



The Commission's Decision on 'Less EU' in Safeguarding the Rule of Law: A play in four acts

Petra Bárd and Sergio Carrera

The European Commission has just rendered itself irrelevant in upholding and safeguarding the rule of law in the EU by declining¹ the invitation extended last October by the European Parliament in its report² to establish a new EU mechanism on rule of law, fundamental rights and democracy. This paper argues that this decision constitutes the final act of what can be called a "rule of law" play, which has been performed mainly by the Commission and is composed of three main and a final 4th act. But let us first rewind to the beginning of the story to review first principles.

The European Union and its Area of Freedom, Security and Justice (AFSJ) are founded on a set of common values and legal principles of democracy, rule of law and fundamental rights. These are formally enshrined in Article 2 of the Treaty on the European Union (TEU), which makes it clear that the EU is a *Wertegemeinschaft*, a community based on democratic rule of law and fundamental rights.

The Commission's responsibility for upholding the Treaties extends to the foundational values that are the hallmark of the EU, as we know it. The only 'hard law' with a solid Treaty-basis that can be invoked to enforce these values is Article 7 TEU, which consists of a preventive arm (determining a clear risk of a breach) and a corrective dimension (determining a serious and persistent breach).

¹ See the Commission's [response](#) to the text adopted in plenary, SP(2017)16, 17 February 2017.

² European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

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978-94-6138-587-1

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The scope of application of Article 7 TEU is remarkably broad, and has the clear advantage that it is not only limited to member states' actions in implementing EU law, but it also covers breaches in areas where they act autonomously. This provision also provides for more or less clear sanctions: if there is a "serious and persistent breach" by a member state of Article 2 TEU principles, this member state might be sanctioned, including suspension of voting rights inside the Council.

Act I. Failure to activate Article 7 TEU

Even though several member states have provided sufficient evidence of disrespect towards Article 2 TEU principles,³ the Commission has never activated the Article 7 procedure owing to both legal and political considerations.

Among the political considerations has been the reluctance of member states to invoke Article 7 when they themselves often have domestic issues with Article 2 values.⁴ Also, the history of Article 7 includes some embarrassing episodes for the guardians of the rule of law, which they want to avoid in the future.

At the turn of the millennium, the Austrian right-wing populist party Freiheitliche Partei Österreichs (FPÖ), led by Jörg Haider, entered government. For fear of disrespecting European values, a political quarantine was imposed on Austria's right following the formation of the government. Three Wise Men were subsequently commissioned with the task of thoroughly investigating the situation, but they did not find any violation of EU values and suggested that the political sanctions should be lifted.⁵

As First Vice-President Frans Timmermans put it, "the case of Austria (...) was a political response which completely backfired at the time, and since then Member States have been reluctant to take issue with other Member States on this basis..."⁶ But the parallel drawn between the Austrian and the current Hungarian and Polish situations is misleading for several reasons.

The most obvious point is that back in 2000 the preventive arm of the Article 7 procedure did not yet exist, the objective of which is to determine whether a risk of breach existed or not.

³ For example, the treatment of Roma in France between 2010-2013, the Italian Ponticelli incident, the mass surveillance of EU citizens by the British GCHQ intelligence service in collaboration with the United States NSA, or the Hungarian and Polish cases of constitutional capture.

⁴ S. Blockmans and S. Russack, *Regroup and Reform: Ideas for a More Responsive and Effective European Union*, CEPS Task Force Report, CEPS, Brussels, February 2017, p. 46.

⁵ M. Ahtisaari, J. Frowein and M. Oreja, "Report on the Austrian Government's Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPÖ" (Wise Men Report), 40 *International legal materials: current documents* 1, 102–123 (2001).

⁶ [Statement](#) by First Vice-President Frans Timmermans and Commissioner Günther Oettinger – EP Plenary Session – Situation in Poland, Strasbourg, 19 January 2016.

Given the absence of a legally pre-defined preventive procedure at that time, political action was taken vis-à-vis Austria before those in power could erode European values

Whereas it is understandable that EU politicians do not wish to cry wolf a second time, the Hungarian and Polish situations cannot be compared to the former situation in Austria, as the two former countries are well known to have already fallen into a state of constitutional capture. Also, it is difficult to assess whether the treatment of Austria backfired, since it is impossible to second-guess what would have happened without the EU's political reaction.

Among the *legal difficulties*, the high threshold required in the Council to activate the procedure should be singled out: a four-fifths majority is needed to invoke the preventive arm, whereas the corrective arm can be vetoed by any member state (except the member state concerned).

The fear on the Commission's side that the high threshold would not be met may be legitimate. However, such considerations do not lift the Commission's obligations from upholding the Treaties and triggering the only existing instrument devised for dealing with these cases. Failure of the proceeding would certainly involve some political costs too. It may also have negative effects in the member state concerned and some others on their way to rule of law backsliding. The cure offered to the challenge – i.e. avoiding the procedure at all costs – is certainly not the right one. The procedure might fail in the end, but that should not prevent the Commission from initiating it.

“The Council will never in a million years trigger Article 7 against Poland”, said the liberal Dutch MEP Sophia in't Veld, LIBE rapporteur on the “Recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights”.⁷ Whereas this might be true, the real cost for the Commission is not an Article 7 process that may be unsuccessful in the end (and that is the most likely scenario), but rather the cost in eroded legitimacy incurred by not fulfilling its obligation to trigger the procedure against member states that violate the Treaty.

In the eye of the public, with the Commission's complicity, Article 7 TEU is not worth the paper it was written on. The Commission should therefore take a clear stance in protecting the rule of law and let the process die in the Council instead of not even attempting to invoke it, thereby forfeiting the opportunity to prompt a discussion among member states about their responsibility towards each other. Even a 'failed' Article 7 process would have the benefit of making member states aware of their responsibility to uphold EU values and the importance of the loyalty and 'sincere cooperation' principle. It would also safeguard the legitimacy of the Commission's role in protecting democratic rule of law with fundamental rights in the EU.

⁷ Maximilian Steinbeis, “Is the EU Commission's Rule of Law Fight about Poland already lost?”, [Verfassungsblog](#), 17 October 2016.

Act II. The European Commission's EU Rule of Law Framework

Implicitly acknowledging its failure to uphold and enforce EU principles by declining to invoke the only possible procedure, the previous Commission published a Communication in March 2014 setting up a New EU Framework to Strengthen the Rule of Law.⁸ The EU Framework (which has come to be known as the 'pre-Article 7 procedure') enables the Commission to find a solution with the member state concerned to prevent the emerging of a systemic threat to the rule of law in that member state, which could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU.

Where there are clear indications that there is a 'systematic threat' to the rule of law in a given member state, the EU Rule of Law Framework allows for the initiation of a formal structured exchange between the Commission and the member state in question. That exchange is organised in three stages: i) a Commission assessment, in which it issues a rule of law opinion; ii) a Commission rule of law recommendation, which is issued in cases where the controversy is still not resolved, and which would provide a fixed deadline for addressing the concerns; and iii) a follow-up or monitoring of the rule of law recommendation, which – if not satisfactorily addressed – could lead the way towards activating the Article 7 TEU mechanism.

While the EU Framework to Strengthen the Rule of Law can be seen as a step in the right direction, it has a number of far-reaching limitations. The monitoring dimension which it envisages is rather weak and crisis-driven. It does not provide a permanent, comparative and periodic assessment of all EU member states' compliance with Article 2 TEU principles and the EU Charter of Fundamental Rights. It also leaves too much discretion in the Commission's hands to deal or proceed with the envisaged procedure, or take any further follow-up steps. The assessment also lacks independence, impartiality and scientific rigour.

Perhaps most importantly, the formulation of a 'pre-Article 7 procedure' is a milestone in a worrying trend of non-enforcement of EU principles to be witnessed for almost two decades. The 1999 Amsterdam Treaty introduced the Article 7 sanction mechanism, and soon after the 2000 Nice Treaty added a preventive arm to it. The EU Rule of Law Framework in essence means that the Commission, instead of making use of the already softened procedure of Article 7.1 TEU, watered down the process even further by inserting a 'preventive-preventive process', which because of its super-soft nature has not proved to be effective at all.⁹

Indeed, the first – and so far only – case in which the EU Framework has been used in practice was against Poland.¹⁰ The main provocation behind this move was the composition of the Polish Constitutional Tribunal in combination with the changes in the Law on Public Service Broadcasters.

⁸ European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014)158, 11.3.2014.

⁹ Dimitry Kochenov and Laurent Pech, "Better Late than Never? On the Commission's Rule of Law Framework and its First Activation", *Journal of Common Market Studies*, Vol. 54 Issue 5, September 2016, pp. 1062–1074.

¹⁰ "Rule of law in Poland: Commission starts dialogue", [Press release](#), European Commission, 15 January 2016.

The application of the pre-Article 7 procedure raises a number of fundamental questions. Triggering the EU Rule of Law Framework against one member state, i.e. Poland, but not another, namely Hungary, where constitutional capture happened long ago, may call into question the overall objectivity and impartiality of the EU rule of law system, as well as the principle of equal treatment among all member countries.¹¹

The case for criticising EU institutions is particularly strong since the rule of law challenges in Hungary and Poland are qualitatively very similar and closely interrelated; in fact, it seems as if the latter was somehow mimicking the former. The Commission has acted in a rather arbitrary and unequal manner, exposing it to criticism on grounds of political bias. Whereas the Hungarian governing party Fidesz belongs to the large party family of the European Peoples' Party, it seems it was given more leeway in departing from EU values than was accorded the Polish Law and Justice Party (Prawo i Sprawiedliwość, PiS), which is affiliated with the less influential group of European Conservatives and Reformists.¹²

Apart from the subjectivity of the EU Rule of Law Framework process and the inequality of treatment among member states, the actual use of the EU Framework vis-à-vis Poland also raises numerous questions concerning the effectiveness of the procedures. Upholding and promoting EU values may follow a “‘sunshine policy’, which engages and involves rather than paralyses and excludes”, a “value-control which is owned equally by all actors”¹³ and which allows ‘cooperative constitutionalism’. But this approach should only be followed *if* the member state in question is playing by the rules, i.e. accepts the validity of European norms and values and the power of European institutions to supervise these.

This is clearly not the case either in Poland or Hungary at the time of writing. “There is no reason to presume the good intentions of those in power to engage in a sunshine approach involving a dialogue and soft measures to make the entity return to the concept of limited government – a notion that those in power wished to abandon in the first place.”¹⁴ Indeed, instead of deliberation and political discourse and diplomacy, the procedure vis-à-vis Poland has turned into a “dialogue of the deaf”.¹⁵

¹¹ For criticism, see Dimitry Kochenov, “The Commission vs. Poland: The Sovereign State Is Winning 1-0”, [Verfassungsblog](#), 25 January 2016.

¹² Georgi Gotev, “Tavares: Discussing rule of law in Poland separately from Hungary will lead ‘nowhere’”, [Euractiv](#), 13 January 2016.

¹³ Gabriel N. Toggenburg and J. Grimheden, “The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers”, in Carlos Closa and Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, 147-171, 158.

¹⁴ Petra Bárd, Sergio Carrera, Elspeth Guild and Dimitry Kochenov, “An EU mechanism on Democracy, the Rule of Law and Fundamental Rights”, CEPS Paper in Liberty and Security in Europe, CEPS, Brussels, April 2016, p. 41.

¹⁵ Kim Lane Scheppele, Laurent Pech, “Poland and the European Commission, Part I: A Dialogue of the Deaf?”, [Verfassungsblog](#), 3 January 2017.

Since negotiations between the Commission and the Polish government remained fruitless, the Commission formalised its concerns in its Opinion of 1 June 2016.¹⁶ These again remained without echo. The Commission went on to issue its Rule of Law Recommendation of 27 July 2016 with regard to the decisions and constellation of the Polish Constitutional Tribunal, with a deadline expiring on 27 October 2016.¹⁷ Knowing the stance of the Polish government, it was unsurprising that the Recommendation did not have any effect. Instead the governing PiS party called into question the power of the Commission to issue such a recommendation¹⁸ and continued to systematically worsening the independence of and the overall situation within the Constitutional Tribunal of Poland.¹⁹

Even Commission President Jean-Claude Juncker became more sceptical about the effectiveness of the EU Rule of Law Framework.²⁰ Nevertheless, instead of launching an Article 7 TEU procedure, perhaps in an attempt to gain more time, a complementary recommendation was adopted by the Commission on 21 December 2016,²¹ which gave the Polish government another two months in which to comply.

The deadline expired, and one needed no oracle to foretell the PiS government's reactions: it failed to comply with the Commission's requests, challenged the legitimacy and objectivity of the pre-Article 7 process and downplayed its importance.²² What is more, postponing the deadline gave the PiS government sufficient time to entirely capture the Constitutional Tribunal. As the Polish Human Rights Commissioner Adam Bodnar laconically summarised the situation: the struggle for the independence of the Tribunal is lost.²³ As a result, the Commission is increasingly losing face and credibility in the eyes of the public in investing time and energy in avoiding the launch of Article 7 TEU.

¹⁶ See Commission [press release](#). For the full text and its analysis, see Laurent Pech, Commission Opinion of 1 June 2016 regarding the Rule of Law in Poland. [Full text](#) is now available, 19 August 2016.

¹⁷ Commission Recommendation regarding the rule of law in Poland, 27 July 2016, C(2016) 5703 final

¹⁸ Jan Cienski and Maïa de La Baume, "Poland and Commission plan crisis talks. Warsaw warns it could challenge the Brussels rule of law probe in the EU's highest court", [Politico](#), 30 May 2016.

¹⁹ Tomasz Tadeusz Koncewicz, "Constitutional Capture in Poland 2016 and Beyond: What is Next?", [Verfassungblog](#), 19 December 2016.

²⁰ Jurek Kuczkiewicz, Juncker au «Soir»: «Il y a un sérieux problème de gouvernance en Europe», [Le Soir](#), 5 November 2016. For an assessment of Mr Juncker's statement, see Laurent Pech, Kim Lane Scheppele, The EU and Poland: Giving up on the Rule of Law?, [Verfassungblog](#), 15 November 2015.

²¹ Commission Recommendation regarding the rule of law in Poland, complementary to Commission Recommendation (EU) 2016/1374, Brussels, 21 December 2016, C(2016) 8950 final.

²² See <http://www.euractiv.com/section/justice-home-affairs/news/poland-has-last-word-in-rule-of-law-dispute/>

²³ Maximilian Steinbeis, "Is the EU Commission's Rule of Law Fight about Poland already lost?", [Verfassungblog](#), 17 October 2016.

Act III. Follow-up by the Commission to the European Parliament's resolution recommending the establishment of an EU Rule of Law Mechanism

The fact that the European Parliament and the Council proceed with their own rule of law agenda, often in conflict with the Commission's positions, can be seen as further evidence that the Commission was not capable of fulfilling its function and enforcing Treaty provisions on EU values or of representing the European interest respectively. The Commission could however benefit from following up these debates by giving other European institutions' thoughtful consideration in the spirit of 'sincere cooperation'.

In its Resolution adopted in Plenary on 8 September 2015,²⁴ the Parliament called on the Commission to draft an internal strategy on the rule of law and the establishment of a comprehensive EU mechanism. Among the tools mentioned were the establishment of an EU scoreboard and a policy cycle on the basis of indicators to measure member states' performance on democracy, rule of law and fundamental rights, and the setting up of an expert panel that would be responsible for carrying out the assessment that fed into an Annual Report.

A year later, in its Resolution of 25 October 2016, the European Parliament's legislative initiative report²⁵ called the Commission to submit by September 2017, on the basis of Article 295 TFEU, a proposal for the conclusion of a Union Pact for democracy, the rule of law and fundamental rights (EU Pact for DRF), which would take the form of an inter-institutional agreement laying down the specific details (Paragraph 1 of the Resolution).

A comprehensive European Added Value Assessment (EAVA) study accompanied the legislative initiative report prepared by the Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) drawn upon on the basis of Article 225 TFEU. It assessed the chances and potential elements of i) an annual monitoring of democracy, the rule of law and fundamental rights based on an EU scoreboard; and ii) an EU policy cycle for democracy, the rule of law and fundamental rights, involving EU institutions and national parliaments.²⁶ The EAVA study confirmed and provided independent evidence on the legal feasibility and value added for establishing the new mechanism.

²⁴ European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013-2014) (2014/2254(INI)) P8_TA-PROV(2015)0286.

²⁵ The Resolution received overwhelming support: the legislative initiative was passed by 405 votes to 171, with 39 abstentions (see European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV(2016)0409).

²⁶ Wouter van Ballegooij and Tatjana Evas, "An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights", Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld), European Parliamentary Research Service, October 2016, PE.579.328; Annex I, Laurent Pech, Erik Wennerström, Vanessa Leigh, Agnieszka Markowska, Linda De Keyser, Ana Gómez Rojo and Hana Spanikova, "Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights"; Annex II, Petra Bárd, Sergio Carrera, Elspeth Guild and Dimitry Kochenov, with a thematic contribution by Wim Marneffe, "Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights".

The primary objective of the Parliament's 2016 Resolution is to incorporate existing EU tools into a single instrument and ensure that they are exploited to the fullest extent. It also aims to remedy the so-called Copenhagen dilemma,²⁷ and bridge the apparent gap between monitoring EU candidate countries before their accession to the EU with regard to foundational European values and the lack of effective tools vis-à-vis those countries that are already EU member states. The Resolution also provides for regular debates in the EU institutions and national parliaments.

The Commission follow-up to the European Parliament's Resolution, however, has essentially and blatantly rejected the ideas and recommendations tabled by the latter institution. On its face, the Commission welcomes the idea of dealing with the rule of law but pretty much dislikes everything about the way the Parliament has moved forward with its own initiative.

The only suggestions adopted are the emphasis on an inclusive approach and the setting up of an inter-parliamentary dialogue. As to the former, it has already been argued above that it will only work with member states, where the boundaries of democracy, the rule of law and fundamental rights are correctly set by national constitutional law and a domestic bill of rights, and where adherence to internal and external correction mechanisms is granted.

In a state of a constitutional capture, however, with a systemic breach of separation of powers, constitutional adjudication, failure of the ordinary judiciary and the ombudsman system, civil society and the media, there is no reason to believe that those in power will engage in meaningful dialogue with European institutions.

The official answer given by the Commission to the Parliament for the non-follow up has been that "at this stage the Commission has serious doubts about the need and the feasibility of an Annual Report and a policy cycle on democracy, the rule of law and fundamental rights prepared by a Committee of 'Experts' and about the need for, feasibility and added value of an inter-institutional agreement on this matter". The lack of detailed reasons or a specific added value or cost of non-Europe assessment backing up that argument is simply bluffing. This not only contravenes Article 225 TFEU, but it is also difficult to reconcile with the Commission's inter-institutional commitments on 'better law making'.

The above-mentioned EAVA study demonstrated that existing EU instruments are simply not fit for purpose for dealing satisfactorily with situations such as those witnessed in Poland and Hungary. These instruments include not only the EU Rule of Law Framework, but also a handful of others, such as the extremely soft, discursive and highly politicised Rule of Law Dialogue between EU Member States initiated by the Council.²⁸

²⁷ "Once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect." European Parliament (2012), Plenary debate on the political situation in Romania, statement by Viviane Reding, 12 September 2012. See also Viviane Reding, "The EU and the Rule of Law: What Next?", speech delivered at CEPS, 4 September 2013.

²⁸ The General Affairs Council of 16 December 2014 formally adopted the Conclusions on ensuring respect for the rule of law and established a Rule of Law Dialogue between EU Member States.

It is striking that one of the Commission's main justifications behind its 'no go' to the Parliament's recommendation is the challenge that setting up such an EU committee of experts would entail. The surprise may come from the fact that one of the most authoritative rule of law monitoring actors in the context of the Council of Europe (CoE) also relies on a similar expert committee-model, i.e. the Venice Commission. The EAVA study equally concluded that such an expert group or 'Copenhagen Commission' would be the only way to ensure impartiality in the EU assessment.

While EU-CoE cooperation is essential in safeguarding the rule of law, the Union cannot solely rely on an assessment delivered by a non-EU monitoring body. The Venice Commission lacks competence in this area and would exceed its mandate to undertake a review of the specificities of the EU legal system, such as the principle of mutual recognition of judicial and administrative decisions and the EU Charter of Fundamental Rights. EU law-specific challenges call for a Union committee or commission of independent experts and scholars²⁹ with competence and expertise in EU member states' compliance with democratic rule of law and fundamental rights.

Another ground alleged by the Commission for not implementing the Parliament's initiative – which may explain this 3rd act – is, in its words, that “there are also practical and political concerns which may render it difficult to find common ground on this between all the institutions concerned”. This is a very sad message from the guarantor of the Treaties. It seems that this Commission is too politically concerned by what certain EU member states' governments may say or do. It is worth recalling that this is simply not the role of the Commission, or how the legitimacy of its contribution will be ultimately assessed.

Final Act VI. A legitimization crisis?

One of the earlier expectations of having a Commission Vice-President responsible for the Rule of Law and Fundamental Rights was that there would be 'more' and not 'less' EU in safeguarding these very EU values when they may be under threat by member states.

Back in 2014, we hoped that the Commission Vice-President's mission as rule of law and fundamental rights supervisor would constitute “a clear signal that these will be top priorities for the new Commission.”³⁰ In retrospect this was only wishful thinking. Rather than fulfilling its role as envisaged by the Treaties, it seems as if this Commission is behaving more like the Council or a member state government. The Commission's negative answer to the Parliament's Resolution calling for action also sends a worrying message and is detrimental to a healthy

²⁹ Sergio Carrera, Elspeth Guild and Nicholas Hernanz, “The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism”, Study for the European Parliament, Brussels, 2013.

³⁰ Sergio Carrera and Elspeth Guild, “A New Start for the EU's Area of Freedom, Security and Justice? Setting of Priorities for the new European Commission”, CEPS Commentary, CEPS, Brussels, 23 September 2004.

working relationship with the European Parliament – the institution holding the higher degree of democratic legitimacy and being closer to the citizens.

If the Commission continues to sideline itself in safeguarding rule of law, democracy and fundamental rights, the final act of this rule of law play can be expected to trigger a *crisis of legitimacy* of the Commission, and, in turn, of the EU itself. The major role and importance that these issues constitute for the Union's foundations cannot be overstated, especially in light of current nationalistic debates across the Union.

EU values constitute the very conditions for the Union's existence and provide the best assurance for its success. It is therefore time for this Commission to firmly deliver an *EU rule of law and fundamental rights agenda* that is not compromised or negotiable by governmental or 'less Europe' interests. Rather, it must clearly demonstrate the Union's value added towards the public and citizenry on issues that lay at the heart of everyone's liberty and security.



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