Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality

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Abstract: This article first offers an examination of the rationale underlying the rule of law framework adopted by the Commission in March 2014 before outlining its main features. It is argued that while the Commission's 'light-touch' proposal falls short of what is required to effectively address internal threats to EU values, it remains preferable to the Council's alternative proposal to hold an annual rule of law dialogue. To make the Commission's framework more workable and effective, which should in turn increase its 'dissuasive potential', a number of modest recommendations are also offered.

Keywords: Rule of law – EU Values – Systemic Threats – Enforcement

> '[The EU's] 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.'
>
> European Court of Justice, 18 December 2014[1]

> 'The death penalty question should be put on the agenda in Hungary … Hungary will stop at nothing when it comes to protecting its citizens.'
>
> Viktor Orbán, Prime Minister of Hungary, 28 April 2015[2]

The rule of law is one of the fundamental values on which the EU is based according to Article 2 of the Treaty on European Union.[3] Faced with what has been described as an increasing number of 'rule of law crises',[4] a new framework to strengthen the rule of law was put forward by the European Commission in March 2014.[5] In doing so, the Commission aimed to address situations where 'a systemic threat to the rule of law'[6] may be detected within any Member State.[7] The publication of the Commission's rule of law

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1 Opinion 2/13, *Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para. 168.

2 I. Traynor, 'Hungary PM: bring back death penalty and build work camps for immigrants', *The Guardian*, 29 April 2015.

3 Art. 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights …'

4 See e.g. J.M. Barroso, State of the Union 2012 Address, European Parliament, 12 September 2012, Speech/12/596.

5 European Commission Communication, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 Final, 11 March 2014.

6 Ibid., p. 3.

7 One should note in passing that the Commission does not address the situation of the Union itself *vis-à-vis* the rule of law. This is not to say that all is well in the best of all possible worlds as far as the EU is concerned. For a 'rule of law audit' of its constitutional framework, see L. Pech, ''A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law', 6 *EUConst* (2010) p. 359. Some of the EU's most important policies can also be sharply criticised on this ground. See

communication was soon followed by the appointment in November 2014 of the First Vice-President of the European Commission in charge inter alia of the Rule of Law – a position held by Frans Timmermans. This development may be understood as further evidence that the issue of EU countries' compliance with the rule of law has both gained salience and will firmly remain on the Commission's agenda for the foreseeable future. This is indeed the first time that a Commissioner has been explicitly tasked to coordinate the Commission's work in the area of the rule of law. It is also worth noting that prior to his appointment, Timmermans had welcomed the Commission's framework on the ground that a more systematic approach was required to avoid any 'rule of law backsliding' post EU accession.[8] Soon after Timmermans' appointment, the Council of the EU decided to adopt its own rule of law initiative and committed itself to establishing a political dialogue among EU Member States to promote and safeguard the rule of law within the EU.[9]

This flurry of initiatives on the rule of law front is yet to lead however to concrete actions.[10] Indeed, despite a succession of distressing developments in at least one EU Member State,[11] the Commission is yet to activate its new rule of law framework whose rationale (Section 1) and main features (Section 2) are analysed below. This article's main argument is as follows: While the Commission's 'light-touch' framework falls short of what is required to effectively address internal threats to EU values (Section 3), it remains however eminently preferable to the Council's alternative proposal to hold an annual rule of law dialogue (Section 4). To make the Commission's rule of law framework more workable and effective, which should in turn increase its 'dissuasive potential', a number of modest recommendations are finally offered (Section 5).

1. The Commission's Diagnosis

The rationale underlying the Commission's new mechanism is that the current EU legal framework is ill designed when it comes to addressing internal, systemic threats to the rule of law and more generally, EU values, as set out in Article 2 TEU. This has become a significant issue to the extent that rule of law deviance within the EU appears to have gained both on intensity and regularity in the past decade.

1.1 An increasing number of challenges to the rule of law

In a well-noted speech on 4 September 2013, Viviane Reding, former EU Justice Commissioner, drew an interesting parallel between Europe's economic and financial crisis and what she viewed as an increasing number of 'rule of law crises' revealing problems of a systemic nature.[12] Three concrete examples were mentioned in her speech:

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e.g. C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35(2) *OJLS* (2015) 325. The EU's own adherence to the rule of law will be one of the main themes covered by a forthcoming book edited by C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2015).

8 Answers to the European Parliament, Questionnaire to the Commissioner-Designate Frans Timmermans, Question 6: <ec.europa.eu/about/juncker-commission/docs/2014-ep-hearings-reply-timmermans_en.pdf>.

9 Council of the EU, Press release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20-21

10 For a critical overview, which usefully complements the present article, see 'Editorial Comments: Safeguarding EU values in the Member States – Is something finally happening', 52 *CMLRev* (2015) p. 619.

11 See most recently, Human Rights Watch, 'Hungary: Little EU Action on Rights Concerns', Press Release, 18 February 2015: <http://www.hrw.org/node/132910>; European Parliament Plenary – Commission statement on the situation in Hungary by First Vice-President Timmermans, Strasbourg, 19 May 2015, Press release IP/15/5007.

12 V Reding, 'The EU and the Rule of Law – What next?', Speech/13/677, 4 September 2013.

(i) The French government's attempt in summer 2010 to secretly implement a collective deportation policy aimed at EU citizens of Romani ethnicity despite contrary assurances given to the Commission that Roma people were not being singled out;
(ii) The Hungarian government's attempt in 2011 to undermine the independence of the judiciary by implementing an early mandatory retirement policy; and
(iii) The Romanian government's failure to comply with key judgments of the national constitutional court in 2012.[13]

Taken together, these episodes have been often understood as demonstrating the increasing number of instances where national authorities consciously sought to systematically undermine key EU values such as the rule of law.[14] It is indeed clear to us that numerous examples of rule of law malfunctioning in the EU, both past[15] and present,[16] could be easily added to this list, making Reding's case even more compelling. The Commission was therefore legitimately right to worry about the 'threats to the legal and democratic fabric in some of our European states'.[17] Indeed, a number of European governments also expressed concerns regarding what may be more generally labelled rule of law backsliding.[18] Among many other initiatives, this led eleven Foreign Ministers to advocate the introduction of a new, 'light' mechanism which would enable the Commission to make recommendations or report back to the Council in cases of concrete and serious violations of fundamental values or principles such as the rule of law.[19]

1.2 An inadequate framework to address the challenges to the rule of law

The suggestion to introduce a new mechanism implicitly assumes that the EU's current 'toolbox' is not adequate to address the previously described challenges.[20] Indeed, the former President of the European Commission himself called for a 'better developed set of instruments',[21] which would fill the space that exists at present between the Commission's infringement powers laid down in Articles 258 and 260 TFEU, and the so-called 'nuclear option'[22] laid down in Article 7 TEU. This diagnosis is, in our view, warranted as both procedures suffer from a number of shortcomings, with the consequence that Article 7

13 For further analysis, see respectively, O. Parker, 'Roma and the Politics of EU Citizenship in France', 50 *JCMS* (2012) p. 475; F. Casolari, 'Respect for the Rule of Law in a Time of Economic and Financial Crisis: The Role of Regional International Organizations in the Hungarian Affaire', XXIII *Italian Yearbook of International Law* (2013) p. 219; V. Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis', 13 *I-CON* (2015) p. 246.
14 See generally A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51 *CMLRev* (2014) p. 59.
15 GN Toggenburg, 'La crisi austriaca: delicate equilibrismi sospesi tra molte dimensioni', *Diritto pubblico comparato ed europeo*, 2001, 735; K Lachmayer, 'The Austrian Crisis', in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member State Compliance* (Oxford University Press, forthcoming).
16 See e.g. M Avbelj, 'Failed Democracy: The Slovenian Patria Case – (Non)Law in Context' (originally published in Slovenian), available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462613>; B. Bugarič, 'A Crisis of Constitutional Democracy in post-Communist Europe: "Lands in-between" Democracy and Authoritarianism', 12 *I-CON* (2015) p. 219.
17 J.M. Barroso, State of the Union address 2013, European Parliament, 11 September 2013, Speech/13/684.
18 J-W. Müller, *Safeguarding Democracy inside the EU. Brussels and the Future of the Liberal Order* (Transatlantic Academy Paper Series 2013).
19 See final report of the Future of Europe Group ('Westerwelle report'), 17 September 2012, para. II(d).
20 For a comprehensive study, see C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in Closa and Kochenov 2015, *supra* n. 7.
21 Barroso, *supra* n. 17.
22 Ibid.

TEU has never been used whereas the Commission's infringement powers have proved ineffective to remedy systemic violations of EU values.

1.2.1 The 'Nuclear Option'

The so-called 'nuclear option' is to be found in Article 7 TEU.[23] This provision, which was first introduced into the EU Treaties by the Amsterdam Treaty, gives the Council of the EU the power to sanction any Member State found 'guilty' of a *serious* and *persistent* breach of the EU values laid down in Article 2 TEU. For instance, the Council could deprive the relevant Member State of certain of the rights it derives from the EU Treaties, including the right to vote on EU legal acts submitted to the Council for adoption. With the Nice Treaty, Article 7 TEU was revised to further enable the EU to adopt preventive sanctions in the situation where there is 'a clear risk of a serious breach' of the EU values by a Member State.

The two scenarios envisioned by Article 7 TEU are not formally linked with each other: preventive sanctions do not necessarily have to come first and the same Member State could be theoretically sanctioned for a clear risk of a serious breach and/or a serious and persistent breach. Furthermore, different procedural requirements govern the two scenarios. In both situations, however, these procedural requirements are particularly demanding. The determination of whether there is a clear risk of a serious breach requires (1) a proposal by one third of the Member States, by the Parliament or the Commission; (2) the assent of the Parliament (i.e., a two-thirds majority of the votes cast, representing a majority of its members); (3) a majority of four fifths of the Council's members. As for the determination of an existing serious and persistent violation, the same conditions apply with two differences: It is for the European Council to act and it must do so by unanimity. Even though abstentions do not prevent unanimity to be reached – the country under scrutiny cannot for obvious reasons block the decision-making process – the procedural requirements make it virtually impossible that the Council would ever be in a position to adopt sanctions (e.g. to suspend the voting rights of the Member State in the Council). Furthermore, the Council is actually under no legal obligation to do so even in a situation where it concludes that a Member States is in breach of Article 2 TEU values. This aspect clearly shows the predominant political nature of Article 7 TEU. The case law of the Court of Justice has further made clear that no private applicant could force the EU to trigger the application of Article 7 TEU.[24]

Unsurprisingly, while there have been many calls for activating Article 7 TEU, not least when it was revealed that several EU Member States and some candidate countries colluded in the running of secret CIA prisons after 9/11,[25] this provision has never been used for essentially two reasons: the thresholds for activating it, as shown above, are virtually impossible to meet, and the existence of a political convention whereby it would

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23 For a general 'official' introduction, see European Commission Communication, Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is founded, COM(2003) 606 final, 15 October 2003. For a more critical study, see W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', 16 *CJEL* (2010) p. 385.

24 See Case T-337/03, *Bertelli Gálvez v Commission* [2004] ECR II-1041, para. 15, where the Court of Justice held that the EU Treaties – the entry into force of Lisbon does not invalidate this conclusion – did not give it jurisdiction to determine whether the EU institutions have acted lawfully to ensure the respect by the Member States of the principles laid down under what is now Article 2 TEU or to adjudicate on the lawfulness of acts adopted on the basis of what is now Article 7 TEU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the Member State concerned.

25 ECtHR, 24 July 2014, App. no 28761/11, *Al Nashiri v Poland*.

be politically counterproductive to do so.[26] This means that with the sole exception of the Cooperation and Verification Mechanism (CVM) – an unprecedented rule of law monitoring mechanism put in place for Romania and Bulgaria at the time of their accession to the EU[27] – the European Commission has for the most part relied on political pressure and its well-established power to bring infringement actions before the EU Court of Justice, to seek changes in the countries which have been found wanting as far as respect for EU values is concerned.

1.2.2 The infringement procedure's limited effectiveness with respect to EU values

Under the rules laid down in Article 258 TFEU, the Commission may initiate an infringement action against any Member State, which has failed to comply with its EU obligations, and may bring the matter before the Court of Justice should the relevant Member State fail to comply with the Commission's recommendation(s). Any Member State failing to comply with the Court's judgment may, under Article 260 TFEU, be brought again before the Court of Justice, which, in this instance, has the additional power of imposing financial sanctions on it.[28]

The Commission has traditionally claimed that the infringement procedure – and at times, the mere threat of using it – has enabled it to score a number of swift successes,[29] which however may be quite legitimately regarded as Pyrrhic victories. Firstly, if the French policy regarding the deportation of Roma people was indeed amended after the Commission threatened to initiate infringement proceedings,[30] it has since been shown that the legal measures adopted by France to address the Commission concerns in 2010 fell short of what is required under EU Law.[31] Similarly, while Hungary reviewed its legislation following its defeat before the Court of Justice, the Hungarian judges affected by the controversial legislation were never reinstated.[32] Finally, there are no indications that the Romanian constitutional conflict mentioned in Reding's speech, which came to an

26 It must however be noted that Vice-President Timmermans recently indicated that any reintroduction of the death penalty by any Member State, an idea mooted by the Hungarian Prime Minister Orbán, would 'lead to the application of Article 7 TEU'. See Commission statement on the situation in Hungary, Strasbourg, 19 May 2015, Press release IP/15/5007.

27 For further analysis, see M.A. Vachudova and A. Spendzharova, 'The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession', *SIEPS European Policy Analysis*, 2012, 1; L. Pech, 'The Rule of Law as a Guiding Principle of EU's External Action', *CLEER Working Paper* 2012/3.

28 For some sobering thoughts on the effectiveness of this mechanism, see P Wennerås, 'Sanctions against Member States under Article 260 TFEU: Alive, but not kicking?', 49 *CMLRev* (2012) p. 145; B. Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?', 19 *ELJ* (2013) p. 420.

29 In Reding's self-congratulatory language, *supra* n. 12, section 2: '[M]easured against the background of the role and duty the Commission has been given so far by the Treaties, I consider that the Commission has been rather successful in dealing with these often very difficult and complex cases.'

30 See European Commission, 'European Commission assesses recent development in France, discusses overall situation of the Roma and EU law on free movement of EU citizens', Press Release IP/10/1207, 29 September 2010.

31 See French Law No. 2011-672 on Immigration, Integration and Nationality enacted on June 17, 2011 and the analysis of it by Human Rights Watch, *France's Compliance with the European Free Movement Directive and the Removal of Ethnic Roma EU Citizens*, 28 September 2011, available at: <www.hrw.org/news/2011/09/28/france-s-compliance-european-free-movement-directive-and-removal-ethnic-roma-eu-citi>

32 Case C-286/12, *Commission v Hungary* [2012] (The radical lowering of the retirement age for Hungarian judges constitutes unjustified discrimination on grounds of age). More recently, Hungary was found to have violated EU law by prematurely bringing to an end the term served by its Data Protection Supervisor: Case C-288/12, *Commission v Hungary* [2014].

apparent end in December 2012 when an agreement was reached between the President and the Prime Minister,[33] would not have ended in a similar manner regardless of the pressure put on Romanian authorities by the Commission. The fact that Romania continues to be subject to the specific monitoring mechanism put in place at the time of its EU accession also appears to indicate the limits of the Commission's influence over Romanian authorities.[34] In any event, it is clear that battles over Article 2 TEU are far from being a story of days past. To give one but worrying example, Hungary's Prime Minister recently advocated the establishment of an 'illiberal state' and referred to Putin's Russia and Communist China as two possible models to follow.[35]

The call for an illiberal regime, which is not pure rhetoric in the context of the contemporary Hungarian state,[36] plainly flies in the face of Article 2 TEU and yet the Commission *cannot* initiate any infringement action against Hungary on this sole basis. Indeed, and strictly speaking, the Commission may only initiate an infringement action against a Member State for a *specific* violation of EU law. This is not to say that Article 2 TEU should be viewed as a mere political declaration – the Treaties make clear that EU institutions as well as EU Member States ought to respect and promote the Union's values.[37] It would also be misguided to consider that EU values cannot constitute legal principles or that they completely lack legal effect. For instance, the rule of law, as a fundamental principle which underlies the whole European legal order, has already been used by the European Court of Justice both as a source from which directly actionable legal principles can be derived, and as a constitutional norm which should guide the interpretation of other legal norms.[38] The rule of law, however, is not *a* rule of law actionable before a court. For instance, one cannot *directly* rely on the EU value of the rule of law to seek annulment of the acts of EU institutions.[39] More generally speaking, Article 2 TEU cannot be a cause of judicial action in and of itself. In other words, because of the relatively open-ended nature of the values laid down in Article 2 TEU, this provision lacks justiciability. In procedural terms, this means that no legal proceedings against any EU country can be brought on this sole legal basis, either before national or EU courts. As far as internal threats to or breach of EU values are concerned, Article 2 TEU may instead be said to rather complement the so-called 'nuclear option' previously analysed. Indeed Article 7 TEU does refer explicitly to the values laid down in Article 2 TEU and to that extent, it may be argued that Article 2 TEU comes within the lex specialis of Article 7

33 For some recent studies, see chapters 5 and 6 in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (Hart, 2015).

34 For the argument that the EU is not necessarily powerless against democratic backsliding in Romania provided that the right constellation of conditions for both social and material pressure exists, see U. Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession', 52 *JCMS* (2014) p. 105.

35 'We are parting ways with western European dogmas, making ourselves independent from them … We have to abandon liberal methods and principles of organising a society. The new state that we are building is an illiberal state, a non-liberal state,' cited in I. Traynor, 'Budapest autumn: hollowing out democracy on the edge of Europe', *The Guardian*, 29 October 2014.

36 See K.L. Scheppele, 'The Unconstitutional Constitution', *New York Times*, 2 January 2012. For an article looking beyond Hungary, see J.-W. Müller, 'Eastern Europe Goes South. Disappearing Democracy in the EU's Newest Members', *Foreign Affairs*, March-April 2014.

37 See Articles 3(1) and 13 TEU as far as the EU is concerned and Articles 4(3) and 7 TEU as far as the Member States are concerned. For the argument that the EU values entail more obligations and guidance for the exercise of EU powers post Lisbon Treaty, see J. Larik, 'From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the EU', 62 *ICLQ* (2014) p. 935.

38 For extensive references, see L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* No. 04/09.

39 Art. 263 TFEU.

TEU and as such, cannot be used to trigger legal actions outside of this framework. In other words, Article 2 TEU cannot be relied upon by the Commission to initiate an infringement action under Article 258 TFEU.

The Commission is thus left with one legal option when it comes to dealing with what may be viewed as national breaches of EU values: pursuing *individual* instances where national authorities do not implement or correctly apply *specific* provisions of EU law. No infringement action would however be possible regarding areas not governed by EU law or in the situation where the national violation of EU values is of a political and diffuse nature. This meant, for instance, that in the absence of any general EU legislative competence over the independence and impartiality of national judiciaries, the Commission had no choice but to rely on the EU principle of non-discrimination on the ground of age to challenge Hungary's legislation regarding the compulsory retirement of judges. The limited scope of the Commission's legal challenge did not unfortunately allow it to impose effective remedies that would have prevented the undermining of the independence and impartiality of Hungarian's judicial system by the national government.[40] And while the scope of Article 7 TEU is not confined to the areas regulated by EU law but also allows the Union to act in the event of a breach in which Member States act autonomously, i.e., in their own exclusive areas of competence, this provision, as previously noted, has been understood as a 'nuclear option' which is there to deter and not to be used, save an extreme situation such as a *coup d'Etat*.

This leaves the EU with an extremely limited set of legal tools to address *systemic* violations of EU values at national level. This is a particularly problematic for a number of important reasons, which one may summarise as follows: Where a country experiences 'constitutional capture' by illiberal forces,[41] i.e. a government's systematic weakening of checks and balances, or is governed by elected officials whose official programme is the dismantlement of the liberal democratic state, these violations of EU values do not simply affect the citizens of the relevant Member State.[42] They also affect EU citizens residing in that country as well as all EU citizens through this country's participation in the EU's decision-making process and the adoption of norms that bind all in the EU. Europe's regulatory and judicial interconnected space is also built on the principle of mutual trust[43] and an absolute requirement of mutual recognition of judicial decisions,[44] which can hardly survive when one national system ceases to be governed by the rule of law. In addition to these negative externalities, any country disregarding the rule of law threatens the exercise of the rights granted to all EU citizens regardless of where they reside in the EU.[45] Finally, the legitimacy and credibility of the EU are both undermined when it ceases to be able to

40 Only a handful of retired judges were restored in office, none to acquire the administrative position within the court structure previously held, and most were simply offered financial compensation. See K.L. Scheppele, 'Making Infringement Procedures More Effective', *EUTopia Law*, 29 April 2014, available at: <www.eutopialaw.com>.

41 Müller, *supra* n. 18.

42 C. Closa, D. Kochenov, J.H.H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union', *EUI Working Papers RSCAS* 2014/25.

43 According to the Court of Justice, the EU's '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', Opinion 2/13, *Accession to the ECHR* (II), 18 December 2014, para. 168.

44 Art. 67 TFEU.

45 For further analysis, see C. Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals, and Procedural Limitations', in Closa and Kochenov, *supra* n. 7.

guarantee internal compliance with the values it has sought – with relative success[46] – to uphold and promote in its external relations.

The Commission therefore had a point when it noted that 'the confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU'.[47] This, in turn, plainly justifies an increased monitoring and policing of EU Member States by the EU itself and this was indeed precisely the aim of the new framework adopted by the Commission in March 2014.

2. The Commission's new framework to strengthen the rule of law

In a nutshell, the Commission's so-called new framework to strengthen the rule of law 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 to prevent the escalation of systemic threats to the rule of law. This procedure is supposed to precede the eventual triggering of the 'nuclear option' laid down in Article 7 TEU. The Commission has also made clear that its framework should not be understood as preventing the concurrent launch of infringement actions against the relevant Member State where specific violations of EU law can be identified.

2.1 Triggering factors

Before describing how the new 'rule of law dialogue' is supposed to work in practice, one must note the Communication's emphasis on the notion of 'systemic threat'. It would be wrong therefore to assume that the Commission sought to gain a new power to examine individual breaches of fundamental rights or routine miscarriages of justice via its new rule of law framework. Rather, the Commission merely sought to gain a new, additional tool to address threats to the rule of law 'which are of a systemic nature'.[48]

As a preliminary point, the Commission sensibly attempts to offer a working definition of the notion of the rule of law. In a similar fashion to a study previously adopted by the Venice Commission,[49] the European Commission's Communication reflects the view that there is now a consensus on the core meaning of the rule of law and that this concept essentially entails compliance with the following six legal principles:[50]

1) Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws;
2) Legal certainty;
3) Prohibition of arbitrariness of the executive powers;
4) Independent and impartial courts;
5) Effective judicial review including respect for fundamental rights;
6) Equality before the law.

46 For a skeptical and recent account, see D. Kochenov, 'Law Perspective: Praise Undeserved? The EU as a Democracy Promoter: A Sceptical Account', in A. Wetzel and J. Orbie (eds.), *The Substance of EU Democracy Promotion: Concepts and Cases* (Palgrave Macmillan, 2015) p. 27.
47 Commission Communication, *supra* n. 5, p. 4.
48 Ibid., p. 7.
49 *Report on the Rule of Law*, Study No. 512/2009, CDL-AD(2011)003rev, Strasbourg, 4 April 2011, para. 35.
50 Commission Communication, *supra* n. 5, p. 4.

While the European Commission did accept that 'the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system',[51] it also suggested, rightly in our view, that the six elements previously listed stem from the constitutional traditions common to most European legal systems and may be said to define the core meaning of the rule of law within the context of the EU legal order. This is not to say that some minor criticism is not warranted. For instance, it is difficult to understand why the principle of equality before the law is distinguished from the broader notion of fundamental rights, which may be thought to necessarily include it. Three additional sub-components are also arguably missing from the Commission's list: The principle of accessibility of the law, which requires that the law must be intelligible, clear, predictable and published, the principle of the protection of legitimate expectations and the principle of proportionality. The principle of legality may however be understood as encompassing the requirement that the law must be accessible and the protection of legitimate expectations is closely linked to the principle of legal certainty. As for the principle of proportionality, its limited use in English administrative law may have led to its exclusion from what has been presented as a consensual list.

Be that as it may, two additional important points are made by the European Commission: the rule of law must be understood as a 'constitutional principle with both formal and substantive components' and it is also one which 'is intrinsically linked to respect for democracy and for fundamental rights.'[52] It is submitted that the Commission's assessment accurately reflects the dominant understanding of the rule of law in Europe and that these two aspects could be viewed as the essential characteristics of what may be termed Europe's rule of law approach.[53] In other words, most national legal systems in Europe do reveal a broad conception of the rule of law, which requires compliance with formal/procedural as well as substantive/material standards. The EU and the Council of Europe similarly promote a conception that is not indifferent to the content or the substantive aims of the law and which encompasses elements of political morality such as democracy and substantive individual rights.[54]

While the Commission's understanding of the rule of law is clearly outlined, which should help in turn other EU institutions when and if they have to decide on the materiality of a national breach in this area, the notion of threat of a 'systemic nature'[55] is by contrast not made particularly clear.[56] It is only stated that this type of threat may result from 'the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress.'[57] In this context, the Commission Communication's references to the case law of the Court of Justice and of the European Court of Human Rights are unhelpful and largely off-point.[58] There is also a degree of confusion between

51 Ibid.

52 Ibid.

53 See generally Pech (2009), *supra* n. 38.

54 L. Pech, 'Promoting The Rule of Law Abroad: On the EU's limited contribution to the shaping of an international understanding of the rule of law' in D. Kochenov and F. Amtenbrink (eds.), *The EU's Shaping of the International Legal Order* (Cambridge University Press 2013) p. 108.

55 Commission Communication, *supra* n. 5, p. 7.

56 For an attempt to clarify what a 'systemic deficiency' in the rule of law may entail, see von Bogdandy and M. Ioannidis, *supra* n. 14, p. 65.

57 Commission Communication, *supra* n. 5, p. 7.

58 For instance, the ECHR concept of systemic or structural problem seems broader and different in nature than the concept of systemic threat. To take a single example, Greece's asylum system may reveal a systemic problem but this does not make it a systemic threat in the absence of any deliberate attempt to undermine the rule of law and may more prosaically reflect a general state failure to properly manage its resources and enforce national and EU policies.

the notions of systemic threat and systemic violation, which is crucial in the context of the proposal. It is for instance difficult to understand if this new recourse to the notion of systemic threat is meant to signal a different substantive test or whether it should simply be understood as broadly synonymous with the notion of 'serious and persistent breach' currently mentioned by Article 7 TEU. This is an important issue as the Commission's proposed mechanism has been described as a new pre-Article 7 TEU procedure as will be shown below. One may finally note that despite Barroso's call to address *serious* and *systemic* threats to the rule of law,[59] the Commission's communication does not explicitly mention 'serious' as a criterion to trigger the new proposed mechanism. Similarly, there are no signs of the pre-defined benchmarks promised by Barroso, prior to the publication of the Commission's Communication and on the basis of which this new mechanism was supposed to be triggered.[60]

2.2 A new pre-Article 7 TEU procedure

With respect the mechanics of what the EU Justice Commissioner has described as a new 'pre-Article 7 procedure',[61] it is important to distinguish between three main procedural stages, which are supposed to be governed themselves by three key principles.

The three procedural stages involve *assessment*, *recommendation*, and *follow-up* by the Commission. They may be described as follows. In the *assessment* phase, the Commission assesses whether there are clear preliminary indications of a systemic threat to the rule of law in a particular Member State and send a 'rule of law opinion' to the government of this Member State should it be of the opinion that there are. In a situation where no appropriate actions are taken, the *recommendation* phase is supposed to commence: a 'rule of law recommendation' may be addressed to the authorities of this country, with the option of including specific indications on ways and measures to resolve the situation within a prescribed deadline. The Commission's *follow-up* consists of the Commission's monitoring of how the relevant Member State is implementing the recommendation mentioned above. Should there be no satisfactory implementation, the Commission would then have the possibility – not the obligation – to trigger the application of Article 7 TEU.

Throughout the whole process, three fundamental principles are in play. Firstly, only systemic threats or violations of the rule of law may trigger the activation of this new mechanism, not minor or individual breaches. Secondly, unlike the current rule of law monitoring tool specifically developed for Romania and Bulgaria, this new procedure is supposed to apply equally to all Member States, regardless of the date of entry into the EU, size, and so forth. Thirdly, while the Commission continues to remain the guardian of EU values, third party and/or external expertise may be sought when necessary. The EU Fundamental Rights Agency (FRA), the Council of Europe (in particular, the European Commission for Democracy through Law also known as the Venice Commission) and judicial networks such as the Network of the Presidents of the Supreme Judicial Courts of the EU may therefore be asked to provide expert knowledge, notably during the assessment phase.

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59 Barroso, *supra* n. 17. The new framework 'should be based on the principle of equality between member states, activated only in situations where there is a serious, systemic risk to the rule of law, and triggered by pre-defined benchmarks'.

60 Ibid.

61 V. Reding, 'A new Rule of Law initiative', Press Conference, European Parliament, Strasbourg, 11 March 2014.

According to the Commission itself, this new framework is based on its current powers as provided for by existing EU Treaties,[62] and would merely complement existing instruments, notably the Article 7 procedure and the infringement procedure laid down in Article 258 TFEU. However, this assessment is not unanimously shared. To give a single example, the Council's legal service has expressed its opposition to the Commission's proposal, alleging, to oversimplify, an unlawful power-grab by the Commission.[63] As will be shown below, while this may well be considered an extremely significant and highly damaging assertion, it is only one of the arguments that have been raised against the Commissions' rule of law framework, the most significant of which will be reviewed below.

3. Strong and weak features of the Commission's proposal

Before offering a critical overview of Commission's proposal, a number of positive features will be highlighted, focusing on points relating to substance, competence, and procedure.

3.1. Positive substantive features

The Commission should first be commended for adopting, as discussed above, a reliable sketch of the core meaning of the rule of law and the main elements contained within it. This was by no means an easy task considering the multiple and at times, conflicting and problematic definitions of the rule of law which one may easily encounter in academic scholarship.[64] The Commission's main concrete proposition also departs from the most widely discussed proposals that have been made prior to the publication of its communication, mostly by EU scholars. Before briefly explaining why the Commission was for the most part wise to do so, a succinct overview of these proposals is in order. In a nutshell, the proposals in question come down to the following key features:

(i) *Compulsory exit*: It has been suggested that the EU Treaties should be amended to give the EU the power to force a chronically non-compliant EU Member State out whereas the EU Treaties only currently foresee voluntary withdrawal from the Union;[65]

(ii) *The EU Charter of Fundamental Rights as a federal standard*: According to this proposal defended by the former EU Justice Commissioner, Article 51(1) of the EU Charter of Fundamental Rights, which provides that its provisions only bind national authorities when they are implementing EU law,[66] should be repealed so as to make all EU fundamental rights 'directly applicable in the Member States, including the right to effective judicial review';[67]

62 Commission Communication, *supra* n. 5, p. 9.
63 Council of the European Union, Opinion of the Legal Service 10296/14, 14 May 2014.
64 For further analysis and references, see Pech (2009), *supra* n. 38.
65 Closa et al., *supra* n. 42, p. 30.
66 For a critique of this provision, see X. Groussot, L. Pech, and G. Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon' in de Vries, Bernitz and Weatherhill (eds.), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart 2013) p. 97.
67 Reding, *supra* n. 12. On the controversial possibility of relying on the EU Charter in national disputes falling outside the scope of EU Law, see A. Jakab 'Supremacy of the EU Charter in National Courts in Purely Domestic Cases' in Jakab and Kochenov, *supra* n. 15.

(iii) *Enabling EU jurisdiction via EU citizenship rights*: First hinted at by Advocate General Poiares Maduro in *Centro Europa*,[68] this proposal essentially suggested to allow national courts, in a situation where fundamental rights of EU citizens would be systemically violated, to invite the Court of Justice to review the legality of national actions in the light of Article 2 TEU notwithstanding the fact that these violations may occur in wholly internal situations from a legal point of view, that is, outside the scope of application of EU law;[69]

(iv) *'Outsourcing' of EU values' monitoring*: The President of the Venice Commission has proposed to delegate the task of monitoring of EU countries' adherence to the rule of law to his organisation on the ground that it has a solid-track record when it comes to assessing and offering solutions to rule of law related problems in the 47 contracting parties to the Council of Europe;[70]

(v) *Creation of a new EU institution*: Closely related to the previous proposal but in opposition to the idea of externalising any monitoring tasks and/or sanctioning powers, the setting up of a 'Copenhagen Commission'[71] has been suggested with the view of subjecting current EU Member States to a similar level of monitoring than EU candidates countries while removing this task from the European Commission as it would have failed in this endeavour;

(vi) *New application of the existing infringement procedure*: Under this proposal, the Commission should aim to present a 'bundle' of infringement cases to the Court of Justice in order to present a clear picture of systemic non-compliance as regards Article 2 TEU and gain the additional power to subtract any EU funds that the relevant Member State may have been be entitled to receive;[72]

(vii) *Peer-review*: Finally, mutual peer-review of each EU country's adherence to the rule of law on the basis of periodic reports to be assessed by national governmental representatives has also been suggested.[73]

None of the above-mentioned proposals is flawless.[74] Those requiring Treaty change, like the compulsory exit one, are not politically realistic. Similarly, enabling litigants to rely on the EU Charter of Fundamental Rights in any situation would be difficult to reconcile with

68 Case C-380/05, *Centro Europa* [2008] ECR I-349, Opinion of AG Maduro.
69 A. von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', 49 *CMLRev* (2012) p. 489.
70 G. Buquicchio, President of the Venice Commission, Speech at the Assises de la justice, 21 November 2013. For a contribution by the Finnish representative at the Venice Commission on this topic, see K. Tuori, 'From Copenhagen to Venice', in Closa and Kochenov, *supra* n. 7.
71 J.-W. Müller, 'Should the EU protect democracy and the rule of law inside Member States?', 21(2) *ELJ* (2015) p. 141.
72 K.L. Scheppele, 'What Can the European Commission Do When Member States Violate Basic Principles of the EUuropean Union? The Case for Systematic Infringement Actions', contribution no. 45 at the Assises de la Justice 2013: <ec.europa.eu/justice/events/assises-justice-2013/contributions_en.htm>, visited 1 June 2015.
73 See the Report prepared by E. Hirsch Ballin et al. for the Adviesraad Internationale Vragstukken (AIV), 'The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation', Report No. 87, 2014, 35. From the same author, see also 'Mutual Trust: The Virtue of Reciprocity. Strengthening the Acceptance of the Rule of Law through Peer Review', in Closa and Kochenov, *supra* n. 7.
74 For further analysis, see Closa, Kochenov, Weiler, *supra* n. 42. See also D. Kochenov, 'On Policing Article 2 TEU Compliance', XXXIII *Polish Yearbook of International Law* (2014) p. 145.

the principle whereby the EU is an organisation 'on which the Member States confer competences to attain objectives they have in common based on conferred powers'.[75] Allowing the Commission and the Court to exercise broad discretion in bundling violations to demonstrate a breach of Article 2 TEU (even if such a breach is found to exist in conjunction with other provisions) would also most likely be seen as legally threatening and politically unacceptable by national governments.

Less intrusive proposals are also potentially problematic. The creation of a new EU monitoring body would add another layer of bureaucracy whereas the Commission and/or the FRA could potentially improve their monitoring capacities provided that they are given the resources, and in the case of the FRA, a clear mandate to do so.[76] By the same token, those who believe that the Commission and the FRA may not be in the position to deliver could be too optimistic to assume that a newly created EU body would necessarily be more capable. As far as the outsourcing of rule of law monitoring is concerned, this avenue may seriously undermine the EU's understanding of itself as a mature autonomous constitutional system if the very *heart* of what it is about – the key values it adheres to, promotes, and is based on – is outsourced to a different organisation such as the Venice Commission, however attractive this solution may sound considering the good reputation of the Council of Europe's advisory body.[77]

The key issue in any event is less monitoring than enforcement. This is why the externalisation of EU Member States' adherence to the rule of law to Council of Europe's bodies is not a particularly promising avenue. In fact, enforcement is the weak spot of *all* the academic proposals on the table. To put it in a rather informal manner, one does not bring about the rule of law by kicking out a Member State that seems to follow a dangerous path irreconcilable with its EU membership. The same applies to allowing the courts of that Member State to send more questions to the Court of Justice or merely enabling the Commission to impose financial sanctions on the 'rogue state', which is part of what the system infringement proposal is about. In a situation where some states are by definition non-compliant, new avenues of safeguarding EU values are indispensable.

In this context, the refinement of the EU's current infringement proceedings and enhancement of the Commission's sanctioning powers may be viewed as the most seducing proposal. Undertaking a change of this nature without first amending the Treaties would however be controversial and possibly unlawful. Viewed in this light, one may understand better why the Commission decided to put forward an eminently 'light touch' mechanism which builds on and complements an already existing – albeit never used – procedure. By avoiding Treaty change, the Commission sensibly avoided a situation akin to asking turkeys to vote for Christmas. The Commission's pre-Article 7 procedure also suggests that the Commission is well aware of the need to tread carefully in this area since the Union, as a democratic constitutional system, is currently not mature enough to move into the highly sensitive business of enforcing relatively open-ended and contested values against reluctant national authorities.

3.2 Positive features from a competence point of view

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[75] Art. 1 TEU.

76 G.N. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in Closa and Kochenov, *supra* n. 7.

[77] The effectiveness of the Venice Commission's working methods and its ability to identify and review countries' adherence to miminum European constitutional standards may however be questioned. See M. de Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Legal Reform', *American Journal of Comparative Law* (2015, forthcoming).

The Commission's new procedure may therefore be reasonably described as anything but revolutionary. In essence it merely requires any 'suspected' Member State to engage in a mere dialogue with no new, automatic or direct legal consequences should the Member State fail to agree with any of the recommendations previously adopted by the Commission. It is difficult therefore to understand the criticism whereby the Commission's pre-Article 7 framework would not be 'compatible with the principle of conferral which governs the competences of the institutions of the Union'.[78] Similarly, one may remain unconvinced by the additional argument that only the Member States – and not even the Council – could establish, via an intergovernmental agreement supplementing the EU Treaties, 'a review system of the functioning of the rule of law in the Member States',[79] which would reflect a 'peer review approach' without any compulsory involvement of the EU institutions unless the Council, i.e., the national governments, decide otherwise.

One may be forgiven for finding the opinion of Council's legal service both unpersuasive and ill reasoned. As a preliminary point, we believe that the Commission, being one of the institutions empowered, under Article 7 TEU, to trigger the procedure contained therein, should in fact be commended for having established clear guidelines on how such triggering is to function in practice. Furthermore, a strong and convincing argument can be made that Article 7(1) TEU already *implicitly* empowers the Commission to investigate any potential risk of a serious breach of the EU's values by giving it the competence to submit a reasoned proposal to the Council should the Commission be of the view that Article 7 TEU ought to be triggered on this basis.[80] It may therefore be compellingly argued that Article 7 TEU *already* allows the monitoring of EU Member States *prior* to the determination of a serious breach of EU values given the obvious need for the Council to be able to rely on solid factual evidence before eventually finding against a 'rogue state'. In other words, it may be submitted that the powers of monitoring Member States with respect to Article 2 TEU values are *inherent* in the powers of the Council and the right of initiative of the Parliament, Commission and Member States under Article 7 TEU.[81] One should finally recall that the European Commission said as much in 2003 in its Communication on Article 7 TEU without the Council expressing any objection then.[82]

To the extent that the new pre-Article 7 procedure exists to make possible the activation of Article 7 TEU – and it would not have been called pre-Article 7 procedure otherwise – and that Article 7 makes clear that the Commission may submit a reasoned proposal to the Council to enable it to adopt recommendations *prior* to the determination of a clear risk of a serious breach of EU values – a task which could hardly be fulfilled without some monitoring framework – it may therefore be reasonably concluded that the Commission did not breach the principle of conferred powers when it adopted this new

78 Council of the European Union, Opinion of the Legal Service 10296/14, 14 May 2014, para. 28. According to the principle of conferred powers, which is laid down in Article 5(2) TEU, 'the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

79 Opinion of the Legal Service, ibid., para. 26.

80 Such a reading is fully in line with the Commission's practice with respect to Article 49 TEU, which governs accession to the EU. In this context, the Commission regularly adopts 'monitoring' reports in which EU candidate countries' progress and alignment with the EU acquis, including compliance with EU values, are reviewed. See D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer 2008) Ch 2.

81 This argument is borrowed from L. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in Closa and Kochenov, *supra* n. 7.

82 COM(2003) 606 final, pp. 7-8: Article 7 TEU 'places the institutions under an obligation to maintain constant surveillance' and 'requires practical operational measures to ensure thorough and effective monitoring of respect for and promotion of common values'.

procedure in March 2014 as it had already implicitly but necessarily be empowered to monitor national compliance with the rule of law under Article 7 TEU. This interpretation is further confirmed by the repeated requests made by the Council to the Commission to develop assessment tools as regards national compliance with Article 2 TEU values.[83]

Moreover, given the overwhelming level of political, legal and economic interdependence between the EU Member States, the principles of mutual trust and mutual recognition of judgments which underlie the EU's Area of Freedom, Security and Justice as a whole – not to mention the blatant, continuing disregard for EU values in at least one EU country – the Commission, if anything, fulfilled (or at least attempted to fulfil) its duty as Guardian of the Treaties[84] by putting forward a framework that would make Article 2 TEU more operational in practice. As noted previously, the Court of Justice recently reaffirmed, in the strongest possible terms, that the EU's '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.'[85] This could be logically construed as necessarily implying not only the right but also a duty on EU institutions, in the absence of any possibility to force a Member State out of the Union, to safeguard the EU's 'constitutional settlement through intervention within Member States.'[86]

3.3 Positive procedural features

On the procedural plane, the key strength of the Commission's framework is that it could be easily deployed alongside other well-established procedures such as the infringement procedure laid down in Articles 258 and 260 TFEU. The Commission's pre-Article 7 procedure may indeed be understood as an attempt to bridge – albeit rather rudimentarily – the gap currently existing between the main form of action for 'standard' and specific violations of EU law and the main procedure dedicated to 'exceptional' and systemic violations of EU values laid down in Article 7 TEU. In this sense, the Commission's proposal is reminiscent of some of the academic proposals listed above, as it attempts to build a new soft system of enforcing EU values on recalcitrant national authorities alongside the long-established procedure dedicated to guaranteeing the application of EU law *sensu stricto*.

Procedurally speaking, another positive aspect of the Commission's proposal lies in the obvious readiness of the Commission to consult a wide range of expert bodies. The FRA, the Venice Commission and other bodies as well as NGOs and think tanks are all explicitly mentioned. This is to be welcomed. It was indeed important to avoid duplication by taking into account the work already done by EU bodies such as the FRA as well as bodies from the Council of Europe and the UN.[87] The Commission's clear willingness to rely on third parties' expertise should not only enhance the proposal's likely effectiveness but also avoids the potential shortcomings of any outright outsourcing of EU problems which would in all likelihood further undermine the authority of EU institutions and

83 See e.g. Council conclusions on fundamental rights and the rule of law, Justice and Home Affairs Council meeting, 6 and 7 June 2013, para. 9, where the Council called on the Commission among other things to make full use of existing mechanisms to better safeguard EU values.

84 See Art. 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…'

85 Opinion 2/13, *Accession to the ECHR* (II), 18 December 2014, para. 168.

86 Müller 2015, *supra* n. 71, p. 145.

87 This was one of the many sensible recommendations contained in a report published by the Bingham Centre for the Rule of Law, *Safeguarding the Rule of Law, Democracy and Fundamental Rights: A Monitoring Model for the European Union*, 15 November 2013.

citizens' confidence in them. This is why it would seem more appropriate to rely, for instance, on the expertise of the Venice Commission to assess, on a case-by-case basis, the reality of any potential breach of the rule of law in any EU Member State while maintaining any enforcement-related procedure 'in-house'. While consultation is welcome, the task of guaranteeing compliance with the core values of EU constitutionalism should not depend on non-EU bodies and the proposal of the Commission, in this regard, is well thought and sensibly designed.

To conclude on the positive aspects of the Commission's rule of law framework, the suggested 'pre-Article 7 procedure' wisely navigates the potential traps related to the substance of the concept of the rule of law. It is further designed in such a way that it can be implemented without going through an extremely time consuming Treaty amendment process with no guarantee of any 'happy ending'. Finally, it enables the Commission to avail of other EU and non-EU bodies' expertise to build a case against any EU Member State while allowing the Commission to complement its well-established power to initiate infringement actions against national authorities with a new procedure that should allow it to simultaneously investigate systemic violations of EU law.

3.4 Weak features

The Commission's pre-Article 7 procedure seems to be well designed until one begins examining how effective it would be at remedying the diagnosis it reflects. It is in the context of the proposal's effectiveness that the main weakness of the proposal lies, potentially annihilating all of the positive points previously highlighted.

To begin with, the framework is based on the presumption that a discursive approach, that is, a dialogue between the Commission and the Member State possibly in breach of Article 2 TEU is bound to produce positive results. The validity of this presumption is questionable. Indeed, once we move towards really problematic cases, i.e. the countries where the ruling élite has made a *conscious choice* not to comply with EU values, then a totally different picture emerges. If such a conscious choice has been made, socialisation in the framework of a new pre-Article 7 TEU procedure is unlikely to bring about any meaningful change and an end to any systemic attempt to breach EU values in the relevant Member State.

A number of additional shortcomings can be highlighted. First of all, the Commission has failed to clarify how it understands the notion of 'systemic threat'. This is however a crucial point as the triggering of the new procedure depends on the presence of systemic threats of the rule of law rather than minor or individual breaches. The Commission should therefore 'clearly define the concept of "systemic threat" *vis-à-vis* both isolated violations on the one end of the scale and systemic violations on the other end, and to be prepared to take action at an early stage.'[88] In this context, yet another possible point of criticism comes to light: the Commission's failure to offer any clear distinction between a systemic *threat* and a systemic *violation*. One would however hope that systemic violations of the rule of law should more easily trigger the new procedure than systemic threats, which could be more diffuse and harder to quantify in practice. When one adds to the picture the absence of any clearly pre-defined benchmarks – despite contrary assurances by former Commission President Barroso – it becomes clear that the Commission's new procedure may end up as unworkable as Article 7 TEU with which it is intimately connected. The Commission's decision to reserve for itself the power to trigger

88 Meijers Committee, Letter to Commissioner Reding: Note on the Commission Communication "A new EU Framework to strengthen the Rule of Law", Ref. CM1406, 15 June 2014, available at: http://www.statewatch.org/news/2014/jun/eu-meijers-cttee-letter-reding-rule-of-law.pdf

the pre-Article 7 TEU procedure further sends a mixed message, especially given the flexible and not strictly legal character of the procedure. Indeed, it suggests that the Commission is keen to preserve an absolute discretionary power to decide when any particular Member State ought to be assessed. It would have been more politically astute and more effective to grant other EU institutions or national governments and/or national parliaments the right to oblige the Commission to investigate any EU Member State, which would still have left the Commission with the complete discretion to decide whether there is or not a risk of a systemic breach of the rule of law.

Leaving aside the uncertainties surrounding the triggering the Commission's procedure, one may furthermore regret some key procedural elements that are likely to further prevent a meaningful and effective enforcement of EU values. The confidential nature of the whole discussion to be held between the Commission and the Member State under investigation will prevent a 'name-and-shame' environment from crystallising, a feature which would most likely add significantly to the effectiveness of the procedure. The non-legally binding nature of the 'rule of law recommendation' to be addressed to the authorities of any country where systemic threats have been identified, 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.

4. The Council's annual rule of law dialogue process

Notwithstanding the shortcomings identified above, the Commission should be commended for taking compliance with EU values seriously. The emphasis on the rule of law, while at first perhaps surprising considering the other values mentioned in Article 2 TEU, is convincingly justified on the ground that respect for the rule of law is a prerequisite for the protection of all other fundamental values upon which the EU is founded. The Commission's prominent role in this context is also logical considering its well-established role as Guardian of the EU Treaties. The case for allowing an early intervention of the Commission in cases of systemic threats to the rule of law in any Member State is, in our view, compelling. However, the proposed framework may be seen as excessively 'soft' in nature. Not that it would be necessarily positive to transform the EU into a fully-fledged militant democracy as first suggested in the 1950s,[89] but as noted above, it is highly unlikely that a *confidential* dialogue coupled with the possibility of adopting *non-binding* recommendations could enable the EU to successfully address the current phenomenon of 'rule of law backsliding', which is affecting a number of EU Member States, with exhibit A being Hungary. These weak features, however, did not stop the Council from attempting to 'kill off' the Commission's new rule of law framework. Indeed, rather then supporting the Commission's initiative, the Council decided instead to establish an annual rule of law 'dialogue among all Member States within the Council', based 'on the principles of objectivity, non discrimination and equal treatment of all Member States' and to be 'conducted on a non partisan and evidence-based approach'.[90] The Council's not so disguised attempt to pre-empt any activation of the Commission's

89 While this is relatively unknown, the possibility of European intervention in a situation of systemic threat to the democratic and liberal constitutional order of a Member State is not an entirely new debate. Indeed, the European Political Community Treaty of 1953, which however never entered into force, provided for the rather extraordinary possibility of European intervention to maintain 'constitutional order and democratic institutions' within the territory of a Member State. See G. de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor', 105 *AJIL* (2011) 649.

90 Council of the EU, press release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20-21.

pre-Article 7 procedure is hardly surprising considering the reluctance and unease of several national governments at the idea of giving to the Commission, or any new EU supranational body for that matter, the power to look into rule of law issues beyond the areas governed by EU law.[91]

From a legal point of view, yet without explicitly stating as much, the Council's dialogue proposal seems to reflect the view that the Commission's pre-Article 7 procedure is not compatible with the principle of conferred competences[92] as well as the Treaty provision providing for the respect of national identities of Member States inherent in their fundamental political and constitutional structures.[93] As noted above, we believe these arguments to be based on a superficial and selective reading of the EU Treaties. The Council's understanding of Article 7 TEU also proved at times to be quite confused: It is for instance incorrect to hold that 'the rule of law applies as a value of the EU in the areas in which the EU has competence and EU monitoring mechanisms are possible to this extent.'[94] On the contrary, it is well established that the raison d'être of Article 7 TEU is to enable the EU to remedy breaches of EU values in areas which are not connected to the exercise of an EU power or more generally, which fall outside the scope of EU law. The EU Commission should therefore be commended for confirming that its rule of law framework adopted in March 2014 remains in place and that it can be activated at any time, despite the negative opinion of the Council's legal service previously cited.[95]

This is not to say that the Commission's new procedure does not suffer from a number of flaws. By comparison, however, the Council's rule of law dialogue looks anaemic and goes nowhere near enough to what is required to address the challenges highlighted in this paper. For instance, the Council calls for an evidence-based approach but what does this mean in practice and is there anyone to argue in favour of an evidence free-based approach? Similarly, the dialogue is supposed to take place in the Council and be prepared by the COREPER, 'following an inclusive approach'[96] but one is again left wondering about what would this exactly entail in practice. More fundamentally, the Council is seeking to use a soft mechanism, which has been regularly criticised for its ineffective nature in the context of its use with non-EU countries. One may for instance refer to the multiple 'human rights dialogues', which the EU has set up with third countries to promote its values abroad. The EU's infatuation for this discursive method has however been rightly questioned, as evidence of substantial and concrete achievements is thin on the ground.[97]

It is therefore tempting to conclude that the Council has only been looking for a 'façade of action',[98] by rejecting any solution, even the most modest ones such as a peer-review mechanism, which would have led to an actual examination of EU countries' adherence to EU values. Two potential explanations come to mind: The Council is either in

91 See e.g. UK Government, *Review of the Balance of Competences between the UK and the EU – EU Enlargement* (December 2014), para. 2.116: 'However the Government does not accept the need for a new EU rule of law framework applying to all Member States. There are already mechanisms in place to protect EU common values and a further EU mechanism would risk undermining the clear roles for the Council and the European Council in this area.'

92 Art. 5 TEU.

93 Art. 4(2) TEU.

94 Italian Presidency Note to the Council of the EU, Ensuring respect for the rule of law in the EU, Doc. 15206/14, Brussels, 14 November 2014, para. 12.

95 See V. Pop, 'Hungary triggers rule of law 'debates' in EU Council, *EUobserver*, 20 November 2014.

96 Council of the EU, press release no. 16936/14, *supra* n. 90, p. 21.

97 European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), para. 157.

98 To paraphrase K. Roth, 'A Facade of Action: The Misuse of Dialogue and Cooperation with Rights Abusers', in Human Rights Watch, *World Report 2011. Events of 2010* (Seven Stories Press 2011), p. 1.

denial about the internal challenges faced by the EU or no other compromise could be found within an institution which welcomes representatives of some national governments whose rule of law records are highly questionable, if not abysmal.[99] It is, in any event, particularly ironic that the Council adopted its annual dialogue proposal on the same day it adopted conclusions on the enlargement process which contain multiple references to the central importance of the rule of law and the need for candidate countries to focus on and tackle related issues with determination, a determination which is however clearly lacking when it comes to the current EU Member States themselves.

5. The way forward

In the absence of any realistic prospect of getting the national governments of EU Member States to agree on a fundamental revision of how the EU Treaties organise the internal policing of EU values, we would encourage the European Parliament to endorse the Commission's rule of law framework and lend its support to any additional reforms which could make the 'pre-Article 7 procedure' more workable and effective. This would in turn increase its 'dissuasive' potential, a dissuasive effect Article 7 TEU no longer has if it ever had it. A number of proposals could be made in this regard. It is submitted that the Commission should in particular undertake the following actions:

(i) Clarify the concept of 'systemic threat' and its relationship with the closely linked but not identical notions of serious threats, systemic violations and systemic deficiencies;
(ii) Adopt pre-defined triggering benchmarks;
(iii) Commit itself to systematically investigating any Member State referred to it under the new pre-Article 7 procedure by the European Parliament, the FRA, the Venice Commission or any national government or parliament of any EU country;
(iv) Justify any decision not to initiate a 'rule of law dialogue' when any of the bodies previously mentioned has referred a Member State to its attention;
(v) Publish any 'rule of law opinion' it may adopt when the Commission is of the view that there is indeed a situation of systemic threat to the rule of law and any response received from the Member State under investigation;
(vi) Commit itself to triggering Article 7 TEU in the situation where its rule of law recommendations are not satisfactorily implemented within the time limit set, which should never exceed a period of twelve months.
(vii) Provided that it is indeed possible to work with the Council (when all of the evidence currently available points toward a Council primarily interested in paying lip service to the need to safeguard EU values), an inter-institutional

[99] To give one example, the Latvian Presidency (first half of 2015) has done absolutely nothing to address the issue of national breaches of EU values. Indeed, the Presidency was rightly condemned by the Alliance of Liberals and Democrats for Europe (ALDE) in the European Parliament for refusing to participate in the parliamentary debate on the situation on Hungary at the European Parliament last May. Speaking for the Council Presidency, Latvian State Secretary for European Affairs Zanda Kalniņa-Lukaševica did welcome the Parliament's concern for the 'preservation of democratic values', but as the Council had not discussed the situation in Hungary, she argued not to be 'in a position to comment': European Parliament News, 'Views on Hungary, fundamental rights and EU values', Press release 20150513IPR55481, 21 May 2015. One could be forgiven to think that Latvia's questionable human rights record when it comes to ethnic discrimination may well explain their lack of urgency with respect to Hungary. On Latvia's record regarding minority rights, see e.g. D. Kochenov, V. Poleshchuk and A. Dimitrovs, 'Do Professional Linguistic Requirements Discriminate?', 10 *European Yearbook of Minority Issues* (2013), p. 137.

> agreement should be negotiated to avoid any duplication of efforts and institutional inertia following the adoption of conflicting understandings of what EU institutions may do under the EU Treaties.

In parallel or indeed, regardless of the lack of consensus amongst national governments on the Commission's rule of law framework, a number of additional, more practical reforms could also be implemented in the short term. It would be particularly helpful for the Commission to centralise and make public any rule of law related report published by EU and non-EU bodies on a dedicated page of its website, and seek to publish a rule of law ranking of EU countries which could reflect and bring together the many indexes and other scoreboards which have developed by governmental and non-governmental organisations over the years. Additional resources should also be allocated to 'infringement teams' and we would finally advise setting up special 'infringement task forces' with respect to any Member State whose compliance with Article 2 TEU is being questioned by any of the institutions and networks mentioned in the Commission's Communication.

Last but not least, the Commission would remain faithful to its raison d'être by lending its unqualified support to many of the useful suggestions made by the European Parliament these past few years. Let us briefly recall for instance that in 2012, it was the European Parliament which first suggested the monitoring of EU countries within the framework of a new 'fundamental rights policy cycle', which would involve every year 'the various fundamental rights actors within the EU structure', i.e., EU institutions, the FRA and EU Member States, with joint measures and events to be organised with NGOs, citizens and national parliaments.[100] The enhancement of the mandate of the FRA, with the view of enabling it to conduct regular monitoring of Member States' compliance with Article 2 TEU, has also been regularly called for.[101] In 2014, the European Parliament went further and called for the urgent establishment of a 'new Copenhagen mechanism' with the aim of ensuring that EU values as well as the fundamental rights laid down in the EU Charter 'are respected, protected and promoted.'[102] It was further suggested that this mechanism should complement the policy cycle on the application of Article 2 TEU in the individual EU Member States mentioned above. A 'Copenhagen commission', to be composed of independent high-level experts on fundamental rights, was also suggested.

Most recently, the Liberal group in the European Parliament (ALDE) made a welcome contribution to the debate by putting forward an 'EU Democratic Governance Pact' modelled on the Stability and Growth Pact (SGP) for the Euro area,[103] which, considering the SGP's poor record when it comes to sanctioning countries having breached its terms, may perhaps not be the best model to follow. In any event, rightly noting that the EU cannot be credible or have moral authority if it is unable to uphold its own standards 'at home', the proposal put forward by ALDE contains a useful set of suggestions, most of which would having the additional advantage of requiring legislative but not Treaty change. One may for instance mention the idea of a European Scoreboard for Democracy, Rule of Law and Fundamental Rights. This new monitoring tool would regularly measure concrete adherence to EU's values on the basis of a series of indicators developed and

100 European Parliament resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010 - 2011) (2011/2069(INI)), para. 20.
101 Ibid., para. 44.
102 European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), para. 8(o).
103 ALDE Initiative Outline, *The EU Democratic Governance Pact. Upholding the Rule of Law and Fundamental Rights* (13 January 2015). The full text of the proposed pact is available at: <http://www.alde.eu/documents/publications>.

measures by the FRA, within the framework of a new 'European Semester'[104] modelled on the existing mechanism that has been developed to measure economic governance in the EU. A number of valuable proposals to amend the European Treaties have also been made: (i) the creation of a new judicial remedy which would allow the Commission to bring an enforcement action against any relevant EU country on the sole basis of Article 2 TEU; (ii) a revision of the text of Article 7 TEU with lower voting thresholds and a set of clearer and wider range of penalties; (iii) the inclusion of a reference to the FRA in the Treaties, to make it possible to amend the Agency's founding regulation not by unanimity as is currently the case but via the ordinary legislative procedure; and (iv), to offer each national parliament the right to refer a draft national law to the Court of Justice for an opinion on its compliance with the Treaties and the Charter of Fundamental Rights. We fully support each and every one of these proposals.

6. Conclusion

This article first submitted that the Commission was correct when it noted in its rule of law Communication from March 2014 that it lacked effective enforcement instruments when it came to monitoring and eventually sanctioning individual EU countries' adherence to EU values. It was further submitted that given the overwhelming level of political, legal and economic interdependence between the EU Member States, the principles of mutual trust and mutual recognition of judgments which underlie the EU's Area of Freedom, Security and Justice as a whole, the Commission has fulfilled its duty as Guardian of the Treaties by putting forward a new framework that would make Article 2 TEU more operational in practice. What has been described as a 'pre-Article 7 TEU procedure' also offers a number of positive features: it provides a satisfactory and workable definition of the rule of law and partially addresses the innate limitations of Article 7 TEU. It is however unlikely to effectively address the diagnosis it aimed to remedy mostly because of the soft and diplomatic nature of the procedure adopted by the Commission. In other words, one may reasonably expect any ideologically illiberal national government to misuse the new procedure to delay the possible recourse to the parts of Article 7 TEU that bite. Thus, instead of being solved, the problem of non-compliance with the EU values laid down in Article 2 TEU could even be exacerbated as a result.

Notwithstanding its doubtful effectiveness and the Commission's questionable resolve in making use of its rule of law framework, the Commission's solution is far more preferable to the Council's alternative answer to organise an annual rule of law dialogue, which demonstrates the Council's continuing preference for rhetoric over action. As for the arguments raised against the Commission's pre-Article 7 procedure, and in particular the allegation that the Commission in doing so breached the principle of conferred powers, they are not persuasive. Any criticism coming from an institution such as the Council which has proved clearly unable to confront its members' obvious failings when it comes to respect with EU values should be taken with a pinch of salt. This is not to say that the Commission itself should be spared from any criticism in this regard. Indeed, while we wholeheartedly welcome Frans Timmermans' clarification that 'there is no such thing as an illiberal democracy' and his renewed commitment 'to use the [pre-Article 7 TEU] Framework'[105] should the situation in any Member State require it, the time has come for

104 'European Semester' is the name given to the EU's annual economic policy coordination process. Within this framework the Commission can adopt country-specific recommendations with the view of boosting growth and jobs.

105 F. Timmermans, 'EU framework for democracy, rule of law and fundamental rights', Speech to the European Parliament, Strasbourg, Speech/15/4402, 12 February 2015.

the Commissioner in charge of the Rule of Law to stop talking the talk and start walking the walk.