of the COREPER doc 10168 on Council Conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental rights of the European Union, 6-7 June 2013.

<sup>67</sup> Thus, the Commission publishes an annual Single Market Scoreboard which includes an evaluation of Member States’ performance in transposing internal market rules: [http://ec.europa.eu/internal\\_market/scoreboard/index\\_en.htm](http://ec.europa.eu/internal_market/scoreboard/index_en.htm)

in relation to candidates for membership, in the context of Article 49(1) TEU.<sup>68</sup> Finally yet importantly, the residual competence of Article 352 TFEU<sup>69</sup> could also be used, in combination with Article 7(1) TEU.<sup>70</sup>

Be that as it may, the preventive mechanism of Article 7 TEU has thus far remained a dead letter. Instead, faced with a deteriorating compliance with the rule of law in the Union, alternative preventive mechanisms have been envisaged.

#### 4.2 Prevention outside Article 7 TEU

Thus, the Commission's 'EU Framework to strengthen the Rule of Law'<sup>71</sup> displays a slight change of approach in the prevention of breaches of EU values. Not only does it refrain from reviving the idea of regular monitoring based on Article 7(1) TEU, but the framework is also set to operate *outside* of the mechanisms of Article 7 TEU.

The new device consists of a three-stage structured dialogue, initiated in case of 'clear indications of a systematic threat to the rule of law in a Member State'. In principle, this formal dialogue starts by the Commission sending a 'rule

of law opinion' to the Member State in question, which substantiates its concerns and gives the national authorities the possibility to respond.<sup>72</sup> Should the matter not be resolved satisfactorily, the Commission may issue a 'rule of law recommendation', which spells out the reasons for concerns, possible solutions, and a deadline within which the Member State would have to remedy the identified issues, and inform the Commission of the steps taken. If unsatisfied by the Member State's efforts, the Commission could then decide to activate the mechanisms of Article 7 TEU.

The Communication further explains that the framework triggers a dialogue between the Commission and the Member State concerned to address 'threats to the rule of law ... which are of systemic nature ... *before* the conditions for activating the mechanisms foreseen in Article 7 TEU [are] met' (emphasis added). It is not conceived as 'an alternative to [the latter], but rather [as] preced[ing] and complement[ing] [its] mechanisms'.<sup>73</sup> In other words, the Commission has set up a pre-preventive procedure,<sup>74</sup> seemingly located between the classic infringement procedure and the mechanisms of Article 7 TEU.

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<sup>68</sup> Moreover, in the specific context of the Area of Freedom, Security and Justice, monitoring compliance with the rule of law could be based on Article 70 TFEU according to which: Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title [i.e. Title V on the Area of Freedom, Security and Justice] by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

<sup>69</sup> It should be recalled that Article 352 TFEU (or Article 308 EC, as it then was) was used as legal basis for the establishment of the EU Fundamental Rights Agency; see Regulation (EC) n° 168/2007 establishing a European Union Agency for Fundamental Rights; OJEU 2007 L53/1.

<sup>70</sup> Some of these legal bases have been envisaged and discussed by L Moxham and J Stefanelli, 'Safeguarding the Rule of Law, Democracy and Fundamental Rights: A Monitoring Model for the European Union', Bingham Centre for the Rule of Law, 15 November 2013; they were also examined, though not in detail, in the Opinion of the Council Legal Service on the Commission proposal for a new Rule of Law framework (doc. 10296/14).

<sup>71</sup> Communication from the Commission to the Council and the European Parliament, *A new EU framework to strengthen the Rule of Law* (COM(2014)158). For the background to this initiative, see Commission President's 'State of the Union' speeches of 2012 and 2013, and Discussion Paper 4: Rule of Law, Assises de la Justice, conference (Brussels, 21-22 Nov. 2013), available at <ec.europa.eu/justice/events/assises-justice-2013/files/rule\_of\_law\_en.pdf>

<sup>72</sup> The steps taken prior to, and for the activation of the mechanism in relation to Poland are recalled here: [http://europa.eu/rapid/press-release\\_MEMO-16-62\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-62_en.htm)

<sup>73</sup> Communication *A new EU framework*, op. cit., p. 3.

<sup>74</sup> The new Commission 'First Vice-President' in charge of 'Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights', would presumably have an active role to play in this framework, as made clear by the incumbent. See hearing at the European Parliament: <ec.europa.eu/commission/sites/cwt/files/commissioner\_ep\_hearings/2014-ep-hearings-reply-timmermans\_en.pdf>; and debate on EU framework for democracy, rule of law and fundamental rights (11 Feb. 2015): [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150211+ITEM-017+DOC+XML+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20150211+ITEM-017+DOC+XML+V0//EN&language=EN); meeting at EP Committee on Civil Liberties, Justice and Home Affairs (30 March 2015): <http://www.europarl.europa.eu/news/en/news-room/content/20150326IPR38564/html/Committee-on-Civil-Liberties-Justice-and-Home-Affairs-meeting-30032015> To be sure, his title and ranking signal that it is a top priority for the new College to safeguard the values of the Union, and particularly the rule of law and fundamental rights.

On the Council's side, it was decided to 'establish ... a dialogue among all Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties'.<sup>75</sup> While acknowledging the Council's role in 'promoting a culture of respect for the rule of law within the European Union', the hybrid 'Conclusions of the Council and the Member States meeting in the Council' foresee that the dialogue takes place annually in the General Affairs configuration of the Council, and that it is prepared by the Presidency and the COREPER.

The two initiatives confirm that, as EU institutions, both the Commission and the Council (and Member States) are committed to promoting EU values in general, and the rule of law in particular. They also suggest that prevention might take other forms than the specific mechanism of Article 7(1) TEU. The initiatives thus constitute new tools and approaches in the protection and safeguard of EU values, and additional steps before, and possibly as a way to prevent the activation of Article 7 TEU.

That said, the two approaches differ significantly. One explanation could be the institutions' distinctive powers in general, and in the context of Article 7 TEU in particular. Yet, the differences also appear to express an underlying divergence of views as to the role the EU should play in safeguarding the rule of law. Thus, the *object* of the two undertakings is not the same. The Commission has established a 'framework' to 'strengthen' the rule of law and to 'resolve future threats to the rule of law in Member States before conditions for activating the mechanism [of Article 7] would be met'.<sup>76</sup> By contrast, the Council and the Member States have set up a 'dialogue' to 'promote a culture of respect for the rule of law' (emphases added).

Moreover, the approaches differ in *nature*. While the Commission proposes a structured exchange between itself and a potentially prevaricating Member State in an EU-driven process, the Council & Member States envisage a dialogue 'among' peers, pointing towards a more restricted EU involvement. Indeed, while the Communication

suggests that the EU (notably the Commission), has the appropriate *competence* to set out a new framework to strengthen the protection of the rule of law, the Conclusions clearly indicate that the Council, and indirectly the EU, is not deemed able legally to establish alone even an annual rule of law *dialogue*.<sup>77</sup> It is symptomatic that the Council & Member States' Conclusions emphasise that their approach is 'without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States inherent in their fundamental political and constitutional structures',<sup>78</sup> while not mentioning any provision of the EU Treaties. The document does not refer to the Commission's Communication either, evoking instead a note from the *Presidency* on 'Ensuring respect for the Rule of Law'.<sup>79</sup> Seemingly, the Council & Member States' Conclusions are not based on, and not meant to be a follow-up to the Commission's initiative, suggesting instead that, for the Member States, the Commission does not have the power to take it.

This position reflects, although only partly, the views of the Council's Legal Service whereby Article 7 TEU itself does not set a basis to further develop or amend [the] procedure which it establishes. It also implied that additional monitoring and dialogue, involving the Commission as envisaged in the 2003 Communication, would not be possible either:

'there is no legal basis in the treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abused its powers by deciding without a legal basis.'

Instead, the Council Legal Service recommended that the Member States set up a mechanism through an inter-governmental agreement, potentially involving the institutions for some tasks.<sup>80</sup>

<sup>75</sup> Conclusions of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law, General Affairs Council meeting, Brussels, 16 Dec. 2014.

<sup>76</sup> Communication, *A new EU framework*, op. cit., p. 3.

<sup>77</sup> Though interestingly, the Presidency note referred to in the conclusions (Note from the Presidency to the Council, 'Ensuring Respect for the Rule of Law in the European Union', doc. 15206/14, Brussels, 14 Nov. 2014) did not evoke the possible need for formal support of the Member States to establish an annual rule of law dialogue.

<sup>78</sup> Further on the interaction between Article 4(2) TEU and Article 2 TEU, see Editorial Comments, 'Safeguarding EU values in the Member States – Is something finally happening?' 52 *CMLRev* (2015).

<sup>79</sup> Note from the Presidency to the Council, 'Ensuring Respect for the Rule of Law in the European Union', doc. 15206/14, Brussels, 14 Nov. 2014.

<sup>80</sup> Doc 10296/14.

In sum, while there is agreement on the notion that institutions must promote the rule of law as a founding value of the Union, there is a clear divergence regarding the extent and nature of this preventive role, both in the context of Article 7(1) TEU, and outside it. Clearly, the inter-institutional sincere cooperation called for in Article 13(2) TEU to ensure that the EU fundamentals are safeguarded, in line with the strong mandate of Article 13(1) TEU, has yet to materialise.

## 5 Conclusion

Envisaged as one of the Union's values, the rule of law is the keystone of the EU legal edifice. This paper has argued

that EU primary law bestows a strong and multi-layered mandate on the Union to ensure that it is observed. While the treaties foresee increased EU preventive and sanctioning competences for that purpose, they also entail duties of sincere cooperation on Member States and institutions to assist the Union in promoting the rule of law, defined as one of its objectives. The combination of EU competence and Member States obligations, though far from flawless, may partly nuance the view that the Union lacks adequate mechanisms to address assaults on its values. The fact that little use, if any, has been made of available devices is indeed indicative that the weakness might lie outside the current legal arrangements.

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