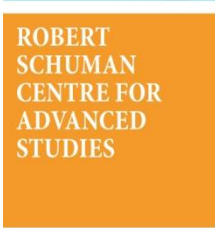




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Upholding the Rule of Law in the EU:
On the Commission's 'Pre-Article 7 Procedure' as a
Timid Step in the Right Direction

Dimitry Kochenov and Laurent Pech

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Abstract

This paper provides a detailed analysis of two institutional reforms, respectively put forward by the European Commission in March 2014 and by the Council of the EU in December 2014 – on how to tackle the problem of Member States' non-compliance with the principle of the rule of law, which is one of the fundamental values of the Union according to Article 2 TEU. It is submitted that while both proposals definitely represent a timid step in the right direction, the Commission's 'light-touch' proposal falls short of what is required to effectively address ongoing and serious threats to the rule of law within the EU but is however clearly preferable to the Council's alternative proposal to hold an annual rule of law dialogue among all Member States within the Council itself.

Keywords

Rule of Law, EU values, Hungary, Article 2 TEU, Article 7 TEU, pre-Article 7 procedure.

‘A political union also means that we must strengthen the foundations on which our Union is built: the respect for our fundamental values, for the rule of law and democracy.’

José Manuel Barroso, then President of the European Commission, State of the Union Address 2012¹

‘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.’

Viktor Orbán, Prime Minister of Hungary, speech given on 26 July 2014²

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 EU framework to strengthen the rule of law was put forward by the Commission last March.⁵ In doing so, the Commission aimed to more effectively address any situation where ‘there is a systemic threat to the rule of law’⁶ within any Member State.

Frans Timmermans’ appointment last November as First Vice-President of the Commission in charge inter alia of the Rule of Law suggests that the issue of ensuring a more effective monitoring of EU countries’ adherence to this principle will not fade from the Commission’s agenda. This is indeed the first time that a Commissioner has been explicitly tasked to coordinate the Commission’s work in this area. It is also worth noting that prior to his appointment, Timmermans had welcomed the Commission’s rule of law communication on the ground that a more systematic approach was required to avoid any ‘rule of law backsliding’ post EU accession.⁷ One may therefore hope that the Commission, which is now presided by Jean-Claude Juncker, will seriously consider activating its new rule of law framework whose rationale (Section 1) and main features (Section 2) are analysed below. This paper will however argue that the Commission’s ‘light-touch’ proposal falls short of what is required to effectively address threats to the rule of law within the EU (Section 3) but is nevertheless preferable to the Council’s alternative proposal to hold an annual rule of law dialogue (Section 4).

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. This has become a significant issue to the extent that rule of law related crises appear to have gained both on intensity and regularity in the past decade.

¹ European Parliament, Strasbourg, 12 September 2012, Speech/12/596. A revised and enlarged version of this working paper has been accepted for publication in *EuConst* 2015, issue 3.

² Cited in I. Traynor, ‘Budapest autumn: hollowing out democracy on the edge of Europe’, *The Guardian*, 29 October 2014.

³ ‘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 eg J. Barroso, State of the Union 2012 Address, European Parliament, 12 September 2012, Speech/12/596; V. Reding, ‘The EU and the Rule of Law – What next?’, 4 September 2013, Speech/13/677.

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

⁶ *Ibid* at 3.

⁷ Answers to the European Parliament, Questionnaire to the Commissioner-Designate Frans Timmermans, Question 6: http://ec.europa.eu/about/juncker-commission/docs/2014-ep-hearings-reply-timmermans_en.pdf

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.⁸ Three concrete examples were mentioned in her speech:

- 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.

Taken together, these episodes have been often understood as demonstrating the increasing number of instances where national authorities were undermining key EU values such as the rule of law. To give a single but representative example, in his 2012 State of the Union address, José Manuel Barroso, then the President of the European Commission, spoke of worrying 'threats to the legal and democratic fabric in some of our European states' which need to be brought into check.⁹

It would be wrong to think that these concerns were limited to EU officials. A number of European governments have also been concerned with what may be more generally labelled rule of law backsliding. This led among many other initiatives eleven Foreign Ministers, on the initiative of Germany's Foreign Minister Westerwelle, to advocate the introduction on 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.¹⁰

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

To suggest the introduction of a new mechanism implicitly assumes that the EU's current 'toolbox' is not adequate to address the previously described challenges. And indeed, the former President of the European Commission himself called for a 'better developed set of instruments'¹¹ that would fill the space that exists at present between the Commission's infringement powers laid down in Articles 258–260 TFEU, and the so-called 'nuclear option'¹² laid down in Article 7 TEU. Indeed, as will be shown below, both procedures suffer from a number of shortcomings, with the consequence that Article 7 TEU has never been used whereas the Commission's infringement powers have proved ineffective to remedy systemic violations of EU values.

⁸ Reding, 'The EU and the Rule of Law', op. cit.

⁹ Barroso, State of the Union 2012 Address, op. cit.

¹⁰ See final report of the Future of Europe Group (known as the Westerwelle report), 17 September 2012, para. II(d) entitled 'Strengthening the EU as a community of values'.

¹¹ J. Barroso, State of the Union address 2013, European Parliament, 11 September 2013, Speech/13/684.

¹² Ibid.

1.2.1 The ‘Nuclear Option’

The so-called ‘nuclear option’ is to be found in Article 7 TEU. This provision, which was first inserted 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.¹³

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. For instance, unanimity is required in the European Council to determine the existence of a serious and persistent breach while a majority of four fifths of the Council’s members and the consent of the European Parliament are required to determine that there is a clear risk of a serious breach.

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 9/11,¹⁴ this provision has never been used for essentially two reasons: the thresholds for activating it are virtually impossible to satisfy and the existence of a political convention whereby it would be politically counterproductive to do so. Crucially, the provision was not even used in the case of the Austrian crisis which followed the elevation to government of the extreme-right FPÖ party ten years ago.

With the sole exception of the original rule of law mechanism put in place for Romania and Bulgaria, which owes its specificity to the pre-accession context of preparing these countries for EU membership.¹⁵ This means that 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 failing to comply with EU values.

1.2.2 The infringement procedure’s limited effectiveness

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 be brought again before the Court of Justice, which, in this instance, has the additional power of imposing financial sanctions on it.

¹³ For further analysis, see European Commission Communication on 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.

¹⁴ At last, the European Court of Human Rights recently found against Poland, one of main culprits, for having knowingly abetted unlawful imprisonment of Guantánamo-bound detainees at a secret prison run by the CIA in 2002-03: *Al Nashiri v Poland*, App no 28761/11 (2014). This is the first time an EU Member State is held to have violated the ECHR for enabling the US authorities to subject individuals to torture and ill-treatment on its territory.

¹⁵ As the EU was concerned with Bulgaria and Romania’s rule of law shortcomings prior to their entry into the EU, an unusual ‘Co-operation and Verification Mechanism’ was set up in December 2006 in order to monitor their progress in addressing specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime post accession. Annual reports are published to monitor progress on meeting the Commission’s rule of law benchmarks.

The infringement procedure has enabled the Commission to score a number of successes: French policy regarding the deportation of Roma people was amended after the Commission threatened to initiate infringement proceedings; Hungary reviewed its legislation following its defeat before the Court of Justice (but crucially, the Hungarian judges affected by the controversial legislation were never reinstated),¹⁶ and the Romanian constitutional conflict mentioned in Reding's speech came to an apparent end. However, recent developments continue to show the limits of the infringement procedure to effectively police and sanction Member States intent on undermining Article 2 TUE.

To give one but worrying example, Hungary's Prime Minister has recently advocated the establishment of an 'illiberal state' and referred to Putin's Russia and Communist China as two possible models to follow.¹⁷ The call for an illiberal regime – which is not pure rhetoric in the context of the contemporary Hungarian state¹⁸ – plainly flies in the face of Article 2 TEU and yet the Commission cannot initiate any infringement action against Hungary on this sole basis.

In a nutshell, the Commission may only initiate an infringement action against a Member State for a *specific* violation of EU law. And while Article 2 is a legally binding provision and should not be construed as a mere political declaration – the EU Treaties make clear that not only EU institutions but all the Member States ought to respect and promote the Union's values¹⁹ – it cannot be a cause of judicial action in and of itself. In other words, the relatively open-ended nature of the values laid down in Article 2 TEU means that no EU institution, or private party, may institute legal proceedings against a Member State on this sole basis either before national or EU courts.

The Commission is thus left with 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. In the absence of any general EU legislative competence over the independence and impartiality of national judiciaries, the Commission had therefore 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. This however did not allow the Commission to impose effective remedies that would have prevented the undermining of the independence and impartiality of Hungarian's judicial system by the national government.²⁰ 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, in their own exclusive area 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

¹⁶ 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].

¹⁷ See *EUObserver*, 'Orban Wants to Build an Illiberal State', available at <http://euobserver.com/political/125128>.

¹⁸ See K. L. Scheppele, 'The Unconstitutional Constitution', *New York Times*, 2 January 2012 and 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.

¹⁹ 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.

²⁰ 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 eutopialaw.com.

forces,²¹ i.e. a government's systematic weakening of checks and balances, or is governed by elected officials whose official programme is the general dismantlement of the liberal democratic state, these violations of EU values do not simply affect the citizens of the relevant Member State.²² They also automatically affect EU citizens residing in that country but also 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. European's regulatory and judicial interconnected space is also built on the principle of mutual trust and an absolute requirement of mutual recognition of judicial decisions, 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. Finally, the legitimacy and credibility of the EU are both undermined when it ceases to be able to guarantee internal compliance with the values it has sought to uphold and promote in its external relations.²³

The Commission had therefore 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'.²⁴ This may justify in turn an increased monitoring and policing of its Member States and the adoption of a new framework to more effectively safeguard the rule of law within the EU.

2. The Commission's proposal

In a nutshell, the Commission's new framework to strengthen the rule of law takes the form of an early warning tool whose primary aim 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 so-called nuclear option laid down in Article 7 TEU. The Commission has also made clear that its proposed 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'. This means that the Commission is not seeking to gain a new power to examine individual breaches of fundamental rights or routine miscarriages of justice. Rather, the Commission is confirming its interest in gaining a new tool to address threats to the rule of law 'which are of a systemic nature'.²⁵

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,²⁶ the European Commission's Communication reflects the view that there is now a

²¹ See generally J.-W. Müller, *Safeguarding Democracy inside the EU. Brussels and the Future of the Liberal Order* (Washington DC: Transatlantic Academy Paper Series, 2013).

²² C. Closa, D. Kochenov, J.H.H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union', EUI Working Papers RSCAS 2014/25.

²³ For a detailed analysis of these and other options, see, C. Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and Procedural Limitations', in C. Closa and D. Kochenov (ed.), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge: CUP, 2015 (forthcoming)).

²⁴ Commission's Communication at 4.

²⁵ *Ibid* at 7.

²⁶ Report on the Rule of Law, Study No. 512/2009, CDL-AD(2011)003rev, Strasbourg, 4 April 2011, para 35.

consensus on the core meaning of the rule of law and that this concept essentially entails compliance with the following six legal principles:²⁷

- 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.

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’,²⁸ 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’, which ‘is intrinsically linked to respect for democracy and for fundamental rights.’²⁹ 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 ‘Europe’s rule of law approach’. 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.³⁰ 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.³¹

While the Commission’s understanding of the concept of rule of law is clearly outlined and should help other EU institutions when and if they have to decide on the materiality of a national breach in

²⁷ Commission’s Communication at 4.

²⁸ Id.

²⁹ Id.

³⁰ L. Pech, ‘The Rule of Law as a Constitutional Principle of the European Union’, Jean Monnet Working Paper No. 04/09.

³¹ 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 F. Amtenbrink and D. Kochenov (eds), *The EU’s Shaping of the International Legal Order* (Cambridge University Press, 2013), 108.

this area, the notion of threat of a ‘systemic nature’³² is not made particularly clear. It is only stated that this type of threats may result from ‘the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress.’³³ 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.³⁴ There is also a degree of confusion between the notions of systemic threat and systemic violation, which is crucial in the context of the proposal. It is 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,³⁵ 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.³⁶

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’,³⁷ 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 may be described as follows:

- i. Commission’s assessment: The Commission will first have to assess 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;
- ii. Commission’s recommendation: In a situation where no appropriate actions are taken, 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;
- iii. Follow-up: Finally, the Commission is supposed to monitor how the relevant Member State is implementing the recommendation mentioned above. Should there be no satisfactory implementation, the Commission would then have the possibility to trigger the application of Article 7 TEU.

³² Commission’s Communication at 7.

³³ Id.

³⁴ 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.

³⁵ J. Barroso, State of the Union address 2013, European Parliament, 11 September 2013, Speech/13/684: 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’.

³⁶ Id.

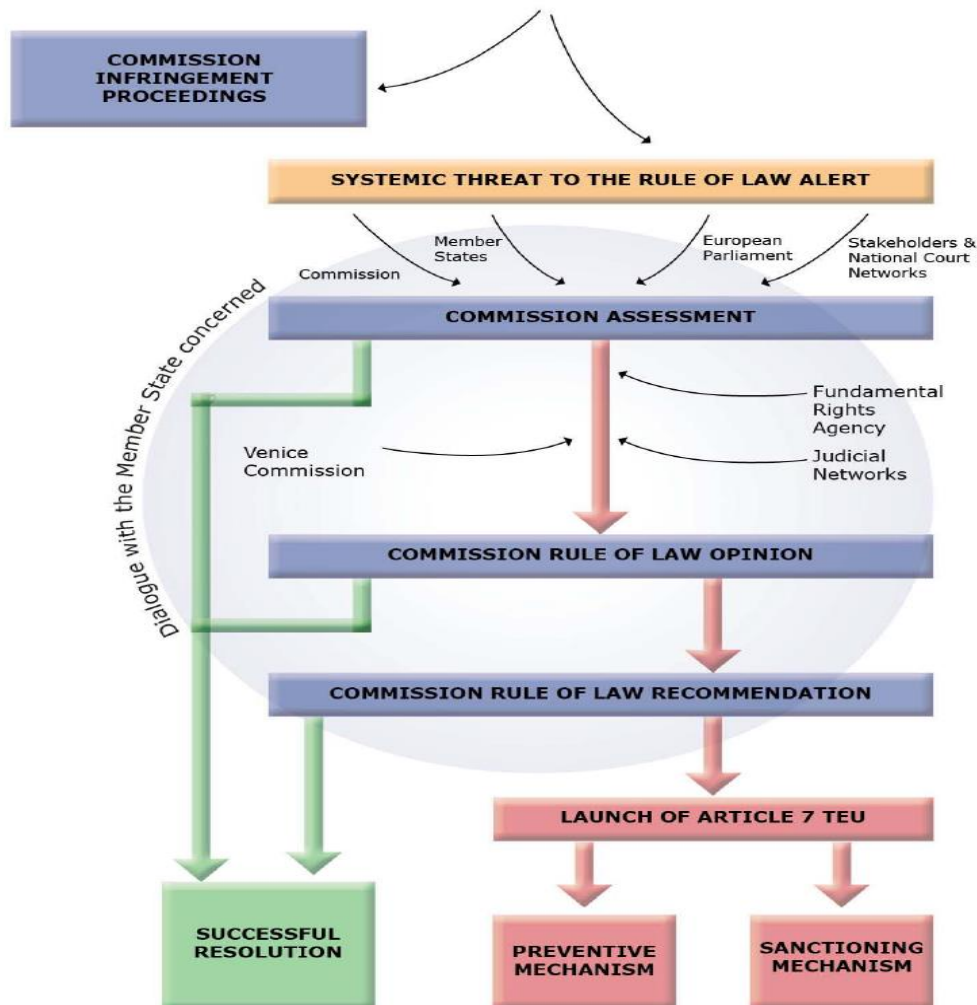
³⁷ V. Reding, ‘A new Rule of Law initiative’, Press Conference, European Parliament, Strasbourg, 11 March 2014.

The Commission’s pre-Article 7 mechanism is furthermore based on three fundamental principles:

- i. Only systemic threats or violations of the rule of law may trigger the activation of this new mechanism, not minor or individual breaches;
- ii. Unlike the current monitoring tool specifically developed for Romania and Bulgaria, this new procedure would apply equally to all Member States, regardless of the date of entry into the EU, size, etc.
- iii. While the Commission will continue to remain the guardian of EU values, third party and/or external expertise may be sought when necessary. The EU Fundamental Rights Agency, the Council of Europe (in particular, the Venice Commission) and judicial networks such as the Network of the Presidents of the Supreme Judicial Courts of the EU could therefore be asked to provide expert knowledge, notably during the assessment phase.

The diagram below³⁸ offers a synthetic view of the main aspects of the pre-Article 7 procedure proposed by the Commission:

A rule of law framework for the European Union



³⁸ Commission Communication, op. cit., Annex II.

According to the Commission itself, this new framework is based on its current powers as provided for by existing EU Treaties,³⁹ and would merely complement existing instruments, notably the Article 7 procedure and the infringement procedure laid down in Article 258 TFEU. This assessment is not however 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.⁴⁰ As will be shown below, this is however only one of the arguments that have been raised against the Commission's suggested rule of law framework, the most significant of which will be reviewed below.

3. Critical Overview

Before offering a critical albeit brief overview of Commission's proposal, a number of positive features will be highlighted.

3.1 Positive features

The Commission's proposal undoubtedly boasts a handful of strong points on the substantive, competence and the procedural plane.

With respect to the substance of the Commission's new rule of law framework, the Commission should be commended for adopting 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.

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. Before briefly explaining why the Commission was for the most part wise to do so, a succinct overview of these proposals from the most radical one to the least far-reaching one is offered below:

- i. Compulsory exit proposal: 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;⁴¹
- ii. The EU Charter as a federal standard: According to this proposal defended by the former EU Justice Commissioner, the provision of the EU Charter of Fundamental Rights, which provides that its provisions only bind national authorities when they are implementing EU law, should be repealed so as to make all EU fundamental rights 'directly applicable in the Member States, including the right to effective judicial review';⁴²
- iii. New preliminary ruling procedure: This widely discussed academic proposal suggested to allow national courts, in a situation where human rights would be systemically violated in their own Member State, to invite the Court of Justice of the EU to consider the legality of national actions in the light of Article 2 TEU, which the Court of Justice is not currently entitled to do;⁴³

³⁹ Commission Communication, *op. cit.*, at 9.

⁴⁰ Council of the European Union, Opinion of the Legal Service 10296/14, 14 May 2014.

⁴¹ Closa, Kochenov, Weiler, *op. cit.*, p. 30.

⁴² Reding, 'The EU and the Rule of Law – What next?', *op. cit.*

⁴³ A. von Bogdandy et al, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489.

- iv. ‘Outsourcing’ of EU values monitoring: The President of the Venice Commission 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;⁴⁴
- v. Establishment of a new EU monitoring body: Closely related to the previous proposal, the setting up of a so-called ‘Copenhagen Commission’⁴⁵ 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 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 be entitled to receive;⁴⁶
- vii. Peer-review: 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.⁴⁷

Space precludes any critical review of the above-mentioned proposals. Suffice it to say that none of them is flawless. Those requiring Treaty change are not politically realistic. The creation of a new EU monitoring body would add another layer of bureaucracy whereas the Commission and/or the EU Fundamental Rights Agency (hereinafter: EU FRA) could easily improve their monitoring capacities provided that they are given the resources and in the case of the EU FRA, a clear mandate to do so. The key issue in any event is less monitoring than enforcement. This is why the externalisation of EU countries’ adherence to the rule of law to Council of Europe’s bodies is not a promising avenue either. The refinement of the EU’s current infringement proceedings and sanctioning powers of the Commission may be viewed as the most seducing proposal but it is not crystal-clear whether a change of this nature could be undertaken without first amending the Treaties.

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 proposed pre-Article 7 procedure also appears to reveal a sensible realisation that the Union is currently not mature enough as a democratic constitutional system to move into the highly sensitive business of enforcing relatively open-ended and contested political values against reluctant national authorities.

The Commission’s proposal may therefore be reasonably described as anything but revolutionary. In essence it merely requires any ‘suspected’ Member State to engage in a dialogue with no new automatic or direct legal consequences should the Member State fail to agree with any of the rule of law recommendations adopted by the Commission. It is difficult therefore to understand the criticism whereby the Commission’s rule of law framework would not be ‘compatible with the principle of

⁴⁴ G. Buquicchio, President of the Venice Commission, Speech at the Assises de la justice, 21 November 2013.

⁴⁵ J.-W. Müller, *Safeguarding Democracy inside the EU*, op. cit. The name of the suggested new EU body refers to the 1993 meeting of the European Council in Copenhagen where the principle of EU enlargement was unanimously approved provided that candidate countries fulfil a number of criteria such as respect for human rights, democracy and the rule of law.

⁴⁶ K.L. Scheppele, ‘What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions’ (2013), available at <http://ec.europa.eu/justice/events/assises-justice-2013>.

⁴⁷ See the Report prepared by E. Hirsch Ballin et al. for the Adviesraad Internationale Vraagstukken (AIV), ‘The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation’, Report No. 87, 2014, 35.

conferral which governs the competences of the institutions of the Union'.⁴⁸ One may on the contrary assert that since the Commission is one of the institutions empowered, under Article 7 TEU, to trigger the procedure contained therein, it should in fact be commended for establishing clear guidelines on how such triggering is to function in practice. In other words, a strong and convincing argument can no doubt be made that Article 7(1) TEU already and necessarily *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.⁴⁹ Moreover, given the overwhelming level of interdependence between the EU Member States and the blatant disregard for EU values in at least one EU country, the Commission fulfilled its duty as Guardian of the Treaties by putting forward a framework that would make Article 2 TEU operational in practice.

On the procedural plane, the key strength of the proposal is that it could be easily deployed alongside other well-established procedures such as the infringement procedure laid down in Articles 258-260 TFEU and which is indeed explicitly mentioned on the diagram sketching the core features of the Commission's proposed new rule of law framework (as reproduced above). This is a clear attempt to bridge – albeit rather rudimentarily – the main form of action for 'standard' and specific violations of EU law with 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 good implementation 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 EU 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 EU FRA as well as bodies from the Council of Europe and the UN.⁵⁰ 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 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. In this sense, the proposal of the Commission is well thought and sensibly designed.

To conclude on the positive aspects of the Commission's proposal, 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'.

⁴⁸ 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.'

⁴⁹ Such a reading is fully in line with the Commission's practice regarding Article 49 TEU. In the context, the Commission regularly adopts a number of 'monitoring' documents in which EU candidate countries' progress and alignment with EU *acquis* are reviewed: D. Kochenov *EU Enlargement and the Failure of Conditionality* (Kluwer Law International, 2008), Ch 2.

⁵⁰ 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.

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.

3.2 Weak features

The Commission's proposed new rule of law framework seems to be well designed until one begins examining how effective it would be at remedying the diagnosis it offers. It is in the context of the proposal's effectiveness that the main weakness of the proposal lies, potentially annihilating all the positive points made about it.

To begin with, the proposal is based on the presumption that 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 systemic breaches of 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' to the rule of law. This is however crucial as the triggering of the Commission's new rule of law framework depends on the presence of systemic threats of the rule of law, rather than minor or individual breaches. It would therefore be advisable for the Commission 'to 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.'⁵¹ In this context, yet another possible point of criticism comes to light: the Commission's Communication does not 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 proposed new framework 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 proposal might actually end up as unworkable as Article 7 TEU – the so-called 'nuclear option' – with which it is intimately connected. The Commission's decision to reserve for itself the power to launch 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 Commission is keen to maintain some level of political discretion regarding any eventual decision to assess a particular Member State whereas it would more likely be more legitimate and effective to give other EU institutions or national governments and/or national parliaments the ability to compel the Commission to investigate any EU Member State.

Leaving aside the uncertainties surrounding the triggering of the Commission's rule of law framework, 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 successful 'name-and-shame' environment from crystallising. The non-legally binding nature of the 'rule of law recommendation' to be addressed to the authorities of any country where systemic threats

⁵¹ 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>

to the rule of law have been identified, and the non-automatic recourse to Article 7 TEU should the recalcitrant Member State fail to comply, further increase the likelihood of ineffective outcomes.

4. The Commission's rule of law framework v. the Council's rule of law dialogue

Notwithstanding the shortcomings identified above, the Commission should be commended for taking compliance with the rule of law 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 Treaties since the EU was established. The case for allowing an early and transparent 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 is perhaps insufficiently revolutionary. Not that it would be necessarily positive to transform the EU into a fully-fledged militant democracy as first suggested in the 1950s.⁵² One may however remain sceptical that a confidential 'rule of law dialogue' coupled with the possibility of adopting non-binding recommendations may enable the EU to successfully address the current phenomenon of 'rule of law backsliding', which is affecting a number of EU Member States.

The Council's reaction to the Commission's proposal leaves one rather pessimistic about the chance of ever seeing the Commission activating its new rule of law framework.⁵³ Indeed, rather than supporting the Commission's proposal, 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'.⁵⁴ The Council's attempt to 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 the power to look into rule of law matters beyond the area governed by EU law.⁵⁵ 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 rule of law framework is not compatible with the principle of conferred competences (Art. 5 TEU) as well as the Treaty provision providing for the respect of national identities of Member States inherent in their fundamental political and constitutional structures (Art. 4(2) TEU). As noted above, we believe these arguments to be based on a superficial and selective reading of the EU Treaties. And while the Commission's proposal suffers from a number of flaws, the Council's rule of law dialogue goes nowhere near enough 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? Similarly, the dialogue is supposed to take place

⁵² It is relatively unknown that 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 dramatic possibility of intervention by the then Community 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 *American Journal of International Law*, 2011, 649.

⁵³ Last November, a spokeswoman for the EU Commission confirmed that the rule of law framework proposed by Viviane Reding remains in place and can be activated at any time, despite the negative legal opinion of the Council previously cited. See V. Pop, 'Hungary triggers rule of law 'debates' in EU council, *EUobserver*, 20 November 2014.

⁵⁴ Council of the EU, press release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20-21.

⁵⁵ 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.'

in the Council and be prepared by the COREPER, ‘following an inclusive approach’⁵⁶ but one is again left wondering about what would this entail in practice. More fundamentally, the Council is seeking to use a soft instrument, which has regularly criticised for its ineffective nature in the context of its use with non-EU countries. To put it briefly, the EU has set up close to forty ‘human rights dialogues’ with third countries to promote its values abroad but the EU infatuation for this discursive method has been rightly questioned, as evidence of substantial and concrete achievements is thin on the ground.⁵⁷

It is therefore tempting to conclude that the Council is only looking for a ‘façade of action’.⁵⁸ Two potential explanations come to mind: The Council is either in denial about the internal challenges faced by the EU or no other compromise could perhaps be found within an institution which welcomes representatives of national governments whose rule of law records are highly questionable if not abysmal. What is particularly ironic that the Council adopted its 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 EU countries themselves.

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 the Commission to undertake some additional work to make its ‘pre-Article 7 procedure’ more workable and effective. To do so, it is submitted that the Commission should (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) agree to systematically investigate any Member State referred to it under this mechanism by the European Parliament, the EU FRA or any national government or parliament or the Venice Commission; (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 opinion’ it may adopt when it is of the view that there is indeed a situation of systemic threat to the rule of law; (vi) publish any response received from the Member State under investigation; (vii) remove any doubt that the Commission will resort to one of the mechanisms set out in Article 7 TEU in the situation where its ‘rule of law recommendations’ are not satisfactorily implemented within the time limit set.

In parallel or indeed, regardless of the lack of consensus amongst national governments on the Commission’s rule of law proposal, a number of practical reforms could also be undertaken. The Commission could seek for instance to centralise and make public any rule of law related report published by EU and non-EU bodies on its website, and seek to publish a rule of law ranking of the EU Member States 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 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.

⁵⁶ Ibid at 21.

⁵⁷ 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.

⁵⁸ To paraphrase K. Roth, ‘A Façade of Action: The Misuse of Dialogue and Cooperation with Rights Abusers’, in Human Rights Watch, *World Report 2011. Events of 2010* (New York: Seven Stories Press 2011), p. 1.

5. Conclusion

Concurring with other commentators,⁵⁹ the paper has demonstrated that the Commission's analysis leading to diagnosing one of the key problems of the current EU as that of the weakness of the Rule of Law enforcement instruments in the Union is absolutely correct. In this light, it is only logical that the institutions, scholars and the Member States interested in the successful functioning of the Union – impossible without full adherence of all the Member States to the Rule of Law and other values expressed in Article 2 TEU – are striving to put a functioning mechanism of Rule of Law oversight in place, which would solve the outstanding problems at least to a certain degree. Approached in this light, the 'pre-Article 7 proposal' analyzed in this paper is undoubtedly a success: it provides a reliable and broad definition of the Rule of Law and establishes the ways of relaxing the innate limitations of Article 7 TEU. As the paper demonstrates, the Commission's proposal is virtually impeccable also when approached from the procedural side: the harsh criticism of it, which came from the Council legal service leaves much to be desired. At the same time, once the odds of the likely effectiveness of the scrutinised proposal are fully taken into account, it appears that the hopes that pre-Article 7 will deliver compliance are more naïf than well-founded. It is the presumption of the positive effects of dialogue with the Member State in breach, which is probably the weakest side of an otherwise well thought over proposal: an ideologically illiberal state will thus most likely misuse the new procedure to delay the possible recourse of its peers and the EU institutions to the parts of Article 7 that bite. Thus, instead of being solved, the problem of non-compliance with the values of Article 2 could even be exacerbated as a result. The same, regrettably, can be said about the Council's initiative, which is likely to be even less effective than that of the Commission. All in all, while pre-Article 7 procedure is definitely a step in the right direction, one's expectations as to the fruits it might bring should be on the very modest side, this study found.

⁵⁹ E.g. Closa (2015) *op cit.*; Closa et al (2014) *op cit.*; Müller (2013) *op cit.*

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