

Chapter 15

Defending Democracy in EU Member States: Beyond Article 7 TEU¹

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I. Introduction

Founded on post-war optimism that a Europe of united democracies could provide both peace and prosperity, the European Union is slowly waking up to the fact that not all of its Member States are committed to democratic principles. Article 2 TEU pronounces (as fact) that “[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” And Article 2 goes on to assert (as fact) that “[t]hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” But for some EU member governments, these values no longer define the aspirational horizon. The requirements of Article 2 are simply no longer met in all Member States.

The Hungarian Fidesz government elected in 2010 started the march toward “illiberal” government, and the Polish Law and Justice (PiS) government elected in 2015 has joined the parade. The two governments have used their election mandates to undermine the rule of law by

¹ This chapter was originally prepared for the conference at George Washington Law School: The EU at a Crossroads: From Technocracy to High Politics?, March 2018. Because we are dealing with a fast-moving set of events, we could not take into account developments after October 1, 2018. We thank Petra Bárd, Gábor Halmai, Tomasz Koncewicz, Dimitry Kochenov, Laurent Pech, and Wojciech Sadurski plus the attendees at the GW conference for helpful conversations about these issues. We are particularly grateful to Francesca Bignami for detailed comments on the draft and much patience as we kept revising up until the last possible minute. We’re also grateful to Cassandra Emmons for footnote wrangling.

bringing their respective judiciaries under political tutelage, by exercising partisan control over the media, by undermining the independence of the civil service, by attacking human rights NGOs as alien, and by treating opposition parties as national enemies. They have railed against migrants, issued dog-whistle denigrations of Jews as disloyal and explicitly attacked Muslim refugees as invaders, rewritten their national histories to cover up flirtations with fascism, and flaunted a sort of nationalism that valorizes ethnic purity. Government leaders in both Poland and Hungary regularly produce angry denunciations of the EU while taking in some of the largest per capita streams of EU funding.²

It has taken European institutions too long to recognize that these threats are serious, persistent and damaging to the democratic infrastructure of the European Union. Failure to address democratic backsliding and attacks on rule of law by member governments not only undermines the EU's legitimacy as a community dedicated to such values, but it also threatens the very functioning of the Union.³ The EU relies for its basic operation on all of its Member States sharing a common commitment to liberal democracy, comprising the rule of law, democracy, and human rights. When a Member State fails to adhere to these basic principles, the constitutional structure of the EU is decisively weakened. EU governance relies heavily on the "sincere cooperation"

² On Hungary: FIDH, "Hungary: Democracy Under Threat. Six Years of Attacks against the Rule of Law," November 2016, https://www.fidh.org/IMG/pdf/hungary_democracy_under_threat.pdf. On Poland: Wojciech Sadurski, "How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding," Sydney Law School Research Paper No. 18/01 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491.

³ Vivien A. Schmidt, "Democracy and Legitimacy in the European Union," in *Oxford Handbook of the European Union*, eds. Erik Jones, Anand Menon, and Stephen Weatherill (Oxford: Oxford University Press, 2012), 661-75.

(Article 4(3) TEU) of national courts and governments acting as agents of EU law.⁴ If a government systematically undermines rule of law at the national level, EU governance may effectively cease to function within that state.

European Commission Vice President Frans Timmermans captured the essence of the problem in a July 2017 speech about the threat to the independent judiciary in Poland, explaining:

Polish courts like the courts of all Member States are called upon to provide an effective remedy in case of violations of EU law, in which case they act as the 'judges of the European Union'. This matters potentially to anybody doing business in and with Poland, or even anybody visiting the country. I think every single citizen wants to have this, if they need a day in court, without having to think: "Hmm, is this judge going to get a call from the Minister telling him or her what to do." That is not how independent judiciary works... This is no matter only for the Polish people. What is happening in Poland affects the Union as a whole. All of us, every single Member State, every citizen of the Union.⁵

As Timmermans emphasized, the damaging effects of the erosion of rule of law are not limited to the jurisdiction where they occur; rather, they radiate across the Union. The EU cannot be strong when some Member States are not committed to the basic premises of the EU's normative project; in fact, it may be unable to function at all.

⁴ Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014); Andreas Føllesdal, "Legitimacy Theories of the European Union," Center for European Studies, ARENA Working Paper 04/15 (2015), https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2004/wp04_15.pdf.

⁵ Frans Timmermans, First Vice-President European Commission, Opening Remarks of College Readout on Grave Concerns about the Clear Risks for Independence of the Judiciary in Poland, July 19, 2017, http://europa.eu/rapid/press-release_SPEECH-17-2084_en.htm.

That said, the European constitutional framework was not built to robustly address the problem of Member States retreating from their commitment to European values. Rather the reverse. The EU was built with many avenues for Member States to check the power of the Union institutions (above all through the powerful role of the intergovernmental Council in EU decision-making), but without many tools for EU institutions to check the Member States' commitment to the basic values of the EU once they entered the Union. Member States were admitted with the assumption that all were part of the democratic family of nations, and as such were firmly committed to the rule of law. The development of the EU's supranational legal order in the post-war decades was only possible because all Member States in fact remained committed to rule-of-law principles and were ultimately willing to accept the European Court of Justice's assertions of judicial authority.⁶

As we discuss in more detail below, as the EU prepared to take in new Member States from East Central Europe, it introduced a procedure in Article F.1 of the Amsterdam Treaty (now Article 7 of the TEU)—designed to sanction Member States that persistently violated the EU's fundamental values. The procedure was reformed subsequently, supposedly in an effort to strengthen it, and yet it has thus far failed to prevent democratic backsliding and attacks on the rule of law in the two most egregious cases the EU has faced—in Hungary and Poland. The failure of Article 7 has left many commentators lamenting that the EU simply lacks the tools necessary to defend its fundamental values. We disagree. EU leaders in fact have a rich arsenal of tools at their disposal with which to defend democracy; the problem to date has been that they have lacked the

⁶ R. Daniel Kelemen, "The Court of Justice of the European Union in the Twenty-First Century," *Law and Contemporary Problems* 79, no. 1 (2016): 129.

political will to act. As our colleague Laurent Pech notes, the bad workman always blames his tools.⁷

We recognize that Article 7 has significant weaknesses, above all its reliance on unanimous agreement at one critical stage. This does not mean that European institutions should not try to use the first part of Article 7, which does not require unanimity, if consensus is not complete.⁸ But while recognizing the limits of Article 7, we argue that the EU could deploy a range of other strategies, from infringement actions concerning violations of the EU's fundamental values (as listed in Article 2 TEU) to the suspension of EU funding under existing financial regulations in order to sanction and discourage democratic backsliding. The European Court of Justice (ECJ) too can play a role, pressing EU leaders to act when they might otherwise prove too weak or beholden to the Member States to do so. Rather than focusing on new tools that might be introduced through Treaty change or even through secondary legislation, we focus here on the tools the EU can already deploy—should it choose to do so.⁹ Of course, Treaty change could always build in new mechanisms for disciplining wayward Member States now that the problem has become clear. But Treaty change (like Article 7 itself) requires unanimous agreement, and it is clear that any approach requiring unanimity is bound to fail once one or more Member States

⁷ Laurent Pech interview by Anna Wójcik, “‘A Bad Workman always Blames his Tools’: An Interview with Laurent Pech,” *Verfassungsblog*, May 28, 2018, <https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>.

⁸ Laurent Pech and Kim Lane Scheppele, “Illiberalism Within: Rule of Law Backsliding in the EU,” *Cambridge Yearbook of European Legal Studies* 19 (2017): 3-47.

⁹ For a discussion of democratic backsliding and populism that considers the implications for EU economic and fiscal policy, see Bojan Bugarič, “The Populist Backlash Against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe,” this volume.

have gone rogue, as is already the case in the EU today. We therefore limit ourselves to discussing how the EU might put existing tools to new uses.

The remainder of this chapter is divided into five sections. Section II outlines the development of the Article 7 procedure and describes how EU leaders failed for a long time to invoke it in the face of brazen attacks on democracy and the rule of law by elected autocrats in Hungary and have only moved to do so very late in the case of Poland. Section III provides a partisan political explanation for the failure of Article 7 and suggests why—though it might act as a deterrent to the most extreme forms of dictatorship—it is unlikely to ever provide an effective remedy against the rise of soft-authoritarian member governments in the EU. Section IV considers a series of alternative mechanisms the EU could use to defend its core values including: a) systemic infringement proceedings brought by the Commission, b) the suspension of EU funds through various mechanisms, and c) rulings by the ECJ to establish that some national judiciaries have been captured by autocratic governments and therefore may not be accorded the presumptions required to establish mutual trust. Section V concludes.

II. Democratic Backsliding and the Promise of Article 7 TEU

When the countries from post-communist Europe queued for admission to the EU after 1989, a formal assessment framework was developed for the first time that required accession states to pass muster as both consolidated democracies and robust market economies. These accession assessments had political, legal and economic components. But the “Copenhagen criteria” that formed the bases for these tests were remarkably vague. As Dimitry Kochenov demonstrated in his sober analysis of the accession process, accession countries’ progress in meeting the standards for entering the EU was measured by apparently detailed assessments of economic readiness for

the single market, but the analysis of whether democracy, human rights, and the rule of law were firmly in place was left to observers whose impressionistic reports were considered good enough.¹⁰

As accession states competed to demonstrate that they met the Copenhagen criteria, however, some existing Member States worried about the possibility that the new Members would fail to keep up their commitments to European values. Pointing to the general lack of democratic experience on the part of the post-communist accession states, these established Member States raised the question of whether the Treaties should include a mechanism for disciplining any EU members if they experienced backsliding on core EU values.¹¹ The result was the insertion into the Treaty of Amsterdam of the precursor of the present day Article 7 TEU, a mechanism through which wayward Member States could be sanctioned upon the unanimous judgment of their peers by having their voting rights suspended in the Council.

From the start, it was clear that the Council, and therefore the Member States, were in charge of disciplining their fellow states. The sanctioning mechanism was designed to prohibit Union institutions from scrutinizing too closely the internal workings of the Member States, leaving the checks to intergovernmental processes. As Wojciech Sadurski explained:

Indeed, the evolution of the dominant opinion, from the early Reflection Group to the actual drafting of Article 7, shows a steady tendency to reinforce the control of Member States, through the Council, over the imposition of sanctions. This

¹⁰ Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Alphen aan den Rijn: Kluwer, 2008); Dimitry Kochenov, "Behind the Copenhagen Façade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law," *European Integration Online Papers* 8, no. 10 (2004): 1-24.

¹¹ Wojciech Sadurski, "Adding Bark to a Bite: The Story of Article 7, E.U. Enlargement, and Jörg Haider," *Columbia Journal of European Law* 16, no. 3 (2009): 385-427.

reinforcement is seen through a combination of factors such as the requirement for unanimity in the Council (minus the Member State in question), reduction of the role of the European Parliament, and suppression of any role for the Court of Justice. The Member States, while clearly seeing the new mechanism in the context of the impending enlargement of the Union, were at the same time careful not to extend, in any way, the scope of EU competences to the area of human rights within their own borders, and to restrict the possible control by the Union of their own behaviour towards their own citizens.¹²

Member States made themselves the central institution in the sanctioning process, leaving only a small role for the Commission and none for the Court of Justice. They also made the mechanism hard to use. The imposition of sanctions on a Member State would require unanimous agreement of other governments in the Council—a notoriously high bar in EU politics.¹³ Even when there were far fewer Member States than there are now (only fifteen then) and on the one occasion when they were in agreement that something had to be done (concerning the rise of the far-right in Austria in 2000), Member States still lost their nerve when the opportunity arose to use this mechanism.

The inclusion of the far-right Freedom Party in Austria’s government the first time, occurring just one year after the sanctions mechanism took effect in EU law, provoked a rare unanimous reaction that nonetheless bypassed this new provision. Instead, Member States

¹² Sadurski, 396 [footnotes omitted].

¹³ For a contrasting view, which emphasizes the “prevention and . . . prior monitoring powers” in Article 7 that do not require unanimous agreement, see Leonard Besselink, “The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives,” in *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance*, eds. Andras Jakab and Dimitry Kochenov (Oxford: Oxford University Press, 2017): 128- 44.

coordinated a set of bilateral sanctions against Austria outside the EU Treaty framework.¹⁴ When it turned out that the Austrian government actually did nothing terribly objectionable, the Member States lifted the sanctions but took away the lesson that they needed a mechanism for warning a Member State that it was at risk of violating basic principles before it actually did so. Shortly afterwards, Article 7 was amended by the Treaty of Nice to include a warning mechanism (now Article 7(1) TEU) that would give EU institutions the ability, based on a four-fifths vote in the Council, to put a Member State on notice that its conduct was violating EU values and risked triggering sanctions (under what is now Article 7(3) TEU) after a unanimous vote of the Council established a breach of values (under what is now Article 7(2) TEU). The EU's first opportunity to use the sanctioning mechanism inserted into the Treaties to deal with democratic backsliding was therefore met not by the actual imposition of sanctions, but instead by the revision of the mechanism itself, so that the EU had a legal way to bark first before biting.¹⁵ Though the introduction of a pre-sanctions warning stage has typically been depicted as a means to strengthen Article 7, arguably the reform did more to weaken it. By adding a warning stage before a breach could be found and sanctions could be imposed, including an extensive process of dialogue with the state in question, the new warning mechanism made the process of sanctioning a state for violating the EU's fundamental values more lengthy and onerous.¹⁶

¹⁴ Heather Berit Freeman, "Austria: The 1999 Parliamentary Elections and the European Union Members' Sanctions," *Boston College International and Comparative Law Review* 25, no. 1 (2002): 109-24.

¹⁵ Besselink, "The Bite, the Bark and the Howl," 128.

¹⁶ Actually, the two procedures—warning in Article 7(1) and sanctioning in Articles 7(2) and (3)—are logically separate. The Council could go straight to Article 7(2) without passing through Article 7(1), but the two are often read as a sequence, which simply serves to slow down the whole sanctioning process and make it more cumbersome.

When the Fidesz government in Hungary moved rapidly after 2010 to capture all independent institutions (including the judiciary) and to remove all checks on the discretion of the Prime Minister, EU institutions again balked at using any part of Article 7—not just its actual sanctions, but even its warning mechanism. Instead, in the State of the Union address given in September 2013, then-President of the European Commission José Manuel Barroso highlighted the increasing “challenges to the rule of law in our own member states” and referred to Article 7 TEU as the EU’s “nuclear option,”¹⁷ an option simply unthinkable.

Rather than activating Article 7, the Commission responded to developments in Hungary by introducing yet another procedural reform. In 2014, right before the European elections, the Commission announced a Rule of Law Framework, creating a process through which the Commission could enter into a dialogue with a Member State before deciding to recommend that the Council trigger Article 7(1). Essentially, the Commission created yet another antechamber to the Article 7(1), which itself had been created as antechamber to the sanctions mechanisms of Article 7(2-3).¹⁸ If Article 7(1) was the bark before the bite of Article 7(2-3) sanctions, then the Rule of Law Framework was the growl, before the bark, before the bite. Notably, though the Rule of Law Framework was developed in response to the Hungarian situation, it has never to this day been used for Hungary.¹⁹

¹⁷ José Manuel Durão Barroso, President of the European Commission, State of the Union Address 2013, September 11, 2013, http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm.

¹⁸ Communication from the Commission, *A New EU Framework to Strengthen the Rule of Law*, COM (2014) 158 final/2 (March 19, 2014).

¹⁹ Dimitry Kochenov and Laurent Pech, “Better Late than Never? On the European Commission’s Rule of Law Framework and its First Activation,” *Journal of Common Market Studies* 54, no. 5 (2016): 1062-74.

The Rule of Law Framework creates a process²⁰ very similar to the one that the Commission uses for infringement actions under Article 258 TFEU, which have existed in EU law since the 1950s, which allow the Commission to sue the Member States for breaches of EU law. The Commission first notifies a Member State that the Commission believes that the Member State may be at risk of violating European law—or, in this case, European values. Then, if the Member State does not respond by changing its ways, the Commission can issue an Opinion outlining specific action that the Member State must take to bring itself into line. Should that fail to achieve the desired result, the Commission can issue a Recommendation as a final warning—and, when all of those stages fail, it can recommend to the Council that Article 7 be triggered, much as it refers an action to the Court of Justice when the steps to negotiate an end to an infringement have failed. Though the Rule of Law Framework was justified as a mechanism that would strengthen the EU's hand in dealing with backsliding member governments, it is hard to escape the conclusion that it has had precisely the opposite effect. As with the introduction of Article 7(1), the Rule of Law Framework has introduced, *de facto* if not *de jure*, a lengthy new procedure that must be completed before the EU can launch even the first, warning stage of Article 7. It has rendered the prospect of actual sanctions ever more remote, with consequences that are evident in the one case where the procedure was actually deployed—*vis-à-vis* Poland.

In 2015, successive elections for the presidency and parliament in Poland set the stage for the EU's values crisis to spread beyond Hungary. Poland's PiS Party won an absolute majority of seats in both houses of the Polish parliament and a PiS-affiliated candidate was elected to the presidency, allowing PiS to completely control the law-making process without having to rely on any votes save its own. PiS did not, however, have the supermajority required to amend the

²⁰ For a more detailed discussion of the Rule of Law Framework's procedures, see Kochenov and Pech, "Better Late than Never?"

constitution, so it undertook to disable the key institution that could say that its actions were unconstitutional: the Constitutional Tribunal. After neutralizing the Constitutional Tribunal by illegally appointing judges to that body and then by refusing to publish its rulings that said that these appointments were unconstitutional, the Polish government then took aim at the general judiciary, capturing control of the courts and violating its own constitution as it consolidated power in the hands of one party.²¹

Even though the Commission had never invoked the Rule of Law Framework in the case of Hungary, which was much farther along in the process of democratic deconsolidation than Poland, the Commission sprang into action quite quickly with Poland.²² In January 2016, the Commission activated the Rule of Law Framework against the government in Warsaw. After giving the Polish government many opportunities to correct its ways, the Commission escalated the dialogue with Poland through all of the stages of the Rule of Law Framework, culminating in multiple Recommendations issued throughout 2016 and 2017.²³ Poland not only did not back down

²¹ Kriszta Kovács and Kim Lane Scheppele, “The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union,” *Communist and Post-Communist Studies* 51 (2018): 189-200.

²² Kochenov and Pech, “Better Late than Never?”

²³ For a detailed account of the Commission’s reaction to attacks on the rule of law in Poland in 2016 and 2017, see the three part series by Laurent Pech and Kim Scheppele on “Poland and the European Commission” – “Part I: A Dialogue of the Deaf?,” *Verfassungsblog*, January 3, 2017, <https://verfassungsblog.de/poland-and-the-european-commission-part-i-a-dialogue-of-the-deaf/>; “Part II: Hearing the Siren Song of the Rule of Law,” *Verfassungsblog*, January 6, 2017, <https://verfassungsblog.de/poland-and-the-european-commission-part-ii-hearing-the-siren-song-of-the-rule-of-law/>; “Part III: Requiem for the Rule of Law,” *Verfassungsblog*, March 3, 2017, <https://verfassungsblog.de/poland-and-the-european-commission-part-iii-requiem-for-the-rule-of-law/>. Also see R. Daniel Kelemen, “The Assault on Poland’s Judiciary,” *Foreign Affairs*, July 26, 2017, <https://www.foreignaffairs.com/articles/poland/2017-07-26/assault-polands-judiciary>.

but became more belligerent with each move of the Commission. Finally, in December 2017, the Commission finally recommended to the Council that Article 7(1) be triggered for Poland.²⁴ To date (October 2018), however, the Council has not yet acted on the Commission's recommendation and taken a vote under Article 7(1) as to whether there is a "clear risk of a serious breach" of the EU's fundamental values in Poland. The Council, instead, has urged more dialogue.

The Council, where Member States could sit in judgment of their fellow Member States, has therefore been largely missing in action throughout the rule-of-law crisis.²⁵ It bestirred itself to enact a Rule of Law Dialogue, a sort of "peer review" process in which each Member State would report once per year on its own progress in observing the rule of law.²⁶ Through eight long years of the Fidesz consolidation of power in Hungary, the Council has said and done nothing. And though the Commission's Reasoned Proposal to trigger Article 7(1) has been in gestation on its agenda for longer than a human pregnancy, the Council has yet to act on that either.

The European Parliament has been more active, passing resolution after resolution, starting with criticism of the Hungarian government's worrisome media law in 2011²⁷ and then expressing

²⁴ *European Commission Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland. Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, COM (2017) 835 final (December 20, 2017).

²⁵ Peter Oliver and Justine Stefanelli, "Strengthening the Rule of Law in the EU: The Council's Inaction," *Journal of Common Market Studies* 54, no. 5 (2016): 1075–84.

²⁶ Ernst Hirsch Ballin, "Mutual Trust: The Virtue of Reciprocity – Strengthening the Acceptance of the Rule of Law through Peer Review" in *Reinforcing Rule of Law Oversight in the European Union*, eds. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016): 133-46.

²⁷ European Parliament Resolution, On Media Law in Hungary, P7_TA(2011)0094 (March 10, 2011).

more concerted concern over the new constitution in 2012,²⁸ culminating in a comprehensive condemnation of the Hungarian government's constitutional capture in July 2013 after passage of the new Hungarian constitution's Fourth Amendment. This amendment inserted back into the constitution nearly all of the laws that the Constitutional Court had found unconstitutional and then disabled the Court by nullifying its past case law and preventing judicial review of constitutional amendments.²⁹ Finally, in May 2017, following attacks on the Central European University and foreign-funded civil society groups, the European Parliament sent to its Civil Liberties Committee (LIBE) a request to prepare a comprehensive report on Hungary that would allow the Parliament to vote on triggering Article 7(1) against Hungary.³⁰ After passing the Civil Liberties Committee of the Parliament, with the strong support of four other committees, and the report was finally endorsed by the Parliament with the requisite two-thirds majority on September 12, 2018—thus triggering Article 7 against the Hungarian government and calling for the Council to vote on whether there is now a clear risk of a serious breach of EU values.³¹

²⁸ European Parliament Resolution, On the Recent Political Developments in Hungary, P7_TA(2012)0053 (February 16, 2012).

²⁹ European Parliament Resolution, On the Situation of Fundamental Rights: Standards and Practices in Hungary (Pursuant to the European Parliament Resolution of 16 February 2012), P7_TA(2013)0315 (July 3, 2013) [hereinafter Tavares Report].

³⁰ European Parliament Resolution, On the Situation in Hungary, P8_TA(2017)0216 (May 17, 2017).

³¹ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Draft Report On a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union Is Founded*, 2017/2131(INL), April 11, 2018, <http://www.europarl.europa.eu/resources/library/media/20180411RES01553/20180411RES01553.pdf> [hereinafter Sargentini Report]. For a more detailed description of this sequence of events, see Kovács and Scheppele, “The Fragility of an Independent Judiciary.” On the Parliament’s September 2018 denunciation of the Hungarian

From different quarters within the EU, then, Article 7(1) TEU is finally now being armed for use against Poland and Hungary. The Commission has pushed the Council to act on Poland and the Parliament has pushed the Council to act on Hungary. But Article 7—even Article 7(1)—is still a heavy lift, for all of the reasons we have adduced. Member States run the show and Member States have been the least active partners among the European institutions in addressing democratic backsliding over the last eight years. Will they rise to the challenge once other European institutions have collected the evidence and presented them with a request for action? In the next section, we explain why we have reason to doubt the will of the Council to act, even when faced with overwhelming evidence.

III. Why Member States Fail the EU

The tendency to sacrifice principles in the name of partisanship is an all-too-common feature of democratic politics around the world. Scholars of comparative politics have identified a particular set of effects that partisan politics can have in the context of multi-level, federal-type systems like the EU's. In such settings, partisanship can help sustain autocratic regimes at the state level within otherwise democratic federations.³² Among other things, democratic leaders at the federal level may come to rely on authoritarian leaders at the state level to deliver votes to their federal level coalitions. As Gibson explains, “Authoritarian provincial political elites, with their abundant supplies of voters and legislators, can be important members of national [*aka federal level*]

government, see Maïa de la Baume and Ryan Heath, “Parliament Denounces Hungary’s Illiberalism,” *Politico Europe*, September 12, 2018, <https://www.politico.eu/article/european-parliament-approves-hungary-censure-motion/>.

³² As these scholars examine this phenomenon in states within national federations, they refer to it as “subnational authoritarianism.” In the EU’s supranational context, the equivalent is “national authoritarianism” within a supranational polity.

governing coalitions.”³³ So long as the local autocrat can deliver needed votes, federal leaders of their party or coalition will be inclined to overlook their authoritarian practices and to defend them against any federal interventions in the name of democracy that might threaten to dislodge them.

This phenomenon has been commonplace in democratic federations across Latin America including Argentina and Mexico, as well as in the United States. In the US case, because the national Democratic Party needed the votes of Southern Democrats (Dixiecrats) to secure majorities in Congress and to elect Presidents, they shielded Dixiecrats against federal intervention, allowing them to maintain authoritarian enclaves in Southern States by “disenfranchise[ing] blacks and many poorer white voters, repress[ing] opposition parties, and impos[ing] racially separate—and significantly unfree—civic spheres.”³⁴ Something very similar is happening in the EU.

As one of us has detailed elsewhere,³⁵ these sorts of political incentives help explain why the EU has so consistently failed to act as Viktor Orbán has brazenly defied the EU’s democratic

³³ Edward L. Gibson “Boundary Control: Subnational Authoritarianism in Democratic Countries,” *World Politics* 58, no. 1 (2005): 107.

³⁴ Robert Mickey, Steven Levitsky, and Lucan Way, “Is America Still Safe for Democracy?” *Foreign Affairs* 96, no. 3 (2017): 22. More generally see Robert Mickey, *Paths out of Dixie: The Democratization of Authoritarian Enclaves in America’s Deep South, 1944–1972* (Princeton: Princeton University Press, 2015); Edward L. Gibson, *Boundary Control: Subnational Authoritarianism in Federal Democracies* (New York: Cambridge University Press, 2012).

³⁵ R. Daniel Kelemen, “Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union,” *Government and Opposition* 52, no. 2 (2017): 211-38; R. Daniel Kelemen, “Europe’s Authoritarian Equilibrium,” *Foreign Affairs*, December 22, 2017, <https://www.foreignaffairs.com/articles/hungary/2017-12-22/europes-authoritarian-equilibrium>. For a contrary view, challenging the argument that partisanship has played a central role in explaining the EU’s reaction to democratic backsliding, see Carlos Closa, “The Politics of Guarding the Treaties,” *Journal of European Public Policy* (2018).

values and consolidated one-party rule in what political scientists would label a competitive authoritarian regime.³⁶ These dynamics also help explain why the EU has at least undertaken a somewhat more aggressive response to similar developments in Poland. Ultimately, these partisan political considerations—coupled with other intergovernmental political considerations discussed below—explain why Article 7 is almost certainly doomed to fail as a mechanism to safeguard democracy and the rule of law in the EU.

The sordid partisan political story behind the rise of autocracy in the EU can be summarized as follows: Fidesz, the political party that Viktor Orbán cofounded in 1988 and has controlled ever since, is a member at European level of the European People’s Party (EPP), which is the largest pan-European political party. Traditionally, the EPP has been the party group of the center right, bringing together national parties such as Germany’s Christian Democrats, France’s Republicans, Spain’s Popular Party, and Poland’s Civic Platform. Orbán’s Fidesz party delivers twelve seats to the EPP in the European parliament (in which the EPP now holds a total of 217 seats), helping it sustain its narrow lead over the second largest party, the Progressive Alliance of Socialists and Democrats (S&D)—the grouping of social democratic parties (which now holds 190 seats). Being the largest party in the European Parliament gives the EPP a decisive role in shaping EU legislation. Also, with the advent of the so-called *Spitzenkandidat* process in the 2014 European election, the largest party in the Parliament won the right to name the European Commission President and thus to put its stamp on the policy direction of the EU’s executive. The influence of these Europarties also extends into the Council where heads of government from the same Europarties regularly (though not always) cooperate. Members of the European Parliament (MEPs) have generally been loyal EPP members, and the Orbán government has been duly

³⁶ Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (New York: Cambridge University Press, 2010).

rewarded for its service to the EPP cause at European level even as it undermines EPP's stated values when its component parties go back home.

Until 2018, EPP leaders consistently defended Hungary's autocratic leader against EU intervention. With the exception of a few words of concern (long since forgotten) expressed over the Orbán government's 2017 attack on the Central European University (which attracted great international attention), leaders of the EPP did not criticize Orbán as his government compromised the independent judiciary, the free press, and civil society organizations and—ultimately—consolidated one-party, semi-authoritarian rule. Instead, when EU leaders affiliated with other political parties called for EU action in reaction to the comprehensive assault on the rule of law and democratic norms in Hungary, EPP leaders blocked them.³⁷ Quite to the contrary, some EPP leaders routinely praised Orbán. For instance, EPP President Joseph Daul endorsed Orbán's reelection in 2014 and later declared, "I would put my hand in the fire for my friend Viktor Orbán." But the most full-throated Orbán defender over the past several years was current EPP Chair Manfred Weber. Weber repeatedly dismissed critiques of Orbán as politically motivated attacks by leftists and has continued to heap praise on him, even as the Hungarian leader has descended deeper into xenophobia, anti-Semitism, and autocracy. For instance, on November 12, 2017, well after Orbán had consolidated his soft-authoritarian regime and in the midst of an anti-Semitic mass campaign to demonize George Soros, Weber congratulated Orbán on his reelection as Fidesz chairman with a tweet that read, "Congratulations to Viktor#Orban, re-elected Chairman of #FIDESZ. Let's keep on our cooperation for a strong Hungary in a strong Europe.

³⁷ To be fair, some EPP MEPs—from the Commission's former Justice Commissioner and current MEP Viviane Reding to outspoken MEP Frank Engel—repeatedly denounced Orbán's actions. But, crucially, the Party leaders and the majority of EPP MEPs repeatedly blocked proposals for action against Orbán's regime, until a shift in position finally took place in 2018 as discussed below.

#FideszCongress @EPPGroup.”

Against the wishes of the EPP, which voted by two-thirds *against* the proposal, the European Parliament’s Civil Liberties Committee (LIBE) was instructed by the plenary in 2017 to prepare a report assessing whether the Parliament should trigger Article 7(1) against Hungary. It appeared as Rapporteur Judith Sargentini prepared her report that the EPP would still try to block it. But in September 2018, when the Parliament had to vote on whether to endorse the Sargentini Report, the EPP’s position shifted. Though the party was divided, fully 58% of EPP MEPs voted at that point to endorse the Report and launch Article 7(1) against Hungary. In fact, EPP votes proved crucial to its passage, which required two-thirds of the votes cast overall.³⁸

The turnaround of the EPP on Fidesz was politically advantageous at that particular moment. Surprisingly, after having defended Orbán for so long, EPP’s fraction leader in the European Parliament Manfred Weber announced on the eve of the vote that he would be endorsing the Report.³⁹ The timing of the vote coincided with the start of the *Spitzenkandidat* process, with candidates stepping forward to compete to be named their Europarty’s candidate for the position of European Commission president. With Angela Merkel’s blessing, Weber had announced his candidacy just a week before. He must have realized that his consistent support of Orbán might lead many EPP members to oppose his candidacy and some have speculated that it was a condition of Merkel’s support for Weber that Weber agree to discipline Orbán. Thus, Weber’s sudden

³⁸ For a breakdown of the parties’ votes on the initial vote in the plenary to charge the LIBE committee with assessing whether Article 7(1) should be triggered against Hungary and the final votes for the Sargentini Report, see Péter Krekó, “The Vote on the Sargentini Report: Good News for Europe, Bad News for Orbán, no News for Hungary,” *Heinrich Böll Stiftung*, September 21, 2018, <https://eu.boell.org/en/2018/09/21/vote-sargentini-report-good-news-europe-bad-news-orban-no-news-hungary>. Only 32% of EPP MEPs had voted initially to refer the issue to committee.

³⁹ Patrick Kingsley, “E.U.’s Leadership Seeks to Contain Hungary’s Orban,” *New York Times*, September 11, 2018, <https://www.nytimes.com/2018/09/11/world/europe/viktor-orban-european-peoples-party.html>.

decision to break with Orbán to endorse the Sargentini Report can be understood best as a political move designed to bolster his candidacy for the Commission presidency. Party politics again seemed to dominate European principles. Public awareness of EPP's role in supporting the Orbán regime was increasing while Orbán's regime was hardening its policies and rhetoric, so other EPP members had started to see their association with Orbán as a political liability and voted for the Report as well.

In the end, however, the drive of the EPP for power dominated its temporary interest in principle. Even though many in the EPP said they would vote to expel Fidesz if the Sargentini Report passed the European Parliament and despite the fact that 58% of EPP MEPs voted for the Report themselves, the EPP announced just a week later that it would not be ejecting Fidesz from the party after all.⁴⁰ Other EPP MEPs have provided a cover for voting for the Report and yet keeping Orbán in the party by saying that the Article 7(1) process just opens a dialogue with Hungary, nothing more.⁴¹ Until the *Council* votes, Article 7(1) is not even fully triggered! Though these events continue to unfold at the time of this writing, it appears that the EPP will stick with Orbán through the 2019 European parliamentary elections, when EPP's overall fraction of votes in the parliament may allow it to push forward an EPP candidate—perhaps even Manfred Weber—as president of the Commission.

Partisan considerations also help explain why the EU has been somewhat more vigorous

⁴⁰ Maïa de la Baume, David Herzenhorn, and Lili Bayer, "Europe's Center Right Won't Expel Orbán, Leader Says," *Politico Europe*, September 19, 2018, <https://www.politico.eu/article/europes-center-right-wont-expel-hungarian-prime-minister-viktor-orban-leader-says-joseph-daul-epp/>.

⁴¹ After the passage of the Article 7(1) report Manfred Weber, for example, said, "The dialogue should begin, not end, in the upcoming weeks and months." Michael Peel, Mehreen Khanand, and Valerie Hopkins, "Orbán Heads into EU Showdown after Centre-Right Allies Desert Him," *Financial Times*, September 13, 2018, <https://www.ft.com/content/d05646fa-b6b5-11e8-bbc3-ccd7de085ffe>.

in its response to democratic backsliding and attacks on the rule of law in Poland since 2015. Poland's governing PiS party is a member of the nationalist, Eurosceptic "European Conservatives and Reformists (ECR)" group in the European Parliament, which is much weaker than the EPP and hence less able to protect PiS against EU action.⁴² This helps explain why the Commission has been willing to launch the Rule of Law Framework against Poland and to eventually recommend to the Council triggering Article 7(1) in reaction to the continued belligerence of the Polish government. It also explains why many EPP MEPs who until recently opposed EU action against Hungary's government, have supported action against Poland's. However, the fact that the EPP leadership continues to shield Orbán for its own partisan reasons will enable him (in a showing of the cross-party solidarity of autocrats) to veto sanctions against Poland under Article 7(2) unless, as one of us has argued,⁴³ the Commission were to invoke Article 7 proceedings against both states simultaneously and eliminate the fellow-traveler veto.

The partisan dynamics described above closely resemble those that sustain subnational authoritarian enclaves in federal systems around the world, but in fact, the situation in the EU is even worse for two reasons. First, the EU's party system is trapped in a mid-range "authoritarian equilibrium." In polities with more fully developed party systems, federal parties may eventually pay a political price for supporting a brazen autocrat at the local level, as his actions can tarnish their party's "brand." There is almost no such price to be paid in the EU's half-baked party system. Few voters are even aware of the existence of Europarties, because national parties align with the

⁴² Kelemen, "Europe's Other Democratic Deficit," 229-30; R. Daniel Kelemen and Mitchell Orenstein, "Europe's Autocracy Problem," *Foreign Affairs*, January 7, 2016, <https://www.foreignaffairs.com/articles/poland/2016-01-07/europes-autocracy-problem>; and Kelemen, "Europe's Authoritarian Equilibrium."

⁴³ Kim Lane Scheppele, "EU Can Still Block Hungary's Veto on Polish Sanctions," *Politico Europe*, January 11, 2016, www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/.

Europarties at European level but the only thing that voters see when they go to vote are the national parties. The Europarties are not options on any ballot and therefore are not a popular brand in any meaningful sense. As a result, the misdeeds of a national autocrat who leads a member party would do no political damage to his Europarty or to other national member parties. Quite simply, Angela Merkel's Christian Democrats' consistent support for the autocratic Orbán has likely imposed absolutely no electoral cost on her party in national elections, in part because few of her voters really knew she was aligned with Orbán at European level. As the Hungarian problem rose through the European institutions to the point where EPP intransigence would be visible for all to see in the vote on the Sargentini Report, it appears that Merkel and Weber decided that the party had to take a stand against Hungary, if only for one day. But the general problem of Europarty unaccountability leaves the EU mired in an authoritarian equilibrium where there are great incentives for Europarties to protect national autocrats who belong to their party groups, and absolutely no political price to be paid for doing so.⁴⁴

Political dynamics in the EU shield autocrats in a second way, through the enduring power of intergovernmentalism in EU decisionmaking. While partisan politics may be sufficient to explain the coddling of autocrats within the EU, it is not strictly necessary. National leaders may block action against autocratic governments out of a sense of self-preservation (fearing that if the EU acts against the Polish or Hungarian governments now perhaps they could act against their government in the future) or out of a sense of reciprocal deference (with an implicit understanding that they will stay out of each others' internal affairs). The statement in spring 2018 by the heads

⁴⁴ As Kelemen points out, the incentives for Europarties to protect local autocrats have increased with efforts to democratize the EU, by empowering the European Parliament and by linking the selection of the Commission President to winning a plurality of seats in the European Parliament. Thus, ironically, democratizing the EU may have made the survival of Member State autocracies more likely. Kelemen, "Europe's Other Democratic Deficit," 217-18.

of government of the three Baltic states—none of whom are affiliated with the PiS’ ECR party group—that they would oppose any EU censure of Poland under Article 7 certainly reflects these dynamics.⁴⁵ Likewise the stalwart opposition of the governments in Bulgaria and Romania to suggestions—made in response to developments in Poland and Hungary—of strengthening rule-of-law conditionality attached to EU funding reflects the fact that they worry these same rules might one day affect them.⁴⁶ More generally, it is striking how few heads of government in the EU—regardless of party group—have denounced the rollback of liberal democracy in Hungary or Poland.⁴⁷ French President Emmanuel Macron’s strong statements before the European Parliament concerning a looming civil war between liberal democracy and authoritarianism in Europe and the risks of a generation of “sleepwalkers” oblivious to this threat, were all the more remarkable as so

⁴⁵ Barbara Bodalska, “Baltic States against EU Sanctions on Poland,” *Euractiv*, March 13, 2018, <https://www.euractiv.com/section/justice-home-affairs/news/baltic-states-against-eu-sanctions-on-poland/>.

⁴⁶ On Bulgaria: Georgi Gotev, “Bulgaria dislikes Commission Plan to Link EU Funding to Rule of Law,” *Euractiv*, May 3, 2018, <https://www.euractiv.com/section/future-eu/news/bulgaria-dislikes-commission-plan-to-link-eu-funding-to-rule-of-law/>. On Romania: AFP, “Romania Backs Poland in Rejecting EU Funding Conditionality,” *Euractiv*, February 2, 2018, <https://www.euractiv.com/section/eu-priorities-2020/news/romania-backs-poland-in-rejecting-eu-funding-conditionality/>.

⁴⁷ For instance, the toughest words German Chancellor ever uttered about the regime Orbán was constructing, came during a visit to Budapest (itself a victory for Orbán) in February 2015 when she said, “Personally, I can’t do anything with the word ‘illiberal’ in connection with democracy.” (*Mit dem Wort illiberal kann ich persönlich in Zusammenhang mit Demokratie nichts anfangen*). See “Merkel weist Orbán zurecht,” *Zeit Online*, February 2, 2015, <http://www.zeit.de/politik/ausland/2015-02/ungarn-besuch-angela-merkel-orban>. A firm denunciation of nascent authoritarianism this was not. France’s President Emmanuel Macron has spoken out more decisively than other leaders, emphasizing that Member States who do not respect the EU’s democratic values should have to face political consequences. See Esther King, “Europe is not a Supermarket,” *Politico Europe*, June 22, 2017, <https://www.politico.eu/article/emmanuel-macron-europe-is-not-a-supermarket/>.

few other leaders have made such statements.⁴⁸ The EU's supranational, quasi-federal legal order has been constructed very much on the understanding that EU institutions—the Commission and the Court of Justice—would enforce the Union's legal norms, instead of national governments enforcing them against one another as would happen in more traditional international legal regimes.⁴⁹ Quite simply, for any legal norms the EU is serious about enforcing, the European Commission—and quite often private actors—are provided with firm legal bases for bringing enforcement litigation. The fact that Article 7 was put in the hands of the European Council provides *prima facie* evidence that it was never really intended to be used.

Yet, perhaps there is some silver lining on the dark shadow that the Council casts over the enforcement of the principles of European law. The literature on subnational authoritarianism teaches us that membership in an overarching democratic federation tends to soften the form of authoritarianism practiced at the state level. The possibility (however remote) of higher-level intervention gives lower-level state leaders “strong reasons to avoid blatantly authoritarian practices, which...increase the likelihood of a federal intervention.”⁵⁰ In other words, the EU may not be able to guarantee that its members remain democracies or adhere to the rule of law, but it at least prevents soft-authoritarian regimes from becoming full dictatorships. Newspapers may be bought by regime allies and shut down, but journalists will not systematically be jailed. Judges will be fired under the guise of changing the retirement age, but they won't be the victims of show trials. The electoral system and campaign advertising may be rigged in favor of the governing

⁴⁸ “France's Macron Urges EU to Shun Nationalism,” *BBC*, April 17, 2018, <https://www.bbc.com/news/world-europe-43794856>.

⁴⁹ William Phelan, *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies* (Oxford: Oxford University Press, 2015).

⁵⁰ Carlos Gervasoni, “A Rentier Theory of Subnational Regimes,” *World Politics* 62, no. 2 (2010): 314.

party, but opposition politicians will not routinely be arrested or die in mysterious circumstances. Seen in this light, we might understand Article 7 as providing an ultimate failsafe that could be deployed if a Member State descended into outright dictatorship, and that should discourage soft-autocrats at the national level from hardening their rule. Comparing what is happening now in Hungary and Poland to the unraveling of nascent democracies in Europe's neighbors such as Turkey and Russia, one might consider this some consolation.

IV. Alternatives to Article 7 TEU: Tools Ready for Use

Article 2 goes to the heart of the organization of the European Union and Article 7 is designed to enforce Article 2. However, because the procedure (Article 7(2) specifically) allows any single Member State to block the imposition of sanctions on a fellow Member State, such sanctions are unlikely to ever be imposed.⁵¹ Even if the Council can muster the four-fifths vote necessary to trigger Article 7(1), this is simply a bark without a bite. If the offending Member State knows that the risks of actual sanctions are minimal due to the unanimity requirement in Article 7(2), then this Member State can blithely ignore the Article 7(1) warning. Worse yet, some Member States seem to revel in overt challenges to the EU, as long as there are no consequences for them. So even if European institutions manage to generate an Article 7(1) warning, Member States determined to challenge the EU will fail to be deterred. Worse yet, having appeared to act, EU institutions may turn away from the problem before it is actually solved.

The values of Article 2 TEU are so crucial to the EU's own internal operation that they should not be entrusted only to the political enforcement mechanism of Article 7. They should also

⁵¹ To be fair, the Council might achieve unanimity in favor of sanctioning a regime that had established a hard-core dictatorship, but—as we have already seen—unanimity in favor of sanctioning more mild authoritarian regimes of the sort already established in Hungary is unlikely to be forthcoming.

be enforceable in law.⁵² Member States must actually be in compliance with the principles of Article 2 in order for the European legal order to work.⁵³ Adherence to the values announced in Article 2 is precisely what permits European Member States to trust each other's governments—and, in particular, their judiciaries—to apply EU law fairly and evenly.⁵⁴ It is also what allows EU citizens to take advantage of their EU citizenship rights both inside their own Member State and throughout the Union.⁵⁵ Much of the legal doctrine built up around the Treaties that unite the EU as a common legal space cannot possibly function as announced if the assumptions underlying the EU legal system are shattered. This suggests that Article 7 should be supplemented by other mechanisms for enforcing Article 2.

The sheer variety and vagueness of values specified in Article 2, however, has led a number of commentators to argue that Article 2 can *only* be enforced through Article 7, a distinctly political procedure in which the united outrage of fellow Member States is the only measure that can be

⁵² Dimitry Kochenov, "On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed," *Polish Yearbook of International Law* 33 (2013): 145-70.

⁵³ Gianluigi Palombella, "Beyond Legality – Before Democracy: Rule of Law Caveats in the EU Two-Level System," in *Reinforcing Rule of Law Oversight in the European Union*, eds. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016), 36-58.

⁵⁴ On the relationship between enforcement of general principles and the obligation of mutual trust, see Daniel Halberstam, "'It's the Autonomy, Stupid!' A Modest Defense of *Opinion 2/13* on EU Accession to the ECHR, and the Way Forward," *German Law Journal* 16, no. 1 (2015): 130-31.

⁵⁵ Jane Jenson, "The European Union's Citizenship Regime: Creating Norms and Building Practices," *Comparative European Politics* 5, no. 1 (2007): 53-60.

effectively used to address non-compliance.⁵⁶ But some Article 2 values do have well understood contours, which lend them to legal enforcement as well. The rule of law, in particular, requires at a minimum the protection of politically independent judicial institutions and the even-handed enforcement of the law, both standards that are clear enough to be enforced legally within the EU and in Member States. The rule of law is also a particularly important value in the set listed in Article 2 because an independent judiciary and the even-handed enforcement of the law are themselves guarantors of other values like the enforcement of human rights. Without the rule of law, it is even impossible to ensure democratic governance since democratic elections require neutral referees enforcing election law and the “rules of the game.”⁵⁷ Rule of law, then, might be thought of as the value that stands behind many of the other values in Article 2. While the rule of law is notoriously capable of many definitions, a core commitment to the independence of judicial institutions and non-discriminatory enforcement of law are central elements in any conception.⁵⁸

The dependence of EU Member States on each other’s judiciaries is perhaps most crucial in the Area of Freedom, Security, and Justice in which Member States are required to turn over individuals to other Member States under the nearly automatic procedure triggered by a European arrest warrant, which requires states to arrest and transfer criminal suspects to the requesting Member State for trial or to complete a period of detention.⁵⁹ It is also a factor in enforcement of

⁵⁶ Matej Avbelj, “The Inherent Limits of Law—the Case of Slovenia,” *Verfassungsblog*, December 6, 2013, <http://www.verfassungsblog.de/en/the-inherent-limits-of-law-the-case-of-slovenia-2/>, and Paul Blokker, “Systemic Infringement Action: An Effective Solution or Rather Part of the Problem?” *Verfassungsblog*, December 5, 2013, <http://www.verfassungsblog.de/en/systemic-infringement-action-an-effective-solution-or-rather-part-of-the-problem-2/>.

⁵⁷ Daniel Ziblatt and Steven Levitsky, *How Democracies Die* (New York: Crown, 2018).

⁵⁸ Brian Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004).

⁵⁹ Libor Klimek, *European Arrest Warrant* (Zurich: Springer Publishing, 2015).

the Dublin Regulation, in which Member States can return asylum applicants to their first state of entry into the EU.⁶⁰ In fact, the same worry applies in differing ways to nearly all applications of EU law, including in the fields of civil, commercial, and family law touched by the Brussels Regulations on the mutual recognition and enforcement of judgments.⁶¹ Member States of the EU hold out to their fellow Member States and to the EU the promise that EU law will be enforced in an even-handed way by an independent judiciary. With the broadening of topics that the EU governs as well as the deepening over decades of the interdependence of Member States within the European Union, Member States, their nationals and businesses operating across borders have built a community of fate that relies on the commitment of every Member State to operate as a democratic, rule-of-law-based, human-rights-protecting order.

It is therefore a matter of serious concern that Article 7 is unlikely to succeed because the only part of Article 7 that one can imagine ever being used is the part that only warns without carrying any practical effect. For the Union to survive and thrive, there must be other mechanisms for protecting the principled core of the European project. In this section, we will review the major alternatives to Article 7 that we believe that European institutions can already use without the need for further Treaty change.

⁶⁰ Giulia Vicini, “The Dublin Regulation between Strasbourg and Luxembourg: Reshaping *Non-Refoulement* in the Name of Mutual Trust?,” *European Journal of Legal Studies* 8, no. 2 (2015): 50-72.

⁶¹ European Parliament and Council Regulation (EU) 1215/2012, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O. J. (L 351) 1 [Brussels I], and Council Regulation (EC) 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, 2003 O.J. (L 338) 1 [Brussels II].

1. Bringing Systemic Infringement Actions

The Commission already has a powerful tool for requiring Member States to follow EU law outside the parameters of Article 7 TEU: infringement procedures. But infringement procedures under Article 258 TFEU are typically brought by the Commission to challenge a specific and concrete violation of the EU *acquis* by a Member State. Infringement procedures carry the assumption that these violations occur in a Member State that is otherwise generally compliant. What should the Commission do if a Member State's conduct raises serious questions about its more general willingness to observe EU law, particularly when a Member State threatens basic EU principles of democracy, rule of law, and protection of human rights or when it persistently undermines the enforcement of EU law within its jurisdiction?

If a Member State is threatening the basic values of the Treaties or putting the legal guarantees presumed by EU law in doubt, that Member State is probably violating more than one precise slice of EU law. Under present practice, the Commission picks its battles, so it currently fails to bring many infringement actions that it might otherwise be justified in launching. As Wennerås notes, the Commission lacks the resources to monitor application of all EU law across the twenty-eight Member States. But, as he also points out, the Commission has a tendency to see problems as individual trees rather than as larger forests and to bring very specific one-off cases rather than more systemic challenges.⁶² For example, when the European Commission decided to bring Hungary's dismissal of its data protection ombudsman to the ECJ in 2012, the Commission limited the infringement to that one issue. Had it asked why the data protection ombudsman had been dismissed, the Commission might have learned that he was fired because he took action

⁶² Pål Wennerås, "Making Effective Use of Article 260 TFEU," in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, eds. András Jakab and Dimitry Kochenov (Oxford: Oxford University Press, 2017), 79-98.

against the Hungarian government's routine collection of data in violation of EU law⁶³ and that the government has also created a new secret police force that had the power to carry out unlimited surveillance against the entire Hungarian population.⁶⁴ The unlimited surveillance was eventually found to be a violation of the European Convention of Human Rights,⁶⁵ but it was never raised as a matter of EU law. Surely the larger problem for EU law was that the Hungarian government was trying to do an end-run around data protection more generally. If so, the firing of the national official charged with ensuring enforcement of EU law was a symptom of a larger problem. But bringing an infringement only for the firing without considering the reasons missed an opportunity. When the Commission taps only a small part of a larger field, it invites legalistic responses (compensating the fired ombudsman) that do not address the underlying norm violation (which might have been better achieved by reinstating him, relaunching the cases he had started or changing the government's data collection practices).

The Commission could simply increase the number of individual infringement actions against persistently violating states.⁶⁶ But even if the Commission were to bring more individual infringements to signal greater concern about a particular Member State, the ECJ is not

⁶³ Kim Lane Scheppele, "Making Infringement Procedures More Effective: A Comment on Commission v. Hungary, Case C-288/12 (8 April 2014) (Grand Chamber)," *Eutopia Law*, April 29, 2014, <https://eutopialaw.com/2014/04/29/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary-case-c-28812-8-april-2014-grand-chamber/>.

⁶⁴ Kim Lane Scheppele, "The New Hungarian Secret Police," *The Conscience of a Liberal* (blog), April 19, 2012, <http://krugman.blogs.nytimes.com/2012/04/19/the-new-hungarian-secret-police/>.

⁶⁵ Szabó and Vissy v. Hungary, App. no. 37138/14, ECLI:CE:ECHR:2016:0112JUD003713814, Judgement 2016.

⁶⁶ See R. Daniel Kelemen and Michael Blauberger, "Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU," *Journal of European Public Policy* 24, no. 3 (2017): 321-36 (for suggestions along these lines).

institutionally able to see the patterns at issue if the cases are filed as they presently are: one by one, in isolation from each other and without the requirement of a national judge on every case to link the cases together. First, the ECJ has no way to assess how a Member State is behaving overall, since each separate violation will typically be taken up by a different panel that will not know about all of the other, different cases coming from that one Member State. Second, even if a particular panel sees the connection with another case before another panel, merging cases on different points of law is not envisioned under the Court's rules of procedure, which limits joinder to cases on the same point of law.⁶⁷

A different strategy of framing cases seems called for, a strategy that puts specific violations in a broader view and that sets the stage for the sort of remedies that would be necessary to bring a Member State back into line with basic values. For that, the Commission needs the option of the “systemic infringement procedure.”⁶⁸ A systemic infringement procedure could be launched when the Commission recognizes that a Member State is engaging in a systemic violation of EU principles and is not just violating a particular narrow provision of EU law. A systemic infringement action would aim directly at the systemic nature of the violation by compiling a single legal action from a set of laws, decisions and actions that together form a more troubling whole. Bundling together a *pattern of violations that adds up to more than the sum of the parts* would allow the Commission to capture how multiple violations of EU law intersect to raise larger issues about a Member State's compliance with European law, as we could see with the Hungarian data

⁶⁷ European Court of Justice, Consolidated Version of the Rules of Procedure of the Court of Justice (September 25, 2012), art. 54 Joinder, https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf.

⁶⁸ Kim Lane Scheppele, “Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures,” in *Reinforcing the Rule of Law Oversight in the European Union*, eds. Carlos Closa and Dimitry Kochenov (Cambridge University Press, 2016), 104-32.

protection example above. That said, the systemic infringement action needs to be more than simply a bundle of unrelated complaints, joined only by the fact that they come from a single Member State. The case should be tied together with an overarching legal theory that links the allegations together, making the systemic violation clear and pointing to a systemic remedy.

Bundling together a set of violations to demonstrate a larger pattern is hardly radical; in fact, the Commission has already tried it and the Court has confirmed the practice.⁶⁹ “General and persistent” violations have been found in a number of cases where the Commission has brought together evidence of a pattern of violations as in the flagship Irish Waste Directive case, where twelve different problematic waste disposal sites were found to be evidence of systemic non-enforcement.⁷⁰ The systemic quality of the violations matter because it allows the Commission to craft a more systemic remedy. In the environmental cases where “general and persistent” violations have been found, the remedy has been for the Member State to change the way it enforces the law and not just to clean up a particular site.⁷¹ These structural remedies make a bigger difference than the small bore remedies available if only one stand-alone problem is alleged, which is precisely why systemic infringement actions are more effective tools than the narrow and technical infringements that are more typical uses of the Commission’s practice.

As these examples indicate, bundling together a series of specific violations to demonstrate a larger pattern is no longer a radically novel idea in the Court’s jurisprudence. But the use we

⁶⁹ See the discussion of this issue in Koen Lenaerts, Ignace Maselis, and Kathleen Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2014), 166-67, sec. 5.11 (with many examples in the notes).

⁷⁰ Case C-494/01, *Commission v. Ireland*, ECLI:EU:C:2005:250. See also Case C-135/05, *Commission v. Italy*, ECLI:EU:C:2007:250, and Case C-88/07, *Commission v. Spain*, ECLI:EU:C:2009:123.

⁷¹ Pål Wennerås, “A New Dawn for Commission Enforcement under Articles 226 and 228 EC: General and Persistent (Gap) Infringements, Lump Sums and Penalty Payments,” *Common Market Law Review* 43, no. 1 (2006): 31.

propose is different from the other cases brought so far in one respect. Instead of simply documenting a pattern that shows EU law has been violated repeatedly on the same point by a single Member State, the systemic infringement procedure would focus on claims that raise questions of more fundamental sort, where the Member State's commitment to European values would be raised by the set of violations alleged.

Systemic infringement procedures before the Court could be structured doctrinally in one of three ways:

First, and perhaps most ambitiously, systemic infringement actions could directly allege that a pattern of Member State conduct directly violates one or more of the basic principles outlined in Article 2. This used to seem a radical and novel suggestion, but the Court of Justice's 2018 decisions in the *Portuguese Judges* and *Celmer* cases (discussed *infra*) indicate that the Court is now ready to enforce Article 2 directly by linking it with Article 19(1) TEU, which guarantees effective remedies in national courts for violations of EU law.⁷² In the run-up to these decisions, a number of commentators had argued that Article 2 could only be enforced through Article 7, as *lex specialis* designed to exclude ECJ action in this area.⁷³ But a growing number of commentators had urged the Court to consider Article 2 as enforceable EU law.⁷⁴ Now it seems that the ECJ has

⁷² Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117 [hereinafter *Portuguese Judges*], and Reference for a Preliminary Ruling from the High Court (Ireland), Case C-216/18 PPU, ECLI:EU:C:2018:586 [hereinafter *Celmer*] (discussed further below).

⁷³ Avbelj, "The Inherent Limits of Law," and Blokker, "Systemic Infringement Action."

⁷⁴ Christophe Hillion "Overseeing the Rule of Law in the EU: Legal Mandate and Means," in *Reinforcing Rule of Law Oversight in the European Union*, eds. Carlos Closa and Dimitry Kochenov (Cambridge: Cambridge University Press, 2016), 59-81; Editorial Comments, "Safeguarding EU Values in the Member States—Is Something Finally Happening?" *Common Market Law Review* 52, no. 3 (2015): 622.

sided with those who believe that Article 2 is legal as well as political. As we will argue at greater length below, this could provide a major new tool for enforcing Article 2 values.

But legally enforcing the broad principles of Article 2 TEU, even by way of Article 19(1), is not the only theory under which a systemic infringement action could be framed. A systemic infringement procedure could argue, second, that a systemic violation of the basic principles of EU law puts a Member State in violation of Article 4(3) TEU. This is familiar ground to the ECJ, which has already developed an extensive jurisprudence of “sincere cooperation” or loyalty.⁷⁵ Using this rubric, the Commission would argue that the challenged laws and practices of a Member State systematically interfere with the operation of EU law in the Member State’s jurisdiction and thus violate the Member State’s loyalty obligations. The *Portuguese Judges* case used this strategy by invoking Article 4(3) TEU in conjunction with Article 2 TEU to provide a systemic reading of both together.⁷⁶ In fact, it would almost appear as if the ECJ is begging the Commission to be more adventurous in the way it frames its infringement actions, offering Article 4(3) as an easy way to make the systemic argument, in addition to offering Article 2 as a legal ground.

In a third variant of the systemic infringement procedure, the Commission could allege that a Member State has engaged in a violation of rights under the Charter of Fundamental Rights (Charter or CFR). If the Commission is the guardian of the Treaty—all Treaties, including the Charter—then it has an obligation to ensure that fundamental rights are protected when violated by Member States implementing EU law. Here, the Commission would not be bringing a case against a Member State that infringed a particular individual’s right, but would instead bring an Article 258 TFEU action for situations in which the regular misapplication of EU law itself generated a practice of widespread rights violations. A legal finding of systemic rights violations

⁷⁵ For a comprehensive account of the loyalty principle in EU law, see Klamert, *The Principle of Loyalty in EU Law*.

⁷⁶ *Portuguese Judges*, paras. 30-36.

by the ECJ could be effective at teeing up the political invocation of Article 7 on the basis that the ECJ has certified violation of rights guaranteed by Article 2.

Given Article 51 CFR, which limits the scope of Charter rights to those violated while a Member State is engaged in enforcing EU law, not all cases of rights violations can be the subject of an infringement action. But the Commission, however gingerly, has started to use this third strategy of adding rights violations to *acquis* violations in infringement actions involving both Hungary and Poland. In its 2015 infringement action against Hungary for violating various directives and regulations connected to the migration crisis, the Commission threw in an additional charge: that Hungary had also violated Article 47 of the Charter, which guarantees the right to a fair trial, through the procedures Hungary used to hear asylum claims.⁷⁷ Afterwards, the Commission supplemented this first infringement action with another over the matter of asylum law, alleging additional fundamental rights violations.⁷⁸ In 2017, the Commission brought an action against Hungary for violating freedom of association as well as the right of data privacy with its new NGO law that requires disclosure of foreign funding. The infringement action addressed the scope problem posed by Article 51 CFR by grounding its rights claims in restrictions on the free movement of capital.⁷⁹ And in the case that the Commission brought to the ECJ against Hungary in the matter of “Lex CEU,” a law of apparently general application that had the effect of specifically targeting Central European University, the Commission alleged that the law

⁷⁷ European Commission Press Release IP/15/6228, Commission Opens Infringement Procedure Against Hungary Concerning its Asylum Law (December 10, 2015).

⁷⁸ European Commission Press Release IP/17/5023, Migration: Commission Steps Up Infringement Against Hungary Concerning its Asylum Law (December 7, 2017).

⁷⁹ European Commission Press Release IP/17/1982, Infringements—Hungary: Commission Launches Infringement Procedure for Law on Foreign-Funded NGOs (July 13, 2017).

violated “the right of academic freedom, the right to education and the freedom to conduct a business as provided by the Charter of Fundamental Rights of the European Union (Articles 13, 14, 16 respectively).”⁸⁰

In confronting the Polish government’s assault on judicial independence, the Commission has also started laying the ground for arguing that systemic violations of Member State obligations must be met with systemic compliance. In its first infringement action against Poland for assaulting the judiciary, launched at the same time as it issued its Reasoned Proposal to the Council advocating the invocation of Article 7(1) for Poland, the Commission took a very legalistic approach to infringements, primarily calling out the five-year difference in the retirement ages of male and female judge, though it also called attention to the ability of the Justice Minister to discretionarily suspend the retirement age for any specific judge.⁸¹ At the same time, however, in its Reasoned Proposal to the Council, the Commission argued that a bonfire of the rule of law was occurring in Poland, showing that the Commission still strongly separated what it could do with infringements compared to what it could do in the Article 7 framework. Since then, however, the Commission appears to have changed tack. In July 2018, the Commission filed another

⁸⁰ European Commission Press Release IP/17/5004, Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law (December 7, 2017). The EU does not have direct authority in the area of higher education but because CEU is a private university, it is considered a service under EU law (Case C-109/92, Stephan Max Wirth v. Landeshauptstadt Hannover, ECLI:EU:C:1993:916). By itself, however, operating in the common market did not give the EU jurisdiction, because CEU is incorporated in the US, so the General Agreement on Trade in Services was invoked. Both the EU and Hungary are signatories and the EU was claiming its right to enforce the measures agreed upon in that Treaty including, among other things, the freedom to conduct a business. This was an usually creative infringement action.

⁸¹ European Commission Press Release IP/17/5367, Rule of Law. European Commission acts to Defend Judicial Independence in Poland (December 20, 2017).

infringement action against Poland for its assaults on the Supreme Court, this time grounding the action in “the principle of judicial independence, including the irremovability of judges...[through which] Poland fails to fulfil its obligations under Article 19(1) of the Treaty on European Union read in connection with Article 47 of the Charter of Fundamental Rights of the European Union.”⁸² But this new approach occurred only after the ECJ practically invited this line of argument in the *Portuguese Judges* case, about which more below. By making the more general case about the rule of law, independence of the judiciary and the state of human rights in a Member State, the Commission is now finally laying the ground for arguing that systemic violations of Member State obligations must be met with systemic compliance and for using infringement actions to act.

Regardless of the way that it is ultimately grounded in EU law, a systemic infringement procedure enables the Commission to signal to Court of Justice a more general concern about deviation from core principles than the Commission’s more narrowly tailored infringement actions had permitted. A systemic infringement procedure has the advantage of putting before the ECJ evidence of a *pattern* of violation so that the overall situation in a particular Member State is not lost in a flurry of individual or comparatively trivial complaints, each of which would be judged on its own, never providing full documentation of the pattern that should cause even more concern. Until very recently, Commission has been using its power to bring infringements much less effectively than it might, though under tutelage from the ECJ, the Commission might be learning to think bigger.

2. Halting the Funding of Autocracies

The EU finds itself in the perverse situation of providing some of the largest transfers of funds precisely to those governments who most prominently thumb their nose at its democratic and rule-

⁸² European Commission Press Release IP/18/4341, Rule of Law. Commission Launches Infringement Procedure to Protect the Independence of the Polish Supreme Court (July 2, 2018).

of-law norms. In short, the EU subsidizes autocracy. Scholars of comparative politics show us that in fact this perverse circumstance is not uncommon, as autocratic states often take root in less-developed regions and are thus recipients of fiscal transfers in federal-type systems. In the EU, as in these other cases, local authoritarians can use federal transfers to support clientelistic networks that perpetuate their rule.⁸³

These dynamics will sound familiar to anyone who has followed recent developments in Hungary and Poland, both huge beneficiaries of EU fiscal transfers. Poland is the largest overall recipient, taking in €86 billion from various European Structural and Investment Funds (ESIFs) in the current funding period (2014-2020).⁸⁴ Hungary meanwhile is the largest recipient of EU funds on a per capita basis, and more than 95% of all public investments in Hungary in recent years have been co-financed by the EU.⁸⁵ A significant chunk of this EU largesse has found its way into the pockets of a set of new oligarchs created by the current governing party, helping sustain Orbán's sprawling, corrupt patronage network.⁸⁶ Ultimately, many of the other sanctions discussed for democratic backsliders—such as the suspension of voting rights under Article 7—may matter very little to leaders of these regimes so long as the money keeps flowing.⁸⁷

⁸³ Gervasoni, "A Rentier Theory of Subnational Regimes."

⁸⁴ European Commission, European Structural and Investment Funds 2014-2020: Official Texts and Commentaries (November 2015), 45, http://ec.europa.eu/regional_policy/sources/docgener/guides/blue_book/blueguide_en.pdf.

⁸⁵ Christian Keszthely, "Hungary's Economy Heavily Depends on EU Funds, Study Finds," *Budapest Business Journal*, March 30, 2017, https://bbj.hu/economy/hungarys-economy-heavily-depends-on-eu-funds-study-finds_130880.

⁸⁶ Bálint Magyar, *The Post-Communist Mafia State: The Case of Hungary* (Budapest: CEU Press, 2016).

⁸⁷ Gábor Halmai, "The Possibility and Desirability of Economic Sanction: Rule of law Conditionality Requirements against Illiberal EU Member States." EUI Working Paper Law 2018/06. http://cadmus.eui.eu/bitstream/handle/1814/51644/LAW_2018_06.pdf?sequence=1.

Many observers recognize the irony of this situation, but have concluded that there is little the EU can do because, in their view, the EU either lacks the legal grounds to suspend the flow of ESIFs in response to democratic backsliding⁸⁸ or would target the wrong actors by withholding funds⁸⁹ or would “poison” broader EU relations if it went down this path.⁹⁰ More recently, with an eye to the EU’s next multi-annual budget that will run from 2021-2027, politicians and academics have advanced a series of proposals⁹¹ (such as ones from the European Parliament,⁹² the German government,⁹³ and European Commissioner for Justice Vera Jourová⁹⁴) to strengthen the rule-of-law conditionality attached to EU funding.⁹⁵ A heated debate has ensued, with governments who

⁸⁸ Hubert Heinelt and Wolfgang Petzold, “The Structural Funds and EU Cohesion Policy,” in *Handbook of European Politics: Interpretive Approaches to the EU*, eds. Hubert Heinelt and Sybille Münch (Northampton M.A.: Edward Elgar Publishing, 2018), 134-54.

⁸⁹ Marjorie Jouen, “The Macro-Economic Conditionality, the Story of a Triple Penalty for Regions,” *Jacques Delors Institute*, Policy Paper 131 (March 2015).

⁹⁰ Florian Eder, “Juncker: German Plan to Link Funds and Rules Would Be ‘Poison’,” *Politico Europe*, June 1, 2017, <https://www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/>.

⁹¹ For a detailed review of the range of proposals regarding funding conditionality made to date, see Halmai, “The Possibility and Desirability of Economic Sanction.”

⁹² European Parliament Resolution, On an EU mechanism on Democracy, the Rule of Law and Fundamental Rights, P8_TA(2016)0409 (October 25, 2016).

⁹³ Guy Chazan and Duncan Robinson, “Juncker Rejects German Plan to Tie EU Funding to Democracy,” *Financial Times*, June 1, 2017, <https://www.ft.com/content/d1b69d8a-46cf-11e7-8519-9f94ee97d996>.

⁹⁴ Eszter Zalan, “Justice Commissioner Links EU Funds to ‘Rule of Law’,” *EUobserver*, October 31, 2017, <https://euobserver.com/political/139720>.

⁹⁵ For more on these proposals, see Jasna Selih, Ian Bond, and Carol Dolan, “Can EU Funds Promote the Rule of Law in Europe?,” Center for European Reform Policy Brief, November 2017, http://www.cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf.

see themselves as the potential targets of such conditionality—not only Poland and Hungary, but other states with problematic judicial systems such as Romania and Bulgaria—adamantly denouncing these proposals. Likewise, the debate has raged within the Commission, with some EU leaders such as Justice Commissioner Jourová defending such plans, while others such as Commission President Jean-Claude Juncker adamantly oppose them.⁹⁶ But these proposals and the entire debate surrounding them misses the fact that, as we will show, the EU already has a sufficient legal basis to suspend the flow of funds to states in which rule-of-law norms are systematically violated. The real problem to date has not been the lack of adequate legal tools, but the lack of political will on the part of the European Commission to use the tools that already exist.

The Common Provisions Regulation (CPR) enacted in 2013 regulates the administration of ESIFs.⁹⁷ As Israel Butler of the Civil Liberties Union for Europe argued in a recent report, “the CPR, read in light of the Charter of Fundamental Rights and the case law of the Court of Justice, already allows the Commission to suspend ESIFs where a Member State does not uphold the rule of law.”⁹⁸ We agree. Article 142(a) of the CPR provides that payments of ESIFs may be suspended if, “there is a serious deficiency in the effective functioning of the management and control system

⁹⁶ Zalan, “Justice Commissioner Links EU Funds to ‘Rule of Law’”; Chazan and Robinson, “Juncker Rejects German Plan to Tie EU Funding to Democracy.”

⁹⁷ European Parliament and Council Regulation (EU)1303/2013, Laying Down Common Provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and Laying Down General Provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, 2013 O.J. (L 347) 320 [hereinafter CPR].

⁹⁸ Israel Butler, “Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework,” Civil Liberties Union for Europe, March 2018, <https://www.liberties.eu/en/news/european-values-fund-two-proposals-mff/14471>.

of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken.”⁹⁹ That requisite management and control system must “ensure that effective arrangements for the examination of complaints concerning the ESI Funds are in place” (Article 74(3), CPR), and must ensure that natural and legal persons have the right to an effective remedy from an independent and impartial tribunal as required under Article 47 of the Charter of Fundamental Rights.¹⁰⁰ The European Court of Justice has affirmed these principles, and emphasized that the framework for remedies must meet the requirements of Article 19(1) TEU for effective legal protection in fields covered by Union law.¹⁰¹

The procedure that the Commission must follow to claw back funds or refuse to pay on schedule under the CPR occurs in a dialogue between the Member State in question and the Commission, a dialogue that is not made public. Therefore, the Commission may have already been using the CPR to restrict funds for rule-of-law reasons more than is visible. In fact, the Commission in the recent European parliamentary debate over the Sargentini Report, seems to have said as much. In that session, Commission Vice-President Frans Timmermans publicly noted that on his watch, “[t]he Hungarian operational programmes for EU structural and investment funds have been the subject of the highest amount of financial corrections in 2016 and 2017 among all EU Member States, as a result of the supervisory role of the Commission.”¹⁰² Later reporting

⁹⁹ CPR, art. 142(a).

¹⁰⁰ Commission Notice, Guidance on Ensuring the Respect for the Charter of Fundamental Rights of the European Union when Implementing the European Structural and Investment Funds (ESI Funds), 2016 O.J. (C 269) 1.

¹⁰¹ Case C-562/12, *Liivimaa Lihaveis MTÜ v. Eesti-Läti programmi*, ECLI:EU:C:2014:2229, paras. 67-75.

¹⁰² Frans Timmermans, European Commission Vice-President, Opening Remarks in the European Parliament Plenary debate on the situation in Hungary (September 11, 2018), https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/opening-and-closing-remarks-european-parliament-plenary-debate-situation-hungary_en.

indicated that the Commission had withheld \$1.8 billion from Hungary due to irregularities.¹⁰³ Perhaps, then, Commission may already be using the CPR to police the rule of law in Member States, but it just may not have announced that it is doing so. If part of the point of insisting on rule of law in the Member States is to dissuade others from going down that path, however, a silent procedure may not be as effective as one that is publicly documented.

Although the Commission has not yet been willing to use the CPR overtly to cut off funds to offending Member States, there are some signs that the Commission has attempted to use other available mechanisms to send warning signals to Member States that do not play by the rules. For example, shortly after the Hungarian government rammed through its worrisome new constitution on the strength of votes of the governing party alone, the Barroso Commission recommended that Hungary be fined under the Excessive Deficit Procedure (EDP) for its persistent violation of the EU deficit rules. The fines were huge: The Commission “proposed to suspend €495,184,000 of Cohesion Fund commitments taking effect on 1 January 2013, representing 0.5 % of GDP and 29% of the country's cohesion fund allocations for 2013.”¹⁰⁴ And the grounds for suspending funds were solid: Hungary had clearly overshot EU deficit targets ever since it had entered the EU and therefore was an appropriate target for the EDP’s sanctions. But many other countries were also in violation of the EDP’s targets at that time and were not the subject of recommended sanctions, leading some (not least the Hungarian government) to argue that the Commission was singling Hungary out for special treatment. In the end, the Orbán government ramped up its revenue-

¹⁰³ “EU Funds Worth \$1.8 billion at Risk for Hungary due to Irregularities: Report,” *Reuters*, September 25, 2018, <https://www.reuters.com/article/us-eu-hungary-budget/eu-funds-worth-18-billion-at-risk-for-hungary-due-to-irregularities-report-idUSKCN1M521H>.

¹⁰⁴ European Commission Press Release IP/12/161, Commission Proposes to Suspend €495 million of Cohesion Fund for Hungary for 2013 for Failure to Address Excessive Deficit (February 22, 2012).

generating measures to bring its budget deficit into line and ECOFIN (the Council configuration for economic matters charged with confirming the Commission's assessment before it could be finalized) ultimately refused to support the sanctions,¹⁰⁵ so the threat fizzled. But many observers at the time could not help but make the link between the measures that the Commission directed at Hungary and the rapid consolidation of power in the hands of Orbán that was taking effect during that time.

Given that the Commission has not felt comfortable making apparent that rule-of-law concerns affect its distribution of EU funds to offending Member States already, it may have wanted more explicit permission to use its power to suspend or claw back ESI funds flowing to Member States by inventing new mechanisms with this precise purpose. This might be behind the Commission proposal for a European Public Prosecutor in recognition of the fact that the EU's current anti-corruption mechanism was not working.¹⁰⁶ At the moment, European Anti-Fraud Office (OLAF) has the power to investigate corruption in the use of EU funds, but upon conclusion of its investigations, it hands over the results to the Member States for further action, prosecution if necessary. Not surprisingly, these files often go nowhere.¹⁰⁷ The Member States most likely to

¹⁰⁵ For an overview of Hungary under the Excessive Deficit Procedure, see "Hungary and the European Union Excessive Deficit Procedure," *The Orange Files*, June 11, 2016, <https://theorangefiles.hu/hungary-and-the-european-union-excessive-deficit-procedure/>.

¹⁰⁶ Carlos Gómez-Jara Díez and Ester Herlin-Karnell, "Prosecuting EU Financial Crimes: The European Public Prosecutor's Office in Comparison to the US Federal Regime," *German Law Journal* 19, no. 5 (2018): 1191-220; Willem Geelhoed, Leendert H. Erkelens, and Arjen W.H. Meij eds., *Shifting Perspectives on the European Public Prosecutor's Office* (Groningen: Asser Press/Springer, 2017).

¹⁰⁷ Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the document Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, SWD (2013) 274 final (July 17, 2013), para. 11.

abuse EU funds often have governments implicated in these corruption schemes at the highest levels¹⁰⁸ and, not surprisingly, these governments are not likely to prosecute themselves when OLAF hands them the evidence to do so. Some tougher mechanism, not dependent on the Member States themselves, was called for.

The creation of a European Public Prosecutor to scrutinize and prosecute corrupt uses of EU funds was authorized in June 2017,¹⁰⁹ when twenty Member States in the Council agreed to set up this new institution under the enhanced cooperation mechanism, which permits a substantial subset of Member States to agree to increased integration without waiting for all Member States to join. The regulation establishing this new office was passed in October 2017.¹¹⁰ Not surprisingly, neither Hungary nor Poland decided to sign up as one of the founding states, nor did other Member States that are considered among the most thoroughly corrupt.

Proposals are now circulating to tie EU funding to the agreement by Member States to the acceptance of the jurisdiction of the European Public Prosecutor. If a Member State will not allow its uses of funds to be scrutinized, then, the theory goes, that Member State should not be entrusted with such funds. Justice Commissioner Vera Jourová first made the proposal to link allocations of EU funds to acceptance of the European Public Prosecutor,¹¹¹ and the call has since been picked up by critics of the Orbán government as a way for the EU to avoid subsidizing Member States

¹⁰⁸ Corruption was an important element of the Sargentini Report, emphasized often in the plenary debate. The plenary debate can be viewed online at <https://www.youtube.com/watch?v=ARfcG2FFi04>.

¹⁰⁹ European Council Press Release 333/17, 20 Member States Agree on Details on Creating the European Public Prosecutor's Office (EPPO) (June 8, 2017).

¹¹⁰ Council Regulation (EU) 2017/1939, Implementing Enhanced Cooperation on the Establishment of the European Public Prosecutor's Office ('the EPPO'), 2017 O.J. (L 283) 1. Since that time, the Netherlands has joined as well.

¹¹¹ Harry Cooper, "EU's Jourová Wants Funds Linked to New Prosecutor's Office," *Politico Europe*, June 8, 2017, <https://www.politico.eu/article/eus-jourova-wants-funds-linked-to-new-prosecutors-office/>.

that do not play by the rules.

Beyond the Public Prosecutor, there is also an attempt to make the distribution of ESIFs explicitly conditional on a Member State's commitment to the rule of law. As we write, negotiations over the multi-annual financial framework for the next five-year period are under way and the Commission has offered as part of that discussion a proposed regulation that would explicitly create rule-of-law conditionality in the use of ESIFs.¹¹² Butler has supported the idea that these legal bases for the suspension of EU funds on rule-of-law grounds should be spelled out in the regulations governing the next multi-annual financial framework.¹¹³ But even though these new proposals would certainly be desirable and explicit recognition of this conditionality would be a step in the right direction, the more crucial point is that the legal bases for action already exist in the CPR but somehow the Commission has not yet had the will to aggressively and publicly use the power already in its hands.

Why then has the EU so far (eight years into the Orbán regime and three years into the PiS government) refused to suspend the flow of funds to its nascent autocracies and done so explicitly in the name of the rule of law? Again, as with its failure to impose Article 7 sanctions, all indications point to a lack of political will as the principal explanation. It would fall to the European Commission to lead the charge in suspending the flow of EU funds to Hungary or Poland, and though some Commissioners have supported the idea of rule-of-law conditionality as a future

¹¹² *Commission Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalized Deficiencies as Regards the Rule of Law in the Member States*, COM (2018) 324 final (May 2, 2018).

¹¹³ Butler, "Two Proposals to Promote and Protect European Values."

remedy, to date the Commission has simply refused to move in this direction.¹¹⁴ This is hardly surprising given that Commission President Jean-Claude Juncker, when asked during a conference in Berlin if he supported what had started as Germany’s proposals to attach rule of law and democracy conditions to EU funds, said: “I am of the opinion that one should not do that.” He added that the proposal would be “poison for the continent.”¹¹⁵ In arguing this, he joins other critics who say that suspending funds to the poorer Member States will simply drive them into the arms of other powers with no interest in democracy or the rule of law, like China.¹¹⁶ Whether Juncker’s refusal to support funding conditionality stems from his partisan loyalty to EPP ally Viktor Orbán¹¹⁷—a sure target of any such sanctions—or from a sincere belief that sanctions would prompt destructive fissures within the EU, the fact remains that so long as the Commission lacks the political will to deploy the tools it has, arming it with an ever larger toolkit by itself would

¹¹⁴ As Gabor Halmai notes, on one occasion when the EU did temporarily suspend some EU funds to Hungary just on the heels of the Orban regime’s dismantlement of the Constitutional Court, it claimed that this suspension was not due to general attacks on the rule of law in Hungary, but due to some technical irregularities in management of the funds (Halmai, “The Possibility and Desirability of Economic Sanction.”). Also see Kester Eddy and James Fontanella-Khan, “Brussels Suspends Funding to Hungary over Alleged Irregularities,” *Financial Times*, August 14, 2013, <https://www.ft.com/content/9b85c228-04f1-11e3-9e71-00144feab7de>.

¹¹⁵ Chazan and Robinson, “Juncker Rejects German Plan to Tie EU Funding to Democracy.”

¹¹⁶ Thorsten Benner and Jan Weidenfeld, “Europe, Don’t Let China Divide and Conquer: Cutting Funds to Countries that Disregard EU Values will Push Them into China’s Arms,” *Politico Europe*, April 20, 2018, <https://www.politico.eu/article/europe-china-divide-and-conquer/>.

¹¹⁷ The 2014 European Parliament elections promised to strengthen democracy and voter engagement in the EU in part through the *Spitzenkandidat* process, which was designed to inject partisan competition into the selection of the Commission President. Ever since he was selected through this process as the EPP’s candidate, Jean Claude Juncker repeatedly promised that his would be a more political European Commission. Advocates of this politicization may rue their success.

have less effect than its advocates might hope.

3. Adjusting the Principle of Mutual Trust and Suspending the Recognition of National Judiciaries

If the EU's political leaders in the Council, European Parliament, and Commission fail to take action to address the rule-of-law crisis in Poland and Hungary, the ECJ and national courts may be called on to address the situation. Indeed, this has already started to occur. As noted above, the EU legal order is founded on an assumption of mutual trust between national judiciaries, which, in addition to their purely national functions, also serve as EU courts and are required to recognize one another's judgments. Attacks on judicial independence and the rule of law in any Member State will inevitably ripple across this interdependent legal order and generate litigation before national courts as well as before the ECJ itself, questioning whether this assumption of mutual trust can be sustained.

In February 2018, the ECJ helped set the stage for such litigation in its ruling in the *Portuguese Judges* case.¹¹⁸ The case involved a reference from a Portuguese court asking if the austerity measures taken by the Portuguese government during the euro crisis infringed the independence of the judiciary. The ECJ said no, but went on to hold that there is a general obligation for Member States to guarantee judicial independence of their national courts; the decision also suggested that the Court would closely scrutinize the independence of Member State courts going forward. The Court's reasoning was truly path breaking for several reasons.

First, the Court grounded its decision in Articles 2, 4(3), and 19 TEU without reference to other provisions of the *acquis*. It therefore established that Member States must ensure the independence of their courts as a direct obligation under the Treaties, not dependent on any particular area of EU law. Second, the Court overtly interpreted Article 2 TEU together with

¹¹⁸ *Portuguese Judges*.

Article 19(1) TEU as establishing that the EU's basic values require that Member States guarantee certain legal protections in their domestic systems. In short, Article 2 was used as a basis for the Court's legal interpretation, even though some commentators had previously argued that *only* the political process set out in Article 7 could be used to determine when Article 2 values had been violated.¹¹⁹ Third, the ECJ established the standards it would use in assessing whether a Member State's judiciary was independent. According to the Court, judicial independence requires that courts operate autonomously without being subordinated to any other body and without taking instruction from elsewhere. An independent court must be protected against all external pressures, including protection for judges against removal from office.

By laying out the Treaty basis for judicial independence in this relatively uncontroversial case, the ECJ has given itself a weapon loaded for use when it examines what the Polish government has done to its courts. Laurent Pech and Sébastien Platon have quite rightly interpreted the judgment as a kind of shot across the bow of the Polish government in reaction to its attack on judicial independence.¹²⁰ Judges across Europe heard the shot, and a judge of the Irish High Court was the first to respond.

Just two weeks after the *Portuguese Judges* decision, on March 12, 2018, Justice Aileen Donnelly of the High Court in Ireland sent a historic reference for a preliminary ruling to the ECJ

¹¹⁹ "There is no role mentioned for the Court of Justice in [Article 7 TEU] – no requirement that the Court must first have found an infringement of Article 2 TEU. The absence of the Court from this process clearly confirms the difference between legal mechanisms and purely political mechanisms." Lawrence Gormley, "Infringement Proceedings," in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, eds. András Jakab and Dimitry Kochenov (Oxford: Oxford University Press 2017), 74.

¹²⁰ Laurent Pech and Sébastien Platon, "Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical dos Juizes Portugueses," *EU Law Analysis* (blog), March 13, 2018, <http://eulawanalysis.blogspot.com/search?q=64%2F16>.

concerning the state of the rule of law in Poland.¹²¹ The case involved a European Arrest Warrant (EAW) issued for a suspect, Artur Celmer, who faced charges for drug trafficking in his native Poland. Mr. Celmer’s lawyers opposed surrendering him to Polish authorities under the EAW on the grounds that the rule of law was no longer functioning there. Justice Donnelly relied heavily on the Commission’s Reasoned Proposal to the Council to trigger Article 7(1) TEU against Poland, and concluded that, “the rule of law in Poland has been systematically damaged by the cumulative impact of all the legislative changes that have taken place over the last two years.”¹²² Before rendering a final decision on whether Mr. Celmer could be returned to Poland, however, Justice Donnelly referred two related questions of EU law to the ECJ. She asked whether the lack of judicial independence in Poland was a sufficient ground for refusing an EAW request, and whether she needed to assess whether Mr. Celmer in particular would be subject to a violation of his rights if he were sent to Poland.

The relevant standard before *Celmer*, was given in the Court’s *Aranyosi*¹²³ judgment, which originated in references from the Higher Regional Court of Bremen asking whether it could refuse European arrest warrant requests from Hungary and Romania. In those cases, the detention conditions in the issuing Member States had been found by the European Court of Human Rights to have infringed the fundamental rights of the persons detained there. The ECJ ruled in *Aranyosi* that national judges must apply a two-pronged test to determine if requests made under EAWs

¹²¹ Ruaidhrí Giblin, “High Court Judge Seeks EU Ruling on Effect of Polish Law Changes,” *Irish Times*, March 12, 2018, <https://www.irishtimes.com/news/crime-and-law/courts/high-court/high-court-judge-seeks-eu-ruling-on-effect-of-polish-law-changes-1.3424530>.

¹²² *Celmer*, para. 124.

¹²³ Joined Cases C-404/15 and C-659/15, Pál Aranyosi & Robert Căldăraru v. Generalstaatsanwaltschaft Bremen, ECLI:EU:C:2016:198.

could be refused. The national judge must assess (i) whether there are systemic deficiencies in rights protections in the country in question and, if so, (ii) whether there are substantial grounds to believe that the individual in question would be likely to have his or her rights violated because of the systemic deficiencies. Information to assess the second prong would result from an exchange of information between the judicial authority that issued the warrant and the one being requested to execute it.

In her *Celmer* reference, Justice Donnelly noted that applying the individualized assessment (the second prong) called for in *Aranyosi* was problematic in a situation where judicial independence itself had been undermined as a structural matter because “[t]hese tests have been predicated on mutual trust and mutual recognition. A problem with adopting that [two-pronged] approach in the present case is that the deficiencies identified are to the edifices of a democracy governed by the rule of law. In those circumstances, it is difficult to see how individual guarantees can be given by the issuing judicial authority as to fair trial when it is the system of justice itself that is no longer operating under the rule of law.”¹²⁴ In other words, structural deficiencies in the rule of law would make the individualized assessment impossible because non-independent judges in the issuing jurisdiction could not certify credibly that the person to be returned would receive a fair trial.

In expedited proceedings, the ECJ answered the reference with a judgment¹²⁵ that held that national judges were still bound by the two-pronged test. First, judges receiving an EAW request must consider the overall independence of the judiciary as they assess whether to send someone to another Member States to stand trial. The Court approvingly cited the Commission’s Reasoned Proposal with regard to Poland as evidence that could be used by a national judge, which meant in

¹²⁴ *Celmer*, para. 142.

¹²⁵ *Celmer*.

practice that it would be easy to find that the Polish judiciary lacked the requisite independence. However, the Court refused to abandon the second prong of the *Aranyosi* test requiring individualized assessment. The existence of a structural deficiency, no matter how serious or pervasive, could not automatically answer the question of whether any specific EAW should be honored. Instead, the judge must still “assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk [of breach of the essence of the fundamental right to a fair trial].”¹²⁶

This judgment was a disappointment to those who had hoped the ECJ would make a more structural ruling. Once the independence of the judiciary was compromised in a particular state, then enforcement of EAWs should be suspended across the board because no credible representations can be made by judges that they are independent enough to guarantee the relevant conditions.¹²⁷ But even without going that far, the *Celmer* ruling will nonetheless allow judges all over the EU who wish to do so to refuse to honor EAW requests from Poland, relying on the Commission’s Article 7(1) Reasoned Proposal. In addition, we might expect additional references to arrive before the ECJ asking related questions on whether there is a duty to recognize the judgments of the compromised Polish judiciary in civil and commercial matters. The ECJ’s approach, despite insisting on a case-by-case assessment of the independence of particular courts within a system that has been broadly compromised, will open a new mechanism for national

¹²⁶ *Celmer*, para. 68.

¹²⁷ Indeed one of us has argued that the decision constitutes a catastrophic missed opportunity. Kim Lane Scheppele, “Rule of Law Retail and Rule of Law Wholesale: The ECJ’s (Alarming) ‘Celmer’ Decision,” *Verfassungsblog*, July 28, 2018, <https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/>.

courts to play a role in addressing attacks on the rule of law.¹²⁸ But this also risks legal chaos, as judges in some Member States (such as Ireland, Germany or Spain) might regularly refuse to recognize judgments from Polish courts but judges in other Member States (like Hungary) may be content to continue recognizing the independence of Polish courts. While the ECJ's approach in *Celmer* may impose some costs on the Polish government for its attack on judicial independence, clearly a more structural remedy is needed to actually fix the Polish judiciary or to create a common approach across the EU. These open questions mean that *Celmer* will not be the last chapter in the ECJ's response to attacks on the rule of law at the national level.

Indeed, there are currently a number of cases winding their way through the EU judicial system on precisely this point. As we noted above, since December 2017, an infringement action has been pending before the ECJ asking whether the discretion of the Polish Justice Minister to suspend the retirement age for any individual judge is a violation of the *acquis* provisions on age discrimination.¹²⁹ On September 24, 2018, the Commission referred a potentially more significant infringement to the ECJ, using the *Portuguese Judges* decision and its invocation of Article 19(1) TEU as the basis for the claim that Poland is infringing EU law on judicial independence with its current measures to gut and pack the Supreme Court.¹³⁰ Perhaps most radically, the Commission

¹²⁸ In fact, as this chapter goes to press, it is clear that the ECJ's decision in *Celmer* is having ripple effects across the EU. The Central Court of Madrid recently sent questions to a Polish district court clearly meant to determine whether the judiciary in Poland is independent enough to permit the Spanish court to honor an EAW. Magdalena Gałczyńska, "Sąd w Madrycie pyta o niezawisłość sędziowską w Polsce. W tle tzw. sprawa Celmera," *Wiadomości Onet*, October 1, 2018, <https://wiadomosci.onet.pl/tylko-w-onecie/sad-w-madrycie-pyta-o-niezawislosc-sedziowska-w-polsce-w-tzw-sprawa-celmera/9vh20ef>.

¹²⁹ European Commission Press Release IP/17/5367.

¹³⁰ European Commission Press Release IP/18/5830, Rule of Law: European Commission Refers Poland to the European Court of Justice to Protect the Independence of the Polish Supreme Court (September 24, 2018).

in this second case asked for interim measures in which the Polish government would be asked to roll back its judicial changes to the situation before April 3, 2018 when the laws contested in the infringement action were enacted. Even though the ECJ was unwilling to issue a structural ruling on the independence of the Polish judiciary in the *Celmer* preliminary reference, it might be willing to do so in the context of an infringement action, because the Commission would then have broad leeway to attempt to intervene and repair the damage, something individual judges in individual arrest warrant cases cannot do.

Without waiting for the Commission to launch this last infringement action, however, and facing a situation in which almost one-third of the judges on the Supreme Court would be immediately removed in summer 2018, the Supreme Court itself filed a preliminary reference with the ECJ on August 2, 2018.¹³¹ The reference was a cry for help from the current president of the Court and another twenty-seven judges whom the government had moved to fire due to the new lower retirement age. The reference asked whether Articles 2, 4(3), 19(1) TEU, Article 267 TFEU, and Article 47 CFR permit sitting judges to be removed. The reference also asked whether a judge's ability to stay in office can be made contingent on the decisions of the President and Prime Minister as well as whether the ECJ's judgment in the Hungarian judicial retirement age case that prohibited lowering the retirement age for existing judges on grounds of age discrimination applies to them. Given all of these potential violations of EU law, the judges asked how they could ensure that EU law on this point was followed. Perhaps even more breathtakingly, the reference also included a question about interim measures—in particular whether the Polish Supreme Court

¹³¹ Jan Cienski, "Polish Supreme Court turns to ECJ for Help," *Politico Europe*, August 2, 2018, <https://www.politico.eu/article/polish-supreme-court-turns-to-ecj-for-help-older-judges-retirement-eu-rule/>; Robert Grzeszczak and Ireneusz Pawel, "The Rule of Law Crisis in Poland: A New Chapter," *Verfassungsblog*, August 8, 2018, <https://verfassungsblog.de/the-rule-of-law-crisis-in-poland-a-new-chapter/>.

would be justified under EU law in disapplying any national law that is contrary to EU law. Though the answer to this last question is obvious in EU law—and the answer is “yes”—the question is particularly loaded in practical terms because the law that would be disappplied involves the tenure of the judges themselves. The automatic result of such an interim measure would be that the Supreme Court judges would declare that they themselves could not be removed and would have the right to remain in office, thereby setting up a direct conflict between the judges and the Polish government with the ECJ having been forced to take sides between them.

Before this reference could be digested at the ECJ, the Polish Supreme Court sent another preliminary reference on August 8 to Luxembourg, this time asking the ECJ whether judicial reassignments and dismissals of judges made by the newly packed National Judicial Council (KRS) breached Article 47 CFR which requires an “effective remedy” for breaches of rights guaranteed by Union law to be available in a hearing before an “independent and impartial tribunal.” Under the Polish judicial reform, decisions of the KRS, which crucially shape judges’ careers, cannot now be appealed to any court. In a move that might well assist this case, the European Network of Councils for the Judiciary (ENCJ) suspended the KRS from membership in the network in September 2018, noting that “It is a condition of ENCJ membership that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice,” but that “as a result of the recent reforms in Poland the KRS no longer fulfill[s] this requirement.”¹³²

With this set of cases before it, the ECJ will thus have other opportunities to offer a structural remedy—the possibility of finding a systemic violation of judicial independence so tantalizingly dangled in the *Portuguese Judges* case. In the Polish Supreme Court references, the

¹³² European Network of Councils for the Judiciary Press Release, ENCJ Suspends Polish National Judicial Council (KRS) (September 17, 2018), <https://www.encj.eu/node/495>.

ECJ has the opportunity to hold out a lifeline, keeping the judges in place so that the Polish government does not win on the facts on the ground before it loses in law. In the infringement cases, finding that the Polish courts are no longer independent and therefore that Poland infringes the basic principle of the rule of law would give the Commission broad leeway to craft a systemic remedy to remove the impediments to an independent judiciary. If the ECJ can prevent the Polish Supreme Court judges from losing their jobs, it would help the Commission's efforts immensely. If it wins the infringement actions, and failing an adequate response from the Polish government on the broader question of judicial independence, the Commission could return to the Court under Article 260 TFEU to seek a large fine against Poland.¹³³ Finally, at that point and after a long journey, one might get the "bite" (beyond the growl, beyond the bark) that would put real pressure on Poland to alter its judicial reforms.

V. Conclusions

Article 7 TEU provides an avenue through which Member States that violate the fundamental principles of the European Union can be warned, and then sanctioned. But given the way that this mechanism is constructed, it can almost never be used. Already we have seen in two very serious cases—Hungary and Poland—that the rule of law can be destroyed and democracy gravely imperiled before European institutions even issue a warning under Article 7. And it is not clear that the politics of the European Union—both party politics and the self-interest of Member States—will allow even a warning to be uttered.

The problems posed by rogue states within the EU are immense. The EU is a web of legal obligations that relies on all Member States honoring their legal commitments under the Treaties. If a Member State rejects European values without leaving its formal membership in the European

¹³³ Wennerås, "Making Effective Use of Article 260 TFEU," 79-98.

Union, the law that holds the whole European project together bends and will eventually break. Even as it has been apparent that the EU cannot function without the rule of law being guaranteed in every Member State, EU institutions have failed to halt the slide into illiberalism or even to defend themselves from the corrupting influence of states that have fallen from grace. One after another, European institutions have had the opportunity to use the tools at their disposal to intervene, and one after another, European institutions have failed.

It is not too late, though substantial damage has already been done. We are convinced that the less political bodies of the EU—the Commission and the Court of Justice—still possess robust tools that they can use to remedy the worst elements of illiberalism and autocracy. Already, we are seeing some signs that the Commission and the Court are reaching for these tools. The problem is that this process has begun late, and we worry that the inherent conservatism of both institutions may still lead them to pass the buck to others, particularly to the Council which will never act. We hope that the catalogue of tools that we have provided can and will be used to good effect. Perhaps most crucially, we hope not only that we have convinced our readers that something can be done, but also that we can persuade the EU institutions themselves that they have the power, the ability, the mandate, and the responsibility to halt the destruction of basic values. Nothing less than the fate of the EU depends on it.