

Better late than never?

On the European Commission's Rule of Law Framework and its first activation

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Abstract

This article first describes how the election in the EU of national governments intent on implementing 'illiberal' agendas has led the European Commission to adopt in March 2014 a new instrument known as the Rule of Law Framework. The mechanism's potential effectiveness and the Commission's reasoning to justify its first activation against Poland in January 2016, when it has failed to do so against Hungary, are subsequently analysed. It is argued that while the Commission should be commended for seeking to address increasing rule of law backsliding at Member State level, it may also be criticised on five main grounds: its procrastination with respect to Hungary; its lack of consistency in the light of the reasoning used in the case of Poland; its misrepresentation of Article 7 TEU as a 'nuclear option'; its continuing failure to trigger Article 7(1) TEU against Hungary; and finally, its unwillingness to more forcefully apply the infringement procedure in a situation where a pattern of systemic breaches of EU values has clearly come to light, as has been the case in Hungary since 2011. More fundamentally, it is submitted that reliance on the Rule of Law Framework alone, if only because of its soft and discursive nature, will not remedy a situation where systemic violations of EU values form part of a governmental plan to set up an 'illiberal' regime.

I. Expecting the guardian to guard

As the 'guardian of the Treaties',¹ the European Commission is expected to ensure that EU law is observed by EU institutions and Member States alike. This concerns, to an equal degree, the EU's *acquis*, that is, the binding body of EU law *sensu stricto*, and the fundamental values on which the Union is founded and which it shares with the Member States according to Article 2 TEU.²

The responsibility to shape, promote and protect the European integration project has been bestowed upon the Commission (then the High Authority) from the early days of the 1951 European Coal and Steel Community: its prominent role being one of the core features of the Schuman Declaration of 9 May 1950 and all of the European Treaties adopted ever since. To fulfil this task, the *Herren der Verträge* endowed the Commission with inter alia the power to initiate infringement actions against any non-compliant Member State before eventually bringing the matter before the Court of Justice. This procedure has been regularly used and led to the successful resolution of countless but specific violations of EU law (Lenaerts et al., 2013, 159). To address more transversal and serious infringements of EU values such as the rule of law, a new provision known as Article 7 was inserted into the Treaty on European Union in 1999. It was initially thought that this provision would never have to be applied and would merely help prevent 'democratic backsliding' post EU accession (Müller, 2013; Bermeo, 2016) at a time

¹ See Article 17(1) TEU: 'The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties...'

² '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.'

where a significant number of Eastern European were expected to soon join the EU (Sadurski, 2010). Faced with the emergence of unforeseen ‘rule of law crises’ (Reding, 2013), and the unexpected transformation of Hungary into what may be labelled an ‘illiberal state’ (European Parliament, 2015c), the Commission deplored the limits of the instruments available to it to address the ‘threats to the legal and democratic fabric in some of our European states’ (Barroso, 2012). This diagnosis led the Commission to adopt a new instrument known as the Rule of Law Framework in 2014 (Kochenov and Pech, 2015).

Two main questions will be addressed below: ‘What went wrong?’ and ‘what should the Commission do about it?’ It will be first submitted that the diagnosis above is essentially correct. Indeed, the case of Hungary and more recently, Poland, which led the Commission to activate its Rule of Law Framework for the first time, show a change in the scale but also in the nature of the challenge with the arrival of national governments intent on implementing ‘illiberal’ changes that directly conflict with EU values (II). It will then be shown how these developments convinced the Commission to complement its enforcement instruments with a new monitoring framework (III). The reasons behind the Commission’s decision to activate the Rule of Law Framework with respect to Poland, when it has failed to do so against Hungary, will finally be analysed (IV). Our main submission is that while the Commission should be commended for seeking to address rule of law backsliding at Member State level in a context where the Council of the EU has been either in denial or engaged in a façade of action (see Oliver and Stefanelli in this issue), reliance on the new Framework alone, if only because of its many shortcomings, will not remedy a situation where systemic violations of EU values form part of a plan to set up an ‘illiberal’ regime, as is the case in Orbán’s Hungary and more recently, Kaczyński’s Poland.

II. The Changing Context

Although the values laid down in Article 2 TEU are not strictly speaking within the scope of ordinary *acquis* in the sense that the Union cannot adopt legislation based on this provision alone, their inclusion within the broader ambit of EU law cannot be disputed (Pech, 2010; Closa et al. 2014; Hillion 2016). In other words, the EU may be said to already possess a very clear and strong constitutional mandate to ensure that its foundational values are observed in each of its Member States. Furthermore, and as a matter of law, EU Member States are under a legal duty to cooperate in this endeavour and assist the EU in promoting its values both within and beyond the EU (Pech, 2016). The special nature of Article 2 TEU can however be deduced from its association with a specific enforcement mechanism which can be found in another Treaty provision (Article 7 TEU), and which itself distinguishes between two situations: where there is a clear risk of a serious breach of Article 2 values in a Member State, and where a serious and persistent breach of the same values has been established (Sadurski, 2010).

Articles 2 and 7 TEU were originally inserted into the EU Treaties primarily for symbolic and dissuasive reasons respectively: It was hoped that the legitimacy of the EU would benefit from a provision making clear that its ‘constitution’ complies with the basic tenets of Western constitutionalism, and that the national governments of Eastern European’s new democracies would be deterred from engaging in any democracy or rule of law backsliding strategies post accession for fear of triggering Article 7. Beyond these two provisions, the irreversible democratic rule of law abiding nature of EU Member States has long been simply presumed as evidenced by the fact that the initial Communities were given neither powers nor legal tools to intervene in this field post EU accession. Moreover, there was no explicit requirement that only

democratic states with a strong rule of law and human rights record could join the Union until the entry into force of the Amsterdam Treaty in 1999.³

The late enshrinement of this condition and insertion of a new mechanism aimed at preventing democracy backsliding post EU accession may be explained by a widely held faith among key institutional actors in the EU's transformative power pre EU accession (Grabbe, 2014), and the constraining effects of the EU's legal and regulatory framework, which has long been believed to make democratic transition irreversible. With respect to the EU's transformative power, it has however been shown that the results of the Commission's monitoring of candidate countries in areas such as democracy were both inconsistent in terms of the quality of democratic transformation (Kochenov, 2008) and unstable, in terms of guaranteeing lasting change, as illustrated, *inter alia*, by the current situation of in Hungary and Poland (Shekhovtsov, 2016). This has led the Commission to adopt a new, more demanding 'rule of law approach' in 2014 with respect to candidate countries, but it is too early to say whether this method may prevent them from acceding to the EU before their compliance record with EU values is both solidly established and self-sustaining (Pech, 2016). With respect to current Member States, the adoption of Article 7 laid to rest the assumption that their adherence to democracy and the rule of law could be considered irreversible. More problematically, its expected dissuasive effect has failed to materialise and prevent what may be called the 'Orbánisation' of Europe as will be shown below.

III. The Commission's New 'Rule of Law Framework'

In his 2013 State of Union address, the former President of the Commission called for a new instrument which would fill the space between the Commission's infringement powers laid down in Articles 258-260 TFEU, and the so-called 'nuclear option' laid down in Article 7 TEU (Barroso, 2012), in order to enable the Commission to address an increasing number of 'rule of law crises' within the EU itself. This call for a new instrument was largely warranted as both procedures suffer from a number of shortcomings, with the consequence that Article 7 TEU has never been used whereas the infringement procedure, as interpreted and applied by the Commission itself, has proved ineffective to remedy systemic violations of EU values.

Main shortcomings of the procedures laid down in Article 7 TEU and Article 258 TFEU

With respect to Article 7 TEU, the main issue is that this provision is politically perceived as a remedy of last resort to be used only in the most extreme circumstances, hence the 'nuclear option' label. Procedurally speaking, this provision is also subject to high decision-making thresholds, with any sanctions requiring unanimity in the European Council (minus obviously the country subject to the proceedings). In addition, the current presence of two 'illiberal' national governments in the EU would seem to make the deployment of the 'biting' clause of Article 7 virtually impossible, unless both countries are tackled *de concert* considering that Hungary has committed itself to blocking any eventual sanctions against Poland (Scheppele, 2016a). It is however often forgotten that the 'nuclear option' consists of two different procedures (Hillion, 2016). Under Article 7(1) TEU, the Commission may for instance discretionarily trigger this provision in a situation where it is of the view that there is a clear risk of a serious breach of EU

³ See 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. ...'

values. No sanctions can be adopted under this procedure. The ‘best’ outcome could be the adoption of recommendations. Accordingly, Barroso’s ‘nuclear option’ label may be viewed as both unhelpful and misleading: unhelpful because it has undermined the dissuasive nature of Article 7 and misleading because there is nothing ‘nuclear’ about stating that the existence of a risk of serious breach and adopting recommendations to address the situation.

With respect to the infringement procedure, the main problem is that the Commission has construed its powers as confined strictly to the areas where concrete, specific provisions of the EU’s *acquis* have been breached. The Commission’s narrow interpretation of its powers under Article 258 TFEU means, for instance, that the Hungarian’s Prime Minister call for the establishment of an ‘illiberal state’ (Traynor, 2014), which is not pure rhetoric in the context of the contemporary Hungarian state (Müller, 2014b), could not in and of itself be subject to an infringement action. In our opinion, there is however no legal obstacle preventing the Commission from using the infringement procedure to simultaneously investigate a set of diffuse and/or cumulative breaches of EU values in conjunction with EU principles such as the duty of loyalty, which is enshrined in Article 4(3) TEU (Scheppele, 2016b), or the requirement that Member States ‘shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’ (Article 19(1) TFEU). Article 258 TFEU does indeed speak of the necessity to ensure that the Member States fulfil any ‘obligation under the Treaties’. This also means that there is no legal hurdle preventing the Commission from bundling numerous apparently minor violations to demonstrate a pattern which itself could amount to a breach of Article 2 TEU (Scheppele, 2016b). The main problem with the Commission’s repeated failure to appreciate the calculated nature and cumulative effect of the breaches of EU law committed in Hungary is that it has too often led the Commission to claim legal victories (Timmermans, 2015b: ‘The Commission has successfully dealt with many ... challenges to the rule of law in recent years, for instance against Hungary on cases like the early retirement of judges’) when they were essentially pyrrhic ones (for instance, the Commission found financial compensation an acceptable remedy to the unlawful firing of senior judges in Hungary, oblivious to the chilling effect of such a measure and permanent damage made to the independence of the judicial branch in this country: Scheppele, 2014; Sólyom, 2015).

In the Commission’s defence, the strategy of dismantlement of the ‘liberal state’ that took place in Hungary was not easy to decipher, at least initially, as this was indeed an unprecedented phenomenon in the EU. The Commission has also received very limited support from the European Parliament, with the European’s People Party doing its best to shield Orbán from criticism, and virtually no support from either the European Council or the Council of Ministers for more drastic actions or sanctions (only a limited number of national governments have been willing to act and back the Commission: see e.g. the joint letter of four foreign ministers from Germany, the Netherlands, Denmark and Finland sent to the President of the Commission on 6 March 2013 cited in Reding, 2013). The absence of strong external support may explain why the Commission showed little inclination to more creatively exploit existing possibilities under Articles 7(1) TEU and 258 TFEU to focus instead on the adoption of a new instrument known as the Rule of Law Framework (European Commission, 2014), the main elements of which will now be briefly described.

Main features of the Rule of Law Framework

In a nutshell, this new instrument takes the form of an early warning tool whose primary purpose is to enable the Commission to enter into a structured dialogue with the Member State concerned. The main aim is to prevent perceived systemic threats to the rule of law from escalating. This procedure consists of three separate phases: (1) In the *assessment* phase, the Commission will assess whether there are clear preliminary indications of a systemic threat in the relevant Member State and sends a ‘rule of law opinion’ to the government concerned if this is the case; (2) In a situation where no appropriate actions are taken, the *recommendation* phase ensures that a ‘rule of law recommendation’ is addressed to the government, with the option of including specific indications on ways and measures to resolve the situation within a prescribed deadline; (3) Finally, in the follow-up phase, the Commission is supposed to monitor how the recommendation is implemented. Lacking satisfactory implementation, the Commission may then discretionally decide whether a recourse to Article 7 TEU is warranted, hence the informal name of the Rule of Law Framework: the ‘pre-Article 7 procedure’.

We have argued elsewhere that this new procedure represents a modest step in the right direction (Kochenov and Pech, 2015). Its adoption showed that the Commission finally understood the serious, if not existential, threat posed by the solidification of authoritarian regimes within the EU. Indeed, as the Court of Justice made it clear in Opinion 2/13, the EU’s ‘legal structure is based on the fundamental premise 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’. Politically speaking, the framework also represents a bold move, especially in the context of the Council’s inaction and its attempts to undermine the Commission’s efforts as evidenced by the Council’s legal service’s opinion holding, unconvincingly, the new Framework to go beyond the powers currently allocated to the Commission under the Treaties (see Oliver and Stefanelli in this issue).

The Commission’s new framework does however suffer from a number of shortcomings. Crucially, it is based on the highly questionable presumption that a discursive approach is bound to produce positive results. However, in really problematic cases, i.e. in countries where the ruling élite has made a *deliberate choice* to implement a programme that directly breaches EU values, socialisation in the framework of a pre ‘nuclear option’ procedure is unlikely to bring about any meaningful change. The non-legally binding nature of the Commission’s eventual rule of law recommendation(s), and the non-automatic recourse to Article 7 TEU should the recalcitrant Member State fail to comply, further increases the likelihood of protracted discussions and ineffective outcomes.

The first activation of this mechanism against Poland shall soon enable us to test the validity of these concerns. We fear, however, that by further postponing any eventual triggering of Article 7(1) TEU, the Framework will most likely enable the Polish government to further entrench legal changes that are clearly incompatible with Article 2 TEU. An additional connected issue which is worth exploring is why was Poland the first country to be subject to this new mechanism when the European Parliament, among others, had repeatedly asked the Commission to trigger it against Hungary in order to assess ‘the emergence of a systemic threat to the rule of law in that Member State’ (European Parliament, 2015a, para. 11).

IV. Why Poland and not Hungary?

Until the rushed and controversial changes adopted by the newly elected Poland’s Law and Justice party with respect to the country’s Constitutional Tribunal and media, the Commission

had done its best to justify the non-activation of its Rule of Law Framework *vis-à-vis* Hungary. Frans Timmermans, the First Vice-President of the European Commission in charge *inter alia* of the Rule of Law since November 2014, did make clear that ‘there is no such thing as an illiberal democracy’. He further committed himself to using the pre-Article 7 procedure should the situation in any Member State require it (Timmermans, 2015a). Unfortunately, the vision of the Commission’s role he exposed in a major speech delivered at the University of Tilburg in September 2015 was nothing but an elegant exercise in justifying inaction (Timmermans, 2015c).

The Commission’s reasoning and justifications

In this speech, Timmermans recalled that the Masters of the Treaties have strictly limited the Commission’s powers when it comes to guaranteeing respect for democracy or the rule of law outside the scope of EU law. In this context, the Commission has only the power to trigger Article 7 TEU and since 2014, to activate its Rule of Law Framework. Strictly speaking, this analysis is not incorrect, but his views of Article 7 are much less convincing:

‘It is a measure of last resort – not to be excluded, but I would hope that we never let a situation escalate to the stage that it would require its use. I believe that the case of Austria, with Jörg Haider’s party joining the government, has weakened the EU’s capacity to react in such a case. It was a political response which completely backfired at the time, and since then Member States have been reluctant to take issue with other Member States on this basis.’

Many approximations can be noted here. Firstly, there was no EU response in the Austrian case but an *ad hoc* action of the Member States, which led to the freezing of diplomatic relations with Austria. Secondly, this initiative came immediately following the formation of the Austrian government before it could undertake actions that could have demonstrated a serious breach of EU values. Finally, there is no clear evidence that this response, while arguably disproportionate, given that there was, strictly speaking, nothing to respond to, ‘completely backfired’ to paraphrase Timmermans. It may have led to a rise in nationalist sentiments in Austria, which was unsurprising considering that diplomatic sanctions were adopted before a breach of EU values in the country could be documented. To use the ‘Austrian precedent’ to justify inaction under Article 7 in the case of Hungary, where ample evidence is available, is therefore puzzling and so is also Timmermans’ failure to mention that Article 7 TEU offers *two* different options, which were not available at the time of the Haider controversy.

Referring to Hungary, Timmermans noted that the Commission ‘can only act against actual measures, not polemics or speeches.’ This is however disingenuous. First of all, this is exactly the opposite of what Timmermans did when the Hungarian Prime Minister suggested reintroducing the death penalty, which led the Vice-President of the Commission to threaten the use of Article 7 TEU (Timmermans, 2015b). Secondly, there is a long list of ‘actual measures’ adopted by the Hungarian government that may easily be found, provided that there is the will to do so. Hungary’s turn into a ‘Frankenstate’ (Scheppele, 2013) is indeed well documented, including by the European Parliament and the Venice Commission. Unconvincing excuses and attempts to beg off the issue aside, Timmermans seems to embrace a vision of a more ‘political’ Commission, which would uphold EU values in a discretionary manner and only where it is sufficiently consensual to do so, a vision which is, with respect, incompatible with its legal role as Guardian of the Treaties.

This may explain why Věra Jourová, the Commissioner for Justice, adopted a different but no less unconvincing line of reasoning at a plenary debate held in Parliament on 2 December 2015 on the situation in Hungary (European Parliament, 2015b). She made clear that for the Commission, there are no ‘grounds at this stage to trigger Article 7 or the Rule of Law Framework’. After listing an astonishingly long list of violations of EU law committed by Hungary – in doing so, not realising she was actually making an overwhelming case for more drastic action under Article 7 TEU – the Commissioner concluded that ‘concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play’.

A critical assessment of the Commission’s reasoning

This line of reasoning can be briefly criticised on two main grounds: (i) A misplaced belief in the effectiveness of multiple but specific infringement proceedings, when the overwhelming evidence suggests that they have until now only led the Hungarian government to tactically retreat and adopt the most minimalistic formal remedies when found in breach of EU law, leaving unlawful practices in place; (ii) A misplaced faith in national rule of law safeguards whereas the Hungarian judiciary’s independence and impartiality have been systematically undermined via forced retirements and other measures. Again, the evidence of the subjection of Hungarian’s judiciary to the ruling party is overwhelming, and easily accessible (e.g. the report issued by IBAHRI, 2015, which concludes that the independence of the judiciary and the rule of law remain under threat in Hungary). And yet the Commission is embarrassingly willing to claim that the national ‘judicial and constitutional mechanisms and safeguards which aim to ensure the protection of democracy and fundamental rights’ are functioning in Hungary in order to conclude that the conditions to activate the Rule of Law Framework are not met.

In our view, there is only one argument one may use to legally justify the non-activation of the Framework, but it is one which would not be easy for the Commission to accept: Hungary’s ‘constitutional revolution’ is now over and the consolidation of Orbán’s power complete. Since the Framework cannot be retroactively applied, the best one may hope for in the case of Hungary is the adoption of systemic infringement actions, that is, the bundling of a set of infringements of EU law which, when taken together, demonstrate a pattern which amounts to a systemic breach of EU values and/or of the principle of loyal cooperation which are respectively laid down in Article 2 TEU and Article 4(3) TEU (Schepele, 2016b).

Commissioner Jourová’s line of reasoning with respect to Hungary did not convince the majority of MEPs who criticised her assessment for focusing ‘mainly on marginal, technical aspects of the legislation while ignoring the trends, patterns and combined effect of the measures on the rule of law and fundamental rights’ and correctly noted that infringement proceedings ‘have failed in most cases to lead to real changes and to address the situation more broadly’ (European Parliament, 2015c, para. 7). Their previous call for an activation of the Commission’s Framework was reiterated after having noted, with a certain degree of prescience, that the Commission and the Council’s failure to decisively act against Hungary would end up prompting the emergence of similar developments in other member states, and raise the broader and existential issue of the Union’s ability ‘to ensure continuing respect for the political Copenhagen criteria once a Member State has acceded to the Union’ (European Parliament, 2015c, para. 5).

Within a few weeks, the MEPs were proven right with the new Polish government’s clear attempt to follow Orbán’s blueprint. This however led to a swift and forceful answer from the

Commission. On 13 January 2016, Timmermans announced the Commission's decision to carry out a preliminary assessment of the situation of the Polish Constitutional Tribunal under the Rule of Law Framework (Timmermans, 2016). The first time this instrument has ever been activated. The primary justification for this unprecedented step was 'the fact that binding rulings of the Constitutional Tribunal are currently not respected', which 'is a serious matter in any rule of law-dominated state' (Id.). The situation would, therefore, allegedly differ from the situation in Hungary – notwithstanding the fact that the Hungarian government similarly paralysed its Constitutional Court in 2011 under a spurious pretext (Sólyom 2015). The legislative changes adopted by the *Sejm* with respect to Public Service Broadcasters is the other official justification given by the Commission to activate phase 1 of the Framework, on the main ground that democracy requires the protection of 'freedom of expression, freedom of assembly and respect of the rules governing the political and electoral processes' (Timmermans, 2016). This is another example of institutional amnesia or selective memory as the media laws adopted in Hungary went far beyond the changes adopted in Poland, as the Hungarian media laws did not simply cover public broadcasting but all media whether public or private. There is therefore either a lack of institutional memory of what happened during the term of the last Commission, or a deliberate attempt to reinterpret history so as to justify the selective use of a new instrument that was officially designed with the aim of treating all Member States equally.

Be that it may, the activation of the Framework means that the Commission has now entered into a process of structured dialogue with Polish authorities. This process is supposed to help the Commission gather all relevant information and evidence in order to assess whether there are clear indications of a systemic threat to the rule of law. If so, as looks more than likely at the time of writing this contribution, phase 2 of the Framework may be activated, in which case the Commission will address recommendations to the Polish government. It is important to note that the framework does not impose any deadlines. The Commission did however make clear in January 2016 that it would review the situation after the opinion of the Council of Europe Venice Commission relating to the changes made to the Polish Constitutional Tribunal is published (European Commission, 2016). This Opinion was published on 11 March 2016. Its main finding is that 'as long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger [in Poland], but so is democracy and human rights' (Venice Commission, 2016, § 135). Considering this assessment and the Polish government's refusal to publish the Constitutional Tribunal's ruling which found the relevant Polish legislation relating to its own membership and functioning unconstitutional – a refusal which the Venice Commission has described as 'contrary to the rule of law' (Venice Commission, 2016, § 143) – the European Commission will have no choice but to move to phase 2 of the Framework should it wish to remain a credible institution.

While the shortcomings of the Commission's Rule of Law Framework were highlighted above, three more come to mind in the light of Poland's ongoing probe. The first is the absence of any clarity on how the Commission understands 'systemic breach'. The additional absence of any pre-defined benchmarks means that the Commission has absolute discretion to decide whether there is a case to answer under the Framework, either because it has objective reasons for doing so or not. This is not to say that we do not think that Poland has a case to answer. We would however argue, as explained above, so does Hungary despite the unpersuasive claim made by Jourová that the situation would differ as national rule of law safeguards would allegedly still work in Hungary (European Parliament, 2015b).

This brings to light another shortcoming of the Rule of Law Framework: the absolute discretion the Commission has given itself to decide when to activate this instrument. This absolute discretion means that political factors may excessively influence its decision-making and lead to similar situations being treated differently. Indeed, the Commission's reluctance to activate its Framework against Hungary can hardly be justified on pure legal grounds. Different political factors are at play. To name but a few, the Commission's Polish probe seems to have been primarily decided to prevent any further 'Orbánisation' within the EU, while the economic and geopolitical importance of Poland at a time of renewed tensions with Russia also means the cost of inaction had dramatically increased. One may also be forgiven for mentioning petty party politics as a key factor. Indeed, Poland's Law and Justice party – a rather improper name considering its understanding of the rule of law – belongs to a relatively marginal parliamentary group in the European Parliament. Support within the Parliament for more drastic action can therefore be more easily secured whereas until then, the two-largest groups in the Parliament – the European People's Party and the Socialists & Democrats group – had voiced their opposition to any meaningful action against Hungary and Romania 'on the basis of the party affiliation of the incumbent government' in these two countries (van Hüllen and Börzel, 2013, p. 22). This shows that it would be wrong therefore to lay the blame at the door of the sole Commission for not having done more with respect to Hungary. A recent intervention by Martin Schulz, the President of the European Parliament, beggars belief in this respect as he explains that contrary to the situation in Poland, EU institutions would have never been 'able to offer evidence that the Hungarian government had breached in a 'serious and persistent' manner EU values, and that in any event, it had the required parliamentary majority to amend the national constitution (Schulz, 2016). To put it concisely, this analysis not only flies in the face of numerous reports by many international bodies, including by the European Parliament itself (see Sargentini and Dimitrovs in this issue), it also conveniently forgets that Article 7(1) TEU can be triggered when there is a mere 'clear risk' of a serious breach of EU values. More worryingly, Schulz seems to suggest that one can breach EU values in total impunity as long as you have the required majority to rewrite the national constitution.

A third and final problem can be highlighted: The impact of the Commission's recent activation of the pre-Article 7 procedure on the future reading of Article 7 itself. Should something 'new' happen in Hungary tomorrow, which may then be viewed by EU institutions as indicative of a systemic threat to EU values, the Hungarian government could then reasonably argue that the Commission should first activate its pre-Article 7 procedure before any eventual recourse to Article 7. This further undermines the effectiveness of this provision. Indeed, it makes its future activation subject to the preliminary exhaustion of a potentially long process with no pre-defined deadlines, which arguably makes Article 7 the least dissuasive 'nuclear' instrument ever made. There is something of a rather depressing pattern here. It seems indeed that every time the EU institutions have been confronted with a seriously 'backsliding state' they have decided to add yet another pre-stage before actual sanctions may be considered let alone adopted. And in the recent case of Poland, considering the nature and severity of the problems highlighted by the Commission itself, a diagnosis, as noted above, further confirmed by the Venice's Commission Opinion on the law relating to the Polish Constitutional Tribunal, one may be forgiven to think that this is exactly the scenario foreseen by Article 7(1) TEU, if not Article 7(2) TEU, in which case the Commission's recourse to the Rule of Law Framework may be seen as an attempt to further delay difficult decisions when faced with an uncompromising 'illiberal' national government.

V. Conclusion

The Commission's adoption of the Rule of Law Framework, while a modest but positive step in the right direction, should not lead one to ignore its shortcomings as well as the Commission's procrastination with respect to Hungary and its lack of consistency considering the rationale used to justify the first activation of the Framework as regards Poland. In focusing its energy on adopting this Framework rather than placing the EU national governments in a position to face up to their own responsibilities by triggering Article 7 TEU, which the Commission has furthermore misrepresented as a nuclear option, or more forcefully apply the infringement procedure in a situation where a pattern of systemic breaches of EU values comes to light as has been the case in Hungary since 2011, the Commission may regrettably be said to have broadly failed to fulfil its role as Guardian of the Treaties in this context.

Fearing, not unreasonably, an anti-EU backlash in countries where the media are subject to tight governmental controls, the Commission has, in our opinion, wrongly assessed the cost of inaction in the long term and failed to take into account the broader interests of EU citizens, whose rights and obligations can now be defined, in part, by 'illiberal regimes' via their participation to the EU's decision making processes. In the Commission's defence, however, some of its actions have had some effect in rolling back some of the worst changes contemplated in Hungary. Furthermore, the Commission's political leeway has been limited in a context where the Council of the EU has proved more interested in discussing the limits of the Commission's powers rather than addressing potential or actual systemic breaches of EU values amongst its members. The Commission is also far from alone in having failed for so long to appreciate the nature of the challenge raised by 'illiberal' forces and their strategy of 'constitutional capture' (Müller, 2013), a new phenomenon in arguably extremely difficult times for the EU, with a seemingly incessant number of new crises of variable nature. We however submit, with respect, that the emphasis on the need for the Commission to be a more 'political' (Timmermans, 2015c) was a mistake. As for the reasons put forward to justify the non-activation of its Rule of Law Framework as regards Hungary, they are utterly unconvincing. What is needed is a Commission that guarantees, as it is indeed required to do so under the Treaties, EU values even in the most difficult political constellations. Doing so would then force other EU institutions to face their responsibilities when it comes to dealing with a new breed of authoritarians bent on consolidating power in plain sight while EU institutions dither about what to do.

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