**The EU Rule of Law Crisis to the next level:  
A Proliferation of Institutional Constructions**

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\*\*\*Work in progress – Comments are welcome\*\*\*

***Abstract:*** The EU is founded on the rule of law as enshrined in Article 2 TEU. Nevertheless, recent developments within certain Member States demonstrate that not all Member States are able to keep up with the high standards of the rule of law during their membership. The EU has already several specific tools at its disposal to govern the rule of law in its Member States, such as the Cooperation and Verification Mechanism for Romania and Bulgaria, Article 7 TEU and the original infringement procedure of Article 258 TFEU. Albeit the fact that various mechanisms exist, new rule of law crises – such as the one in Hungary and recently in Poland – emerged. This suggests that the existing EU legal framework to govern the rule of law has certain limitations and to a certain extent shortcomings, not enabling the EU to govern effectively the rule of law in its Member States. Due to this ineffective and inadequate rule of law governing by the EU, new rule of law mechanisms have been instigated by each new rule of law crisis. The Hungarian crisis starting in 2012 after the Fidesz Party became the new leading party in the Hungarian government ultimately led to the establishment of the EU Framework to strengthen the rule of law in 2014 by the European Commission. As a reaction, the Council of Ministers in turn created its own Rule of Law Dialogue. The recent Polish Constitutional crisis on the other hand reopened the discussion about the ineffectiveness of the existing rule of law governing mechanisms. Consequently, the European Parliament initiated a EU Mechanism on Democracy, the Rule of Law and Fundamental Right. Hence, each new national rule of law crisis contributes to a proliferation of new mechanisms. The aim of this paper, therefore, is to assess these new rule of law mechanisms in the light of the most recent rule of law crisis in Poland.

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# Introduction

*“For decades, the EU has been the strongest impetus for democratic change and respect for human rights in Europe. As we approach the 25th anniversary of the fall of the Berlin wall, the EU should demonstrate in no uncertain terms that it will not accept the re-establishment of an illiberal state within its borders.”[[1]](#footnote-1)*

Throughout its history, the European Union (hereinafter ‘EU’) has encountered a lot of crises. Yet, it is confronted with another – potentially much more dangerous – crisis, going to the essential foundations of the EU.[[2]](#footnote-2) As laid down in Article 2 TEU, the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the right of persons belonging to minorities. These values ought to be safeguarded within the EU by all its Member States. Consequently, when those values are not upheld within the EU and its Member States, the foundational stones of the EU will be affected and the foundations of the EU will be weakened, potentially questioning the *reason d’être* of the EU. Hence, non-compliance with the fundamental values can lead to *“an acute disruption of the very basis of the system of EU law at both the national and the supranational level”* – in other terms, this crisis is able to disrupt the whole integration based on the fundamental values.[[3]](#footnote-3)

This paper will focus on the rule of law crisis, as *“the rule of law is the backbone of any modern constitutional democracy”*.[[4]](#footnote-4) To uphold mutual trust among the Member States and their respective legal systems, all the Member States have to comply with the rule of law. Yet, recent developments occurring in both ‘new’, but also ‘founding’ Member States determine that enforcing the rule of law compliance in the EU is not a forgone conclusion, despite the various mechanisms at the EU’s disposal, such as Article 7 TEU, the Cooperation and Verification Mechanism for Romania and Bulgaria and the infringement procedure under Articles 258, 259 and 260 TFEU.[[5]](#footnote-5) In addition, each emerging rule of law crisis contributes to the discussion that the original rule of law enforcement framework lacks of accuracy and effectiveness. Moreover, the institutions became aware of the need for an effective rule of law enforcement to bring deviant Member States back on course, enabling them to comply with the rule of law again. Consequently, each new rule of law crisis instigates the creation of new rule of law mechanisms.

The European Commission (hereinafter ‘Commission’) started by establishing a ‘Framework to strengthen the Rule of Law within the Member States’ (hereinafter ‘Rule of Law Framework’) as a consequence of the Hungarian crisis since 2012. The Rule of Law Framework complemented the already existing and more general legal framework to enforce the rule of law compliance by the Member States. The Council of Ministers (hereinafter ‘Council’), however, did not support the Commission’s initiative. Moreover, the Council focused on questioning the Commission’s legal power to adopt the Rule of Law Framework. In turn, it created its own Rule of Law Dialogue. The European Parliament (hereinafter ‘Parliament’), finally, is of the opinion that too many mechanisms and processes exist at EU level to govern the values of Article 2 TEU.[[6]](#footnote-6) In response to the Polish rule of law crisis, the Parliament proposed an inter-institutional pact, which would clarify the scope of EU action as well as the division of competences between the EU institutions and the Member States.

This paper will therefore contribute to the current discussion on the ineffectiveness of the original enforcement framework and the subsequent problematic enforcement of the rule of law compliance by the Member States of the EU. Moreover, this paper is based on the presumption that the EU fails to enforce rule of law compliance by the Member States on the basis of the original enforcement mechanisms as a reaction to which a proliferation of institutional creations arose. The question thus emerges whether the institutional creations improve EU’s position, enabling it to enforce effectively the rule of law compliance in the Member States. To this end, the institutional creations will be subjected to a critical assessment. First, the Rule of Law Framework of the Commission will be examined in view of a case study of Poland. This will be followed by an examination of the Rule of Law Dialogue of the Council to end with an assessment of the proposal of the Parliament to establish an EU mechanism on Democracy, the Rule of Law and Fundamental rights.

# The proliferation of institutional creations in times of crisis

## Abstention before prevention: the Commission's EU Rule of Law Framework

### Introduction

In light of the Hungarian rule of law crisis, the EU demonstrated an inability to undertake action against Member States that are not complying with the rule of law. This crisis emerged after the 2012 national elections in Hungary. Subsequently, political power became concentrated in the hands of the right-wing Fidesz Party that received a 2/3 majority in the government. The ruling party carried out various constitutional reforms, undermining the system of checks and balances, including among other things the reduction of the Constitutional Court’s power and an increased control over the media.[[7]](#footnote-7) As a consequence, the Venice Commission identified a structural problem with regard to judicial independence and, in other terms, a breach of the rule of law.[[8]](#footnote-8)

Instead of initiating Article 7 TEU – the mechanism especially designed for sanctioning a serious breach of fundamental values, such as the rule of law and consolidated by the Member States in the Treaties – the Commission decided to launch various infringement procedures under Article 258 TFEU for specific and singled-out breaches of EU law.[[9]](#footnote-9) The Commission launched for instance an infringement procedure against the measure of the Hungarian government to lower the retirement age of judges, prosecutors and notaries from the age of 70 to 62 years.[[10]](#footnote-10) The Commission argued in this case that this measure constituted an unjustified discrimination based on age which is contrary to the Equality Directive 2000/78[[11]](#footnote-11).[[12]](#footnote-12) The Court of Justice of the European Union followed the reasoning of the Commission and proclaimed that lowering the retirement age established a prohibited difference in treatment directly based on age.[[13]](#footnote-13) Consequently, the Hungarian government failed to fulfil its obligations under Directive 2000/78.

In order to implement the judgement, the Hungarian government had to allow the disadvantaged judges to return to their former positions. Nevertheless, the Hungarian National Judicial Office firstly appointed new judges to the empty positions. Afterwards, the senior judges were allowed to return back, yet not to their original positions if those positions had already been filled with the new appointees.[[14]](#footnote-14) Furthermore, the Hungarian government offered compensation to the retired judges if they decided not to return to work. As a result, very few judges actually returned to judging and none returned to their leadership posts.[[15]](#footnote-15) According to former Commissioner *Reding*, the Hungarian government sufficiently complied with the judgement of the Court of Justice of the European Union by adopting these measures.[[16]](#footnote-16) However, the Commission merely focused on fragments of the issue – lowered retirement age, instead of focussing on the broader picture addressing the greater concern – independence of the judiciary. Thus, the Commission based its rule of law enforcement in Hungary merely on the infringement procedure of Article 258 TFEU, addressing specific issues rather than the rule of law issue as such.

The Commission, as guardian of the Treaties, took the lead. Former President of the Commission, José Manuel Barroso, wanted to develop a tool of instruments, enabling the EU to react appropriately to national rule of law crises, apart from the soft power of political persuasion and the ‘nuclear’ power of Article 7 TEU.[[17]](#footnote-17) Subsequently, the Commission established a new framework to ensure an effective and coherent protection of the rule of law in all the Member States in order to address and resolve a situation where a systemic threat to the rule of law would emerge, namely the ‘EU Framework to strengthen the Rule of Law’ – also called the ‘pre-Article 7 TEU mechanism’. The Rule of Law Framework should enable a Member State to find a solution in order to avoid the development of a threat to the rule of law into a clear risk of a serious breach within the meaning of Article 7 TEU.[[18]](#footnote-18) Where Article 7 TEU can only be activated as soon there is a clear risk of a serious breach, the Rule of Law Framework is developed enabling the EU to react already in an earlier stage, namely when there is a threat to the rule of law – admitting that the difference in meaning between both concepts is not really clear.

### Theoretical setting of the new Rule of Law Framework

According the Commission, the Rule of Law Framework will be based on the principles of dialogue, objectivity and thorough assessment, equal treatment and swift and concrete actions.[[19]](#footnote-19) Therefore, the Rule of Law Framework consists, as a rule, of a three stage procedure, namely Commission Assessment, Commission Recommendation and a Follow-up to the Commission Recommendation.[[20]](#footnote-20)

#### First stage: Commission Assessment

The Rule of Law Framework will be activated by measures taken by the authorities of a Member States or by situations where the authorities of a Member State tolerates situations which are likely *“to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law”*.[[21]](#footnote-21)In other terms, if a threat to the rule of law emerges in one of the Member States which is of systemic nature, the Commission has the possibility to start the first stage of the Rule of Law Framework.[[22]](#footnote-22)

The first phase of the Rule of Law Framework is an assessment of the Commission. On the basis of the assessment of the facts, the Commission will review whether a certain development within a Member States consists of a systemic threat to the rule of law.[[23]](#footnote-23) In order to determine whether such a systemic threat to the rule of law occurs, the Commission will build its fact-finding not only upon own expertise, but more importantly also upon the expertise of third parties.[[24]](#footnote-24)

The expertise of the European Union Agency for Fundamental Rights (hereinafter ‘FRA’), for instance, is an important source of information. This agency with a merely advisory power consists of experts collecting and analysing data and providing assistance and expertise in the field of fundamental rights.[[25]](#footnote-25) Nevertheless, the FRA could alert the Commission of suspected breaches of fundamental rights, although it is only recognised that EU institutions seek the assistance of the FRA to obtain a report on the situation in the concerned Member State.[[26]](#footnote-26) Moreover, the authority of the FRA is limited to the scope of EU law.[[27]](#footnote-27) Consequently, issues related to fundamental rights arising within Member States that go beyond the implementation of EU law are not incorporated within the mandate of the FRA.

The Commission took into account these limitations of the FRA. Therefore, the Commission consults not only EU bodies in order to find indicators for rule of law threats in a certain Member State, but also other international organisations dealing with the rule of law, such as the Council of Europe, in particular the Venice Commission. However, relying on the expertise of bodies aside from the EU can be criticised, as Article 2 TEU contains ‘EU’s’ fundamental values.[[28]](#footnote-28) ‘Outsourcing’ will be most likely insufficient in dealing with specific areas of EU law which requires a EU autonomous interpretation.[[29]](#footnote-29) However, all Member States of the EU are members of the Council of Europe and, therefore, subject to the monitoring of this organisation. Furthermore, the Commission explicitly refers to the case law of the European Court of Human Right and the documents of the Venice Commission in order to define the rule of law as mentioned in Article 2 TEU. [[30]](#footnote-30) So, as far as the rule of law standards of the EU and the Council of Europe correspond, the Commission should nevertheless use the expertise of the Council of Europe and consequently, the information gathered by this international organisation. The EU could thus benefit from the extensive data produced by the Council of Europe, in order to avoid overlap and unnecessary duplication of information, time and money.[[31]](#footnote-31)

The Commission, however, does not provide more information on how the assessment of the facts will be carried out.[[32]](#footnote-32) It enables the Commission to gather information and assess the situation in a flexible manner suitable for the specific developments of the concerned Member State. However, it impedes the control of the Commission’s compliance with its own proclaimed principles upon which the Rule of Law Framework is based, namely the principles of objectivity and impartiality.[[33]](#footnote-33) Uncertainty about the reasons that instigates the Rule of Law Framework contributes to ambivalence whether the mechanism should be activated or not and (unintentional) to opportunistic behaviour of the Commission. Especially, it has to be considered that the Commission is the only EU institution that can activate the Rule of Law Framework and therefore has a wide margin of discretion deciding whether or not to invoke this Framework.[[34]](#footnote-34)

If the Commission concludes on the basis of the assessment that a systemic threat to the rule of law exists, the Commission will initiate a dialogue with the concerned Member State by sending a ‘Rule of Law Opinion’ giving the concerned Member State the possibility to respond.[[35]](#footnote-35) Nevertheless, the established dialogue between the Commission and the concerned Member State during the first stage is highly confidential. The content of the dialogue, the meetings and the correspondence is confidential. In other words, only the initiation of the Rule of Law Framework and the sending of a Rule of Law Opinion will be made public.[[36]](#footnote-36) After all, the Commission is of the opinion that full disclosure of the dialogue within the context of the Rule of Law Framework would undermine the mutual trust between the Commission and the concerned Member State which is necessary to find an appropriate solution.*[[37]](#footnote-37)*

The confidential nature of this first stage and in particular of the dialogue between the Commission and the concerned Member State will prevent the pressure of ‘naming and shaming’. Moreover, publishing a Rule of Law Opinion at this early stage of the procedure would contribute to the impartiality and objectivity of the Rule of Law Framework – values upon which it is based. It would even clarify how information gathering is carried out, what elements will lead to the conclusion that a systemic threat to the rule of law exists and how the procedure evolves from one stage to another. It would oblige the Commission to motivate its actions extensively. Moreover, this would increase legal certainty for the Member States, as other Member States can evaluate their own actions in comparison to these of the concerned Member State and adjust where necessary in light of the assessment of the Commission.

#### Second stage: Commission Recommendation

However, when no satisfactory solution has been found and objective evidence of a systemic threat exists, the Commission will initiate the second stage. During this stage, the Commission issues a ‘Rule of Law Recommendation’, indicating the reasons for concern. Furthermore, the Rule of Law Recommendation stipulates specific indications on ways and measures to resolve the rule of law issue.[[38]](#footnote-38) The concerned Member State has to implement the recommendations and consequently redress the issue within a certain fixed time limit.[[39]](#footnote-39) The Rule of Law Recommendation, contrary the Rule of Law Opinion, will be made public.[[40]](#footnote-40)

#### Third stage: Follow-up to the Commission Recommendation

Finally, the Commission will follow-up the concerned Member State’s rule of law compliance by monitoring the developments it makes in light of the Rule of Law Recommendation. According to the Commission, this monitoring can be done by further exchanges with the Member State, whereby it will verify whether the problematic actions still occur, or whether the Member State has implemented its commitments and redressed the problematic situation.[[41]](#footnote-41)

In case there is no satisfactory follow-up within the stipulated time-limit, the Commission prescribes the possibility to invoke Article 7 TEU.[[42]](#footnote-42) The fact that the Rule of Law Framework did not produce the desired outcome and the concerned Member State is still threatening the rule of law without appropriate action to redress the non-compliance intrinsically leads to the emergence of a serious and persistent breach of the rule of law by that Member State. Hence, the substantive requirements for the activation of Article 7(2) TEU will be met. However, considering that the Commission *“will assess the possibility of activating one of the mechanisms set out in Article 7 TEU”*, the Commission does not commit itself to subsequently activate Article 7 TEU when the Rule of Law Framework does not produce the desired result. In any event, there is no obligation for the Commission to activate Article 7 TEU after failure of the Rule of Law Framework.

#### Caveats on the Rule of Law Framework?

The Commission’s Rule of Law Framework cannot be considered as revolutionary.[[43]](#footnote-43) First of all, the Rule of Law Framework in essence builds upon constructive dialogue between the Commission and the concerned Member State. Dialogue will only result in a positive outcome, if the concerned Member State is willing to cooperate. Uncooperative behaviour will lead to unconstructive dialogue, jeopardising the effective functioning of the Rule of Law Framework. In line with the duty of sincere cooperation pursuant Article 4(3) TEU, the Commission expects that the concerned Member State will cooperate throughout the process and will refrain from adopting any irreversible measure in relation to the concern raised by the Commission.[[44]](#footnote-44) Although the Commission did not explicitly refer to the infringement procedure set out in Article 258 TFEU, it could nevertheless launch such a procedure forcing a Member State to cooperate in accordance with the duty of sincere cooperation. The leverage of imposing a lump sum and/or penalty payment could contribute to increased cooperation and, ultimately, to a swifter compliance with the rule of law. However, it remains uncertain whether the Commission will effectively elaborate this possibility in practise.

As the Rule of Law Framework is merely built upon dialogue and is considered to be a ‘pre-Article 7 TEU mechanism’, this ensures that it does not create new legal consequences for the Member States.[[45]](#footnote-45) Nevertheless, criticism has been raised with regard to the competence of the Commission to establish the new Rule of Law Framework. The Council’s Legal Service, for instance, raised objection of the principle of conferred powers enshrined in Article 5 TEU. The Council argued that the Commission has no competence to create this Rule of Law Framework, as the Treaties do not provide a legal basis empowering the institutions to do so.[[46]](#footnote-46) The delimitation of competences, however, should not be problematic for establishing a dialogue between the Commission and the concerned Member State due to the explicit link between Article 7 TEU and the Rule of Law Framework. Moreover, the Commission itself highlights that the Rule of Law Framework is a mechanism that precedes and complements Article 7 TEU. After all, the Commission has to issue a – reasoned – proposal in order to activate Article 7 TEU.[[47]](#footnote-47) It can be presumed that the Framework sets out the detailed guidelines concerning the working of Article 7 TEU or not, giving the Commission implied powers to assess its Member States’ behaviour.[[48]](#footnote-48) This implies, by determining whether it will propose the activation of Article 7 TEU, that the Commission has to investigate any potential risk.[[49]](#footnote-49)

Hence, the principle of conferred power can in principle not be an issue considering its link to Article 7 TEU. However, this intrinsic link between the Rule of Law Framework and Article 7 TEU hinders the effective functioning and consequently the effective enforcement of the rule of law in the Member States. [[50]](#footnote-50) An Unsatisfactory outcome in the third and final stage results in the possibility to propose the activation of Article 7 TEU. There is no doubt though that Article 7 TEU has shortcomings. In essence, Article 7 TEU merely confers powers to political institutions, giving both the European Council and the Council a wide margin of discretion. The Council, on the one hand, *may* determine whether there is a clear risk of a serious breach of the rule of law.[[51]](#footnote-51) In turn, the European Council *may de*termine whether a serious and persistent breach exists.[[52]](#footnote-52) Ultimately, if the European Council determines that such a breach exists, the Council *may* impose sanctions.[[53]](#footnote-53) Consequently, Article 7 TEU only contains possibilities instead of obligations for the political institutions. The Court of Justice of the European Union only has explicitly restricted jurisdiction. According to Article 269 TFEU, the Court of Justice of the European Union merely has the power to review the legality of a decision pursuant Article 7 TEU in light of the procedural rules. Additionally, the high majority thresholds – respectively unanimity and four fifth majority – complicate the activation of the mechanism and, subsequently, the imposition of sanctions against non-compliant Member States.

Therefore, it is unlikely that the Rule of Law Framework will result in the compliance with the rule of law by a deviant Member State. The mechanism depends too much on dialogue and its relation with Article 7 TEU. The incentives are too low – non-binding dialogue and recommendations will not force unwilling Member States to redress the situation. To date, the first and only practical application of the Rule of Law Framework demonstrates – even emphasises – these caveats of the Rule of Law Framework.

### Putting theory into practise: first application of the Rule of Law Framework in the rule of law crisis of Poland

#### The run-up to the activation of the Rule of Law Framework

Contrary to Article 7 TEU, the Commission’s Rule of Law Framework has already been activated for the first time in January 2016 following the rule of law developments in Poland, potentially threatening the rule of law. At the end of 2015, the rule of law in Poland has been brought into disrespect due to the constitutional reforms adopted by the newly elected Polish Government (*Sejm*) which ultimately led to a dispute between the legislative and the judicial power.

This dispute started by an act of the former *Sejm*, electing the successors of the five judges whose term would end in 2015, namely three needed to be replaced in November (hereinafter the ‘November Judges’) and two in December (hereinafter the ‘December Judges’). In November 2015, national elections found place and a new *Sejm* was elected. Upon the instalment of the newly elected *Sejm*, they adopted resolutions invalidating the election of the five judges and electing five new judges. As a result of an appeal, the Polish Constitutional Tribunal had the opportunity to review the Act of the former *Sejm*. On 3 December 2015, the Constitutional Tribunal rendered the decision that the election of the November Judges was constitutional as the mandate of the former judges expired before the end of the term of the former *Sejm*. The election of the December Judges by the former *Sejm,* however, was unconstitutional as the mandate of the former judges expired after the instalment of the new *Sejm.* As a consequence, the new *Sejm* had to allow the November Judges to take up their position in the Constitutional Tribunal instead of the judges they elected. The December Judges, on the contrary, where rightfully replaced by the new *Sejm*.

In addition, the newly elected *Sejm* amended twice the Act on the Constitutional Tribunal at a very short notice. The first amendment[[54]](#footnote-54) introduced a three-year tenure of office for the President of the Constitutional Tribunal, renewable once, and terminated the tenure of the incumbent President and Vice-President.[[55]](#footnote-55) The second amendment[[56]](#footnote-56) altered to a great extent the functioning of the Constitutional Tribunal. Changes such as the attendance quorum, the voting majority, sequence of the cases and disciplinary proceedings were adopted.[[57]](#footnote-57) In the judgments of respectively 9 December 2015 and 9 March 2016, the Constitutional Tribunal analysed these amendments and concluded that they both were unconstitutional because they were undermining, among other things, the independence of the judiciary. The *Sejm*, however, claimed that the Constitutional Tribunal did not rule in accordance with the new legislation. Consequently, they consistently refused to publish the judgments of the Constitutional Tribunal, including all judgments rendered after the judgment of 9 March 2016.

#### First stage: Commission Assessment

These constitutional developments concerning the composition and functioning of the Constitutional Tribunal and the persistent refusal to publish judgments rendered by the Constitutional Tribunal raised concerns with respect to the rule of law compliance by Poland.[[58]](#footnote-58) Therefore, the Commission decided on 13 January 2016 to initiate for the first time its Rule of Law Framework, establishing constructive dialogue. Poland, however, has shown little cooperative spirit.[[59]](#footnote-59) Moreover, the leader of the ruling Law and Justice Party is of the opinion that the Framework is contrary to EU law.[[60]](#footnote-60)

Finally, five months after the activation of the Rule of Law Framework, the Commission has adopted on 1 June 2016 a Rule of Law Opinion.[[61]](#footnote-61) As mentioned before, the content of the dialogue and the Rule of Law Opinion is confidential. Hence, the Commission announced the content of the Rule of Law Opinion during a press conference in a very generalised manner. Namely, the Commission raised three concerns related to: the appointment of judges to the Constitutional Tribunal and the implementation of the judgments of the Constitutional Tribunal concerning these appointments, the laws amending the Act on the Constitutional Tribunal, and the effectiveness of the Constitutional review of new legislation.[[62]](#footnote-62) However, at this point of time, more details were not released, as the Commission is of the opinion that this *“would undermine the protection of the purpose of the ongoing investigation; (…) disclosure of the document at this point in time would affect the climate of mutual trust between the authorities of the Member State and the Commission, which is required to enable them to find a solution and prevent the emergence of a systemic threat to the rule of law.”[[63]](#footnote-63)* Meanwhile, the Council of Europe, in particular the Venice Commission, had already adopted and even published an extensive opinion on the situation in Poland.[[64]](#footnote-64) In a later stage, the Commission granted the full disclosure of the Rule of Law Opinion because the Commission had already issued the Rule of Law Recommendation.[[65]](#footnote-65)

In its Rule of Law Opinion, the Commission focuses on the assessment of the three concerns. Firstly, the Commission emphasised the need to implement the judgments regarding the appointment of the judges of the Constitutional Tribunal.[[66]](#footnote-66) In other words, the November Judges appointed by the former *Sejm* should take up their function of judge in the Constitutional Tribunal. Secondly, the Commission adjudicated that the amendments of 22 December 2015 to the Act of the Constitutional Tribunal are undermining the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution.[[67]](#footnote-67) Moreover, these measures raise concerns regarding the separation of powers and the integrity and independence of the judiciary.[[68]](#footnote-68) This was already proclaimed by the Constitutional Tribunal itself and the Venice Commission. However, the Polish government refused to publish the judgements, creating legal uncertainty.[[69]](#footnote-69) To conclude, the Commission claims that the Constitutional Tribunal is hindered to perform an effective constitutional review due to the legislative reforms.[[70]](#footnote-70)

As a consequence, the Commission had to conclude that a systemic threat to the rule of law emerged in Poland. Persistent refusal to publish and implement judgments of the Constitutional Tribunal declaring the legislative actions and reforms implemented by the *Sejm* unconstitutional demonstrates without doubt that safeguard measures established at national level to secure the rule of law are systematically and adversely affected and therefore consists of a systemic threat to the rule of law. It could even be claimed that the threshold of a serious and persistent breach to trigger Article 7 TEU has already been reached, especially considering the impact of the amendments to the Act of the Constitutional Tribunal on the effectiveness of the Constitutional Tribunal. In contrast, the Commission decides to proceed with the second stage of the Rule of Law Framework.

#### Second stage: Commission Recommendation

Poland has had the opportunity to submit their observations upon which further constructive dialogue is based in order to find solutions. Instead, the *Sejm* adopted on 22 July 2016 a new Act on the Constitutional Tribunal (hereinafter ‘New Act’). Upon further assessment, the Commission concluded that this was no satisfactory remedy, as concerns related to the rule of law still existed. As a result, the Commission instigated the second stage by issuing on 27 July 2016 a recommendation regarding the rule of law in Poland.[[71]](#footnote-71)

The Rule of Law Recommendation reflects to a great extent the content of the Rule of Law Opinion. It highlights, however, the issue of the effective functioning of the Constitutional Tribunal.[[72]](#footnote-72) The Commission acknowledges that the New Act contains certain improvements such as the voting majorities, the sequence rule, and disciplinary proceedings. Nevertheless, certain provisions containing rule of law violations remain unchanged. Moreover, new concerns have been introduced. For instance, the Public Prosecutor-General, who is also the Minister of Justice, appears to have the possibility to delay or even prevent the examination of certain cases by deciding not to participate at the hearing.[[73]](#footnote-73) Indeed, absence of the Public Prosecutor-General will prevent an examination of the case when the New Act foresees in the obligation to participate in the hearings, such as in cases examined by the full bench.[[74]](#footnote-74)

Hence, the situation in Poland regarding the rule of law still consists of a systemic threat to the rule of law, whereby the Constitutional Tribunal is prevented from fully ensuring an effective constitutional review adversely effecting its integrity, stability, and proper functioning, which is one of the essential safeguards of the rule of law.[[75]](#footnote-75) Therefore, the Commission recommends, first of all, that all judgments of the Constitutional Tribunal have to be published and implemented.[[76]](#footnote-76) Secondly, it urges conformity of the New Act with the already rendered judgments of the Constitutional Tribunal and the Opinion of the Venice Commission of 11 March 2016.[[77]](#footnote-77) Moreover, the Constitutional Tribunal should have the opportunity to review the New Act before it enters into force.[[78]](#footnote-78) Lastly, the Polish authorities have to refrain from actions or public statements that could further undermine the legitimacy and efficiency of the Constitutional Tribunal.[[79]](#footnote-79) These recommendations had to be implemented within a 3-month timeframe.

#### Third stage: Follow-up to Commission Recommendation

During this timeframe, the Constitutional Tribunal reviewed on 11 August 2016 the New Act before its entry into force in accordance with the Rule of Law Recommendation of the Commission. Various provisions – similar to the one’s that raised concerns in the context of the Rule of Law Framework – were found unconstitutional. The Constitutional Tribunal adjudicated that those provisions were contrary to the principle of separation and balance of power, independence of courts and tribunals from other branches, integrity and efficiency of public institutions, and independence of judges. Again, the *Sejm* did not recognise these concerns and refused to publish the judgment. Moreover, the New Act entered into force. As a counterbalance, the *Sejm* decided to publish a number of judgments of the Constitutional Tribunal, with the exception of the judgments of 9 March 2016 and 11 August 2016, including the following judgments.

This deadline has passed, but none of the recommendations have been carried out. Moreover, on 27 October 2016 the Polish Ministry of Foreign Affairs has stated that the recommendations were incompatible with the interests of the Polish state.[[80]](#footnote-80) The Polish Ministry of Foreign Affairs is of the opinion that the Commission is interfering in the internal affairs of Poland, without adhering to the principles such as respect for sovereignty, subsidiarity and national identity.[[81]](#footnote-81) The Commission has pursued its assessment on the basis of incorrect assumptions which lead to unwarranted conclusions.[[82]](#footnote-82)

This is quite contradictory, because not only the Commission, but more importantly also the Polish Constitutional Tribunal itself proclaimed concerns in light of the rule of law in various judgments. Furthermore, the Venice Commission repeated its rule of law concerns.[[83]](#footnote-83) Improvements have been made; however, it argued that the effects of the improvements are too limited as a consequence of which the work of the Constitutional Tribunal would be considerably delayed and obstructed.[[84]](#footnote-84) Moreover, it would make the Constitutional Tribunal's work ineffective and eventually undermine the independence of the judiciary.

#### Relaunch of the second stage

Once again, instead of issuing a reasoned proposal to initiate Article 7 TEU, the Commission adopted a Rule of Law Recommendation ‘complementary’ to the Rule of Law Recommendation of 27 July 2016.[[85]](#footnote-85) The complementary Rule of Law Recommendation repeats in essence the first one. Besides, it also focuses on the newly adopted Law on the status of judges and Law on the organisation and proceedings that are an implicit implementation of the judgment of 11 August 2016. On the other hand, new concerns such as the reintroduction of disciplinary proceedings are submitted. The recommendations in essence remain the same.

Hence, the Commission extends the follow-up phase with a complementary recommendation allowing the Member State more time to solve the rule of law problems – or, in other terms, allowing itself more time to postpone the activation of Article 7 TEU. The Polish authorities have to solve the problem within a time-limit of two months. The response to the complementary Rule of Law Recommendation is slightly more positive than the previous one. Indeed, the Polish authorities recognise the consolidation of a democratic rule of law in Poland, including stable grounds for the operation of the Constitutional Tribunal to be its overriding goal.[[86]](#footnote-86) However, Poland does still not recognise that the dispute over the rules governing the functioning of the Constitutional Tribunal is a systemic threat to the rule of law.

Remarkably, the Commission refers to the possibility to directly invoke Article 7 TEU *“should a sudden deterioration in a Member State require a stronger action from the EU”*.[[87]](#footnote-87) Despite the Rule of Law Opinion, the first Rule of Law Recommendation, the two opinions of the Venice Commission and the judgments of the its own Constitutional Tribunal, Poland has consistently followed the path of disrespect for the rule of law. The dispute in Poland between the judiciary and the legislature has been ongoing for almost two years without dramatic improvements. The consistent refusal to publish judgments of the Constitutional Tribunal, the repeated introduction of new laws deteriorating the effective functioning of the Constitutional Tribunal, and the reaction of the Polish authorities on the Commission’s opinion and recommendations and on the Venice Commission’s opinions demonstrate as such a deterioration regarding rule of law compliance in Poland. Hence, a stronger action from the EU is required. Furthermore, the threat to the rule of law has developed not merely into a clear risk of a serious breach of the rule of law, but definitely into a serious and persistent breach. Nevertheless, the Commission is not taking any specific actions whatsoever. This, unfortunately, manifests that the Rule of Law Framework does not provide the Commission, nor the EU, an effective mechanism to enforce the rule of law, although it can be considered to be *“a timid step in the right direction”*.[[88]](#footnote-88)The creation of new legal instruments suggests the raise of awareness among the EU institutions to acquire an effective enforcement mechanism of the rule of law. This is the first step towards the effective enforcement of the compliance with the rule of law by the Member States.

## The Council’s inaction as reaction

Apart from the ineffective working of the Rule of Law Framework, the Council of Ministers did not support the Commission’s initiative. Instead, it focused on questioning the Commission’s legal power to adopt a Rule of Law Framework. The Council recognised that the EU has a key role in the development of a new mechanism by referring to its role as an *“anchor for reforms in the areas of the rule of law and fundamental rights for several third countries”*.[[89]](#footnote-89) The Council considers itself as the pivotal figure to accompany future developments of a new EU Framework to strengthen the rule of law, taking its ‘responsibilities’, instead of the Commission as the guardian of the Treaties.*[[90]](#footnote-90)*

Hence, the Council established a constructive dialogue between the Member States based on a non-partisan and evidence-based approach, considering the principles of objectivity, non-discrimination and equal treatment of all Member States.[[91]](#footnote-91) Despite the statement of the Council that the dialogue will be conducted on the basis of an ‘inclusive approach’ – whatever that means, dialogue will be limited to thematic debates confined to one specific topic each year.[[92]](#footnote-92) The first annual Rule of Law Dialogue at the end of 2015, for instance, related on the one hand to “tolerance and respect: preventing and combating anti-Semitic and anti-Muslim hatred in Europe”, and on the other hand “the rule of law in the age of digitalisation”. During the Rule of Law Dialogue, the Council has particularly discussed the areas in which the Member States see a need for EU action to further strengthen the rule of law. Further, *“Member States were invited to share one example of a best practise and one example of a challenge encountered at national level in relation to the respect for the rule of law, as well as the approach to respond to that challenge*.*”[[93]](#footnote-93)*

Hence, the Council’s Rule of Law Dialogue seems to have any intention to confront Member States with rule of law concerns that appear at the national level.[[94]](#footnote-94) Sadly, in response to a fear that has been expressed, the dialogue was demarcated within the very specific limits of the thematic debates that have been decided on in advance.[[95]](#footnote-95)

The proposal of the Council’s Legal Service to establish a peer review system on the basis of an intergovernmental agreement between all the Member States has been completely ignored.[[96]](#footnote-96) Moreover, this mechanism is in no sense comparable to the Rule of Law Framework of the Commission, neither can it be considered an added value to the original enforcement framework the EU has at its disposal to govern rule of law compliance.

## Cooperation instead of opposition: the Parliament’s Inter-Institutional Pact

In turn, the Parliament believes that too many mechanisms and processes exist at EU level to promote, protect and safeguard the values of Article 2 TEU.[[97]](#footnote-97) The various mechanisms contrasting rules and procedures, empowering different institutions to act. As a consequence, cooperation between the various institutions is non-existent and inter-institutional rivalry emerges, as the Council's reaction on the Commission's establishment of the Rule of Law Framework demonstrate.[[98]](#footnote-98) Therefore, the Parliament proposed an inter-institutional pact – ‘European Union Pact on Democracy, the Rule of Law and Fundamental rights’ (hereinafter ‘DRF-Pact’) – in order to clarify the scope of EU action as well as the division of competences between the EU institutions and the Member States. It tries to overcome the gap between the proclamation of the values and the compliance by the Member States and the institutions with these principles.[[99]](#footnote-99)

This DRF-Pact, however, does not have the aim to create a new mechanism as this was the case with the proposals of the Commission and the Council. There is after all no need to reinvent the wheels. It builds upon the existing mechanisms and integrates them into one single framework to govern not only the rule of law, but also democracy and human rights.[[100]](#footnote-100) The DRF Pact consists of three separate, however intertwined phases, namely the DRF Scoreboard, the DRF Semester and the DRF Policy Cycle in the institutions.

Contrary to the crisis-driven approach of Article 7 TEU and the Rule of Law Framework, the DRF-Pact will be based on a permanent and periodic monitoring of the Member States. Namely, the first cycle of the DRP-Pact is a DRF-Scoreboard upon which DRF-Reports with country-specific recommendations will be built.[[101]](#footnote-101) It, therefore, resembles the Cooperation and Verification Mechanism (hereinafter ‘CVM’) that was established by the Commission for Bulgaria and Romania, as both Member States had to improve the compliance with the rule of law after their accession. The CVM can be criticised as it creates differentiation among the various Member States and lacks of sanctioning power for the Commission in case of non-compliance. However, it constitutes a permanent and periodic monitoring and evaluation process for Member States’ compliance. As a consequence, Member States are subject to continuous scrutiny of the Commission. The first cycle of the DRF-Pact, thus, depends on the positive features, yet acknowledges the limitations of the CVM by extending the scope *ratione* as well as the scope *ratione materiae* , as monitoring is respectively applicable to all Member States and relates to all fundamental values.[[102]](#footnote-102)

The Commission has to draw up the DRF-Report in consultation with a panel of independent experts, using all kind of information from for instance the Venice Commission, the FRA, other specialised EU-agencies, Member States, experts, academics, case law of the Court of Justice of the European Union and the European Court of Human Rights, and other international organisations.[[103]](#footnote-103) This panel of independent experts will contribute to the objectivity of the assessment, as the experts have to carry out a qualitative and quantitative assessment on an anonymous and independent basis.[[104]](#footnote-104) Consultation of a panel of independent experts enables the Parliament to overcome criticism concerning the objectivity and impartiality of the Commission's Rule of Law Framework. Article 2 TEU violations are always politically sensitive. As a consequence, Member States consider actions from the Commission in order to redress the situation to be an infringement on their national sovereignty. Independency and anonymity from an independent panel of experts are therefore required to draw up reports in an impartial and objective manner. Hence, this first cycle of DRF-Pact is the required missing phase in the EU's rule of law enforcement to date.

The DRF Scoreboard and Country Specific Reports will be the basis of the second cycle, namely the DRF Semester, whereby both the role of the Parliament and the Council are crucial. Within the context of the Rule of Law Dialogue and an inter-parliamentary debate respectively, the Council and the Parliament will hold an annual debate concerning these reports. Ultimately, these debates will result in the adoption of Council Conclusions and a Resolution of the Parliament.[[105]](#footnote-105) Considering the conclusions of both the Council and the Parliament, the Commission can either launch a systemic infringement procedure or a peer review under Article 70 TFEU on the other hand.

The Systemic Infringement Procedure has been proposed by *Scheppele* and extends the infringement procedure under Article 258 TFEU.[[106]](#footnote-106) The Commission will determine systemic complaints with respect to a certain Member State by bundling a group of individual infringement actions together under the banner of an infringement procedure in light of Article 2 TEU. As a consequence, infringements of Article 2 TEU will be brought under the scrutiny of the Court of Justice of the European Union. By combining all the individual violations into a systemic infringement, the CJEU can determine the deeper problem leading to a systemic compliance judgement. The CJEU acknowledges that “*the fact that the deficiencies pointed out in one or other case have been remedied does not necessarily mean that the general and continuous approach of those authorities, to which such specific deficiencies would testify where appropriate, has come to an end.*”*[[107]](#footnote-107)* Therefore, the systemic problem will be solved in a permanent manner, and will, therefore, not only lead to temporary compliance with the fundamental values of Article 2 TEU.[[108]](#footnote-108) It can be considered the Commission's task to bring a non-compliant Member State before the CJEU showing the pattern in various violations and, eventually, bundling them together.[[109]](#footnote-109) Also Advocate General *Geelhoed* recognises the principle of bundling individual infringements and states: “*It would appear to me that it certainly cannot be ruled out that, under certain conditions, a pattern of complaints may provide the basis for a finding that a Member State has structurally infringed its Community law obligations.*”*[[110]](#footnote-110)*

Hence the DRF-Pact is not only a political mechanism, but also allows to examine a situation in a legal context. The Systemic Infringement Procedure, however, is criticised, because it is a purely legal remedy to an essential political issue.[[111]](#footnote-111) However, the legal question arising is whether a Member State has systematically infringed its commitments under EU law through its own laws or practises. This constitutes pre-eminently a legal question.[[112]](#footnote-112) Furthermore, the systemic infringement procedure will be launched after political debate in the Council and the Parliament and as part of the DRF-Pact. It seems that the DRF-Pact has found a balance between a merely political and legal procedure.

However, the systemic infringement procedure and the Article 70 TFEU peer review mechanism are not the only possibilities. Instead of clarifying the competence delimitation, the proposal of the Parliament is quite unclear as to which procedure has to be instigated in which case. Article 10 of the Draft Agreement leaves open some other options as well. Firstly, if it can be deduced from the DRF Report that a certain Member State is complying with the values of Article 2 TEU, no further action is necessary.[[113]](#footnote-113) Secondly, if a Member State on the contrary falls short on one or more aspects of the values of Article 2 TEU, the Commission can start a dialogue with that Member State.[[114]](#footnote-114) This second procedure thus refers back to procedure of the Commission’s Rule of Law Framework. However, if the DRF Report contains the assessment of the independent expert panel which mentions that there is a clear risk of a serious breach of the values of Article 2 TEU and that there are sufficient arguments for the activation of Article 7(1) TEU, the three institutions – namely the Commission, the Council and the Parliament – should each discuss the matter individually and take a reasoned decision.[[115]](#footnote-115) Finally, if it is clear from the DRF Report that the expert panel has decided that there is a serious and persistent breach increasing or remaining unchanged over a period of at least two years and there are sufficient reasons to activate Article 7(2) TEU, again the three institutions – namely the Commission, the Council and the Parliament – should each discuss the matter individually and take a reasoned decision.[[116]](#footnote-116) Hence, at the end of the DRF Semester, it is not yet clear which institutions should undertake which concrete steps. In case a Member State complies with the fundamental values of Article 2 TEU, there is of course no problem. In the case where Member States are not complying, should the Commission launch a systemic infringement procedure, or should it give priority to installing a peer review mechanism under Article 70 TEU? Should the Commission start a dialogue in the light of its Rule of Law Framework? Or yet another option, should the Commission, the Parliament or the Council invoke Article 7 TEU? Therefore, the Parliament has to further clarify and to a certain extent rewrite the DRF Semester in order to clarify once and for all the issue regarding the delimitation of competences.

# Conclusion: The missing link – Monitoring, Cooperation and Coordination

In the EU a gap emerges between the proclamation of the rule of law by the Treaties and the actual compliance with the rule of law by the Member States. But at the same time, the EU is unable to govern effectively and efficiently the compliance of the rule of law through the existing legal framework. The mechanisms are going from too political-oriented such as the ‘nuclear option’ of Article 7 TEU, to too case-specific such as the infringement procedure enshrined in Article 258 TFEU. In turn, the CVM has a too constrained scope of application to tackle systemic infringements against the fundamental values. In fact, all these mechanisms are crisis-driven and focus on redressing incompliance.

As a consequence of the Hungarian rule of law crisis, a Rule of Law Framework has been established by the Commission. The Rule of Law Framework can be considered to be *“a timid step in the right direction”*.[[117]](#footnote-117) Admittedly, the application of the Rule of Law Framework regarding the Polish crisis demonstrates the limitations of this Framework. The creation of new legal instruments suggests in the meantime the raise of awareness among the EU institutions to acquire an effective enforcement mechanism of the rule of law. This is the first step towards the effective enforcement of the compliance with the rule of law by the Member States. It is necessary to focus on what the rule of law is and how the rule of law can be enforced before the rule of law is infringed. It is the degree of rule of law compliance that potentially causes problems, as it requires a case-by-case assessment. The relevant facts have to be analysed in order to determine whether a specific component of the rule of law has been breached. An effective enforcement of the rule of law compliance therefore requires a comprehensive and periodic monitoring mechanism, comparable to the CVM. Further, the Rule of Law Framework should mark clear indicators which warrant its activation, establishing legal certainty for the Member States. Member State will be aware of the fact that they are monitored on a regular basis. Moreover, they know what actions will lead to a reaction of the EU.

Furthermore, it is not clear how all the various legal instruments to enforce the compliance of the rule of law relate to each other. There is Article 7 TEU, Article 258 TFEU, the CVM, the Commission’s Rule of Law Framework and the Council’s Rule of Law Dialogue. EU’s existing legal framework has been developed into a ‘toolbox’ packed – or does one have to say overloaded – with enforcement equipment. There is no coherence among the various instruments, nor any form of coordination between the various EU institutions responsible for activating the instruments. This leads to unnecessary discussions between the various EU institutions and consequently to uncertainties whether or not the EU is going to act against non-complying Member States, ultimately bringing the existence of the EU in danger.

Hence, the proposal of the Parliament to create a DRF Pact seems an opportune improvement. The original idea to have a permanent monitoring mechanism in order to observe the rule of law compliance of the Member States on a stable and continuous basis is the first well-needed step in rule of law enforcement. Coordination and cooperation – the ultimate aim of the DRF Pact – is the next necessary requirement in the process of rule of law enforcement. It will ensure the maintenance of order in a legal framework that up until today creates disorder.

Accordingly, the existence of systemic compliance deficiencies in some Member States and the proliferation of enforcement mechanisms over the recent years emphasise EU’s failure to enforce the compliance of the values nowadays. If the values enshrined in Article 2 TEU mean anything, the EU has to take a firm stance and stop the rule of law backsliding by its Member States.

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22. The Commission acknowledges that the Commission still has the possibility to either launch an infringement procedure under Article 258 TFEU in case the situation falls within the scope of EU law, or directly activate Article 7 TEU if the situation in the concerned Member State requires a stronger action from the EU. Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law, COM(2014)158 final/2, 19 March 2014, 7. [↑](#footnote-ref-22)
23. The Commission defines the rule of law, taking into account the case law of both the Court of Justice of the European Union and the European Court of Human Rights, and the documents of the Council of Europe, as follows: *“(The Rule of Law) include(s) legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law”.* Systemic threats to the rule of law are therefore threats to *“the political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence and impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists as a result of, for instance, the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress”*. Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law, COM(2014)158 final/2, 19 March 2014, 4 and 7. [↑](#footnote-ref-23)
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