

# Enforcing compliance of the Rule of Law by the Member States of the EU: Emphasising the EU's Failure?

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# ENFORCING COMPLIANCE OF THE RULE OF LAW BY THE MEMBER STATES OF THE EU: EMPHASISING THE EU'S FAILURE?\*

Femke Gremmelprez\*\*

***Abstract:** The EU is founded on the rule of law enshrined in Article 2 TEU. Nevertheless, recent developments within certain Member States demonstrate that not all Member States are able to keep up with the high standards of the rule of law during their membership. The EU has several tools at its disposal to act against non-compliant Member States, such as the Cooperation and Verification Mechanism for Romania and Bulgaria, the nuclear option of Article 7 TEU, and the original infringement procedure under Article 258 TFEU. The European Commission has established a new EU Rule of Law Framework in 2014, which is applied for the first time for Poland. This suggests that the EU is not able to enforce the compliance of the rule of law effectively by using its original legal framework. The question, thus, raises whether the new mechanism will enable the EU to enforce effectively the compliance of the rule of law by the Member States. Based on an extensive assessment of the original legal framework and the EU Rule of Law Framework, the state of play of the EU to enforce the compliance of the rule of law will be analysed.*

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## I. Introduction

*“Our Union is built on a break from the past; on the principle that societies should be free and open, sheltered from arbitrariness and force. Compromising on values is compromising on the EU, weakening it and bringing it to a standstill. There can be no Europe without full respect of our common values.”<sup>1</sup>*

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

Though, various Treaty provisions declare that the values should be promoted and respected – already even before a state wants to accede to the EU.<sup>4</sup> It is not only the aim of the EU to promote its values, also the EU institutions shall aim to promote them.<sup>5</sup> Moreover, according to the principle of mutual recognition, the Member States have to facilitate the achievement of the EU’s tasks and shall refrain from taking any measure which could jeopardise the attainment of the objectives of the EU.

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<sup>1</sup> F. TIMMERMANS, “Commission Statement: EU framework for democracy, rule of law and fundamental rights”, SPEECH/15/4402, Strasbourg, 12 February 2015.

<sup>2</sup> D. KOCHENOV, “Europe’s Crisis of Values”, *University of Groningen Faculty of Law Research Paper Series* 2014, no. 15, 4; and A. VON BOGDANDY, M. KOTTMANN, C. ANTPÖHLER, J. DICKSCHEN, S. HENTREI and M. SMRKOLJ, “Reverse Solange – Protecting the essence of fundamental rights against EU Member States”, *Common Market Law Review* 2012, no. 49, (489) 490.

<sup>3</sup> D. KOCHENOV, “Europe’s Crisis of Values”, *University of Groningen Faculty of Law Research Paper Series* 2014, no. 15, 4.

<sup>4</sup> According to Article 49 TEU, the candidate countries have to respect the values enshrined in Article 2 and has to be committed to promote them.

<sup>5</sup> Article 3(1) TEU and Article 13(1) TEU.

This paper will focus on the rule of law as part of the fundamental values. The European Commission (hereinafter ‘Commission’) has established a Framework to strengthen the rule of law within the Member States which complement the already existing and more general legal framework to enforce the compliance of the fundamental values by the Member States. According to the Commission, “*the rule of law is the backbone of any modern constitutional democracy*”.<sup>6</sup> To uphold mutual trust among the Member States and their respective legal systems, each Member State has to comply with the rule of law. Nevertheless, in the recent years, problematic situations emerged in various Member States. Hence, it can be argued that a gap exists between the proclamation of the values enshrined in Article 2 TEU and the degree of actual compliance with these values by the Member States.<sup>7</sup>

This paper will argue that the EU fails to enforce the compliance of the rule of law by the Member States. To this end, the original legal framework to enforce the compliance of the rule of law are assessed below, namely Article 7 TEU, the infringement procedure of Article 258 TFEU and the Cooperation and Verification Mechanism for Romania and Bulgaria. Then, the newly established EU Rule of Law Framework of the Commission as a reaction to the inefficiencies of the foregoing mechanisms has been subject to a critical review, in particular in relation to the first activation with regard to Poland.

## **II. The failure of the original enforcement mechanisms**

The EU has a ‘toolbox’ with various instruments at its disposal to enforce the compliance of the rule of law by the Member States. In the Treaties, various mechanisms can be found. The main instrument, but at the same time the most far going, is Article 7 TEU. The current Treaties leave some other options open to address non-compliance with the rule of law, such as the infringement procedure of Article 258 TFEU. Besides the Treaties, also the Acts of Accession foresee instruments to monitor compliance, namely the Cooperation and Verification Mechanism for Romania and Bulgaria.

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<sup>6</sup> <sup>6</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law, COM(2014)158 final/2, 19 March 2014, 1.

<sup>7</sup> W. VAN BALLEGOIJ and T. 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), PE 579.328, April 2016, 1.

**a) Article 7 TEU: ‘the nuclear option’**

Article 7 TEU is the only explicitly mentioned option in the current Treaties to enforce the compliance of the rule of law by the Member States. It is introduced by the Amsterdam Treaty in the light of the membership prospect of the ten CEECs and amended by the Nice Treaty, developing the rule of law “*from a precondition for accession into an ongoing and enforceable condition of EU membership*”.<sup>8</sup> Article 7 TEU establishes the possibility to take measures in case of breaches of the rule of law and other fundamental values enshrined in Article 2 TEU. It provides a two-stage procedure consisting of, on the one hand, an early warning system in case of a risk of breaches of the rule of law and, on the other hand, a sanction mechanism in the event of an actual breach of this value.

In essence, Article 7 TEU merely confers powers to political institutions, giving both the European Council and the Council of Ministers (hereinafter ‘Council’) a wide margin of discretion. The Council, on the one hand, *may* determine whether there is a clear risk of a serious breach of the rule of law.<sup>9</sup> In turn, the European Council *may* determine whether a serious and persistent breach exist.<sup>10</sup> Ultimately, if the European Council determines that such a breach exists, the Council *may* impose sanctions, namely the suspension of certain rights that can be derived from the Treaties, including the voting rights of the Member State in the Council.<sup>11</sup> Moreover, the Court of Justice of the European Union (hereinafter ‘CJEU’) has explicitly restricted jurisdiction. According to Article 269 TFEU, the CJEU merely has jurisdiction to review the legality of a decision pursuant Article 7 TEU regarding the procedural rules.

Additionally, the high majority thresholds increase the difficulty for triggering the mechanism and, consequently, imposing sanctions against non-compliant Member States. The thresholds for activating Article 7 TEU are nearly impossible to meet. According to Article 7(2) TEU, for instance, the European Council unanimously has to determine the existence of a serious

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<sup>8</sup> Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union, Respect for and promotion of the values on which the Union is based, COM (2003) 606, 15 October 2003, 3.

<sup>9</sup> Article 7(1) TEU.

<sup>10</sup> Article 7(2) TEU.

<sup>11</sup> Article 7(3)

and persistent breach with unanimity.<sup>12</sup> All Member States have to agree, but it seems that the Member States are too concerned that the ‘nuclear option’ will be used against them one day. The fact that Article 7 TEU has been called the ‘nuclear option’ will not increase the political willingness to invoke the mechanism.<sup>13</sup> On top of that, it creates “*a political convention whereby it would be politically counterproductive*” to invoke Article 7 TEU.<sup>14</sup>

To date, this Treaty-based mechanism has never been used in practise, although situations warranted the entry into force of the Article 7 TEU mechanism. Hence, it has never come to the point where the political institutions had to use their margin of discretion. The other institutions, the European Commission and the European Parliament, together with the Member States which can propose to start this mechanism, seem reluctant to activate the mechanism.

Besides the political discretion, the fact that Article 7 TEU contains unclear notions is also one of the reasons why Article 7 TEU has never been invoked. Substantive concepts such as ‘a clear risk of a serious breach’ and ‘a serious and persistent breach’ are not defined, neither are clear benchmarks determined to activate Article 7 TEU in an objective and impartial manner.

However, besides its shortcomings and its unfeasibility, Article 7 TEU has a good intention to penalising and remedying a serious and persistent breach, and above all preventing a breach of the rule of law. This mechanism can be seen as a unique instrument of EU integration, as it has a ‘general and horizontal’ nature.<sup>15</sup> In particular, it does not make a distinction between ‘old’ and ‘new’ Member States, and the scope of Article 7 TEU is not restricted to the areas covered by EU-law, but it also allows the EU to take actions in the event of a breach, whereby Member States act autonomous within their exclusive competence.<sup>16</sup> A breach can be seen as undermining the very foundations of the EU and therefore, it ignores the traditional limitation

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<sup>12</sup> Obviously apart from the Member State concerned. Art. 354 TFEU establishes that the member of the Council or the member of the European Council representing the Member State concerned shall not take part in the vote and calculation of the majorities mentioned in Art. 7 TEU.

<sup>13</sup> M. BARROSO, State of the Union 2012, 12 September 2012, [http://ec.europa.eu/soteu2012/files/soeu\\_web.pdf](http://ec.europa.eu/soteu2012/files/soeu_web.pdf).

<sup>14</sup> L. PECH et al., “An EU mechanism on democracy, the rule of law and fundamental rights – Annex 1”, European Added Value Unit, PE 579.328, April 2016, 115.

<sup>15</sup> G. SAPUTELLI and S. MANGIAMELI, “Article 7 The Principles of the Federal Coercion” in H.-J. BLANKE and S. MANGIAMELI (eds.), *The Treaty on European Union: Commentary*, Berlin, Springer Berlin Heidelberg, 2013, (349) 351; and W. SADURSKI, “Adding a bite to a bark? A story of Article 7, the EU enlargement, and Jorg Haider”, *Sydney Law School Research Paper* January 2010, no. 10/1, 26.

<sup>16</sup> C. CLOSA, D. KOCHENOV and J.H.H. WEILER, “Reinforcing rule of law oversight in the European Union”, *EUI Working Paper RSCAS* 2014, 7.

of competences based on the principle of conferral of powers pursuant Article 5 TEU.<sup>17</sup> Notwithstanding these positive features, the shortcomings prevail.

The political discretion and the lack of judicial protection and review are besides the high majority thresholds to activate the mechanism the main reasons why the EU is not able to enforce effectively the compliance of the rule of law by the Article 7 TEU mechanism. Nevertheless, Article 7 TEU puts forward some important features which could ultimately lead to an effective and accurate enforcement mechanism. Elements such as the general and horizontal scope, judicial review, and continuous scrutiny of all Member States will enable the EU to (re)act appropriately as soon as possible.

### **b) Article 258 TFEU: the original infringement procedure**

From the EU-Treaties, another implicit mechanism can be derived, namely the infringement procedure of Article 258 TFEU. Infringement actions are to challenge specific and concrete violations of EU-law by a Member State. The case law of the CJEU is in a great extent related to “*deficient, incomplete or incorrect transposition of Directives*”.<sup>18</sup> In case Member States are not complying with the rule of law, the Commission can also bring the concerned Member States before the CJEU, however, merely for singled-out issues breaching specific EU-legislation.

Hungary is an excellent example of a Member State brought before the CJEU on the basis of Article 258 TFEU in relation to rule of law’s compliance. It concerns the constitutional changes in Hungary as a consequence of the concentration of political power in the hands of a right-wing party, including the reduction of the Constitutional Court’s power and the radically lowered retirement age for judges, prosecutors, and notaries from the age of 70 to 62 years.<sup>19</sup> Instead of initiating the mechanism under Article 7 TEU for a breach of the independency of the judiciary as an element of the rule of law, the Commission decided to start individual infringement procedures under Article 258 TFEU.<sup>20</sup> In the case of the lowering of the

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<sup>17</sup> W. SADURSKI, “Adding a bite to a bark? A story of Article 7, the EU enlargement, and Jorg Haider”, *Sydney Law School Research Paper* January 2010, no. 10/1, 26.

<sup>18</sup> C. PINELLI, “Protecting the fundamentals: Article 7 of the Treaty on the European Union and beyond”, *FEPS Jurists Network* 25 September 2012, 10.

<sup>19</sup> T. BOROS, “Constitutional amendments in Hungary: The Government’s struggle against the Constitutional Court”, *Friedrich Ebert Stiftung Büro Budapest* February 2013.

<sup>20</sup> Judgement in *Commission/Hungary*, C-286/12, ECLI:EU:C:2012:687, and judgement in *Commission/Hungary*, C-288/12, ECLI:EU:C:2014:237.



retirement age, the infringement procedure was found successful. The CJEU declared this as an unjustified discrimination based on age contrary to the Equality Directive 2000/78 and ordered that the judges have to return. Nevertheless, Hungary only complied with the judgement after the National Judicial Office appointed new judges to the empty positions. Then, Hungary allowed the senior judges to return back to work, but not to their original positions if those positions had already been filled with the new appointees.<sup>21</sup> Furthermore, the Hungarian government offered compensation to the retired judges if they would not go back to work. As a result, very few judges actually returned to judging and none returned to their leadership posts.<sup>22</sup> Nevertheless, this led according to Commission Reding to compliance with the judgement of the CJEU: *“Hungary has respected – as the rule of law requires – the judgement of the Court of Justice of November (...). President Barroso and I were intensively involved in bringing all these matters to a satisfying conclusion from a legal perspective.”*<sup>23</sup>

However, by lodging an individual infringement procedure, the structural and persistent problems specific for the situation in Hungary are not solved. The Venice Commission, in particular, identified the issue as a structural problem of judicial independence.<sup>24</sup> It is clear that the Commission only focused on a fragment of the issue – age discrimination, instead of providing the CJEU with the broader picture addressing the greater concern – independency of the judiciary. Infringement procedures are important, but if a Member State is threatening the foundational stones of the EU, this procedure will only address a specific and concrete violation of EU-law by a Member State and not the structural problem related to the rule of law as such. Therefore, this procedure will be too small bore to challenge the structural problem the Member State is faced with.<sup>25</sup> Considering this procedure, another shortcoming can be discovered. Even when the Commission launches various infringement procedures

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<sup>21</sup> E. MUSTAFIC, “European values as criteria for accession to the European Union: the effectiveness of sanction mechanisms on Member States and non-Member States”, *Central European University*, March 2014, 39.

<sup>22</sup> K. SCHEPPELE, “What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions”, November 2013, [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45\\_princetonuniversityscheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45_princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf), 7.

<sup>23</sup> V. REDING, “The rule of law – What next?”, 4 September 2013, [http://europa.eu/rapid/press-release\\_SPEECH-13-677\\_nl.htm](http://europa.eu/rapid/press-release_SPEECH-13-677_nl.htm).

<sup>24</sup> European Commission for Democracy through law (Venice Commission), Opinion on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of Courts of Hungary, CDL-AD(2012)001, Strasbourg, 19 March 2012, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)001-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e).

<sup>25</sup> K. SCHEPPELE, “What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions”, November 2013, [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45\\_princetonuniversityscheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45_princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf), 3.

concerning one Member State, as it was the case for Hungary, the CJEU would still not be able to address the structural and persistent problem. The CJEU is namely institutionally not able to generate the patterns at stake if the cases are filed one by one.<sup>26</sup> Each concrete infringement action stands on its own ground.<sup>27</sup> In addition, this mechanism gives a wide margin of discretion in the hands of the Commission. The Commission might not start proceedings at all or when started, may stop proceedings for political reasons, etc. The infringement procedure related to the expulsion of EU citizens with Roma origin by France for instance – although initially started, was avoided by setting an ultimatum for France.

Hence, analysing the infringement procedure of Article 258 TFEU, this mechanism certainly will not be accurate to enforce the compliance of the rule of law. The Commission has never launched an infringement procedure to remedy a violation of the fundamental values of Article 2 TEU. It cannot be used to address matters that go beyond EU competence, contrary to the Article 7 TEU mechanism. It is not designed to resolve structural and persistent problems in a Member State. Moreover, it is crisis-oriented, meaning that the infringement procedure can only be initiated if a rule of law violation already occurred and moreover represents a breach of a specific EU rule. The enforcement of the compliance with Article 2 TEU and the rule of law in particular by Member States clearly needs a more general approach. Not only specific EU-law infringements have to be tackled, but rule of law infringements as such should be dealt with. Moreover, Article 2 TEU infringements should be brought under the scrutiny of the CJEU, avoiding the political convention with respect to Article 7 TEU and reducing the risk of discretion and opportunistic behaviour.<sup>28</sup> In this way, the CJEU will be able to develop case law concerning Article 2 TEU and the enshrined fundamental values, improving the legal certainty and clarity about the scope and meaning of the fundamental values.<sup>29</sup>

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<sup>26</sup> K. SCHEPPELE, “What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions”, November 2013, [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion_en.pdf), 3.

<sup>27</sup> K. SCHEPPELE, “What can the European Commission do when Member States violate basic principles of the European Union? The case for systemic infringement actions”, November 2013, [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppesystemicinfringementactionbrusselsversion_en.pdf), 3.

<sup>28</sup> L. PECH et al., “An EU mechanism on democracy, the rule of law and fundamental rights – Annex 1”, European Added Value Unit, PE 579.328, April 2016, 41.

<sup>29</sup> D. KOCHENOV, “How to turn Article 2 TEU into a down-to-Earth provision?”, 8 December 2013, <http://www.verfassungsblog.de/how-to-turn-Article-2-teu-into-a-down-to-earth-provision/#.VUSx8EJoWE4>; and K. SCHEPPELE, “What can the European Commission do when Member States violate basic principles of the

### c) Cooperation and Verification Mechanism for Bulgaria and Romania

Contrary to Article 7 TEU and Article 258 TFEU, the EU has also a country-specific mechanism at its disposal to enforce the compliance of the rule of law. Namely, the Commission has set up a Cooperation and Verification Mechanism for Bulgaria and Romania (hereinafter ‘CVM’) in order to assess the progress made by those Member States and to help focus the efforts of the concerned Member State through specific recommendations, as both Bulgaria and Romania had to make improvements with regard to the rule of law. It has to be admitted, the CVM can be considered as an improvement and as an essential mechanism to verify whether a Member State remains complying with the rule of law after accession. It brings the Member State concerned under continuous scrutiny of the Commission. Though, the CVM is limited with regard its scope *ratione personae*. The CVM brings along increased differentiation among Member States. Only Romania and Bulgaria are subject to additional monitoring of the Commission, where other Member States are not, despite the fact that there are situations which may have justified the monitoring of other Member States. It creates the impression that some Member States are ‘more equal than others’. Differentiation with respect to monitoring the compliance of the rule of law suggest that Romania and Bulgaria are ‘second class’ Member States in comparison with the other Member States, contrary to the principle of equality of Member States pursuant Art. 4(2) TEU.

Even to date – nigh years after the accession, both Member States still have to make progress.<sup>30</sup> Shortcomings related to the rule of law have still not been solved, notwithstanding the fact that the Commission alleges that the CVM reports have played an important role in the consolidation of the rule of law in Romania and Bulgaria.<sup>31</sup> Moreover, more deficiencies occurred over the years. In 2012, for instance, important questions were raised regarding the respect for the rule of law and the independence of the judiciary in Romania.<sup>32</sup> The

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European Union? The case for systemic infringement actions”, November 2013, [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45\\_princetonuniversitiescheppelesystemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45_princetonuniversitiescheppelesystemicinfringementactionbrusselsversion_en.pdf), 6.

<sup>30</sup> Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism, COM (2015) 35 final, 28 January 2015 and Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Cooperation and Verification Mechanism, COM (2015) 36 final, 28 January 2015.

<sup>31</sup> Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism, COM (2015) 35 final, 28 January 2015 and Report from the Commission to the European Parliament and the Council on progress in Bulgaria under the Cooperation and Verification Mechanism, COM (2015) 36 final, 28 January 2015.

<sup>32</sup> Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism, COM (2012) 410 final, 18 July 2012, 1.

Commission named various concerns, such as political challenges to judicial decisions, the undermining of the constitutional court, the overturning of established procedures, the removal of key checks and balances and the indications of manipulations and pressure which affect institutions, members of the judiciary, and eventually have a serious impact on society as a whole.<sup>33</sup> This means that even five years after the accession of Romania, it is still not satisfying the benchmarks that actually already should have been fulfilled at the time of accession. Moreover, the Commission had to introduce a supplementary benchmark. Namely, since July 2012, the Commission reviews the progress made for the independency of the judiciary as long as the recommendations are not fulfilled. So, although the scope *ratione materiae* is limited, the CVM is characterised by a certain degree of flexibility. Due to the exceptional nature of the developments in Romania in 2012, the Commission justified the inclusion of specific urgent recommendations addressing the situation with regard to the respect for the rule of law and the independence of the judiciary. The Commission States: *“Overall progress has to be assessed in the context of a wider social recognition of key principles such as the rule of law, and the independence of the judicial process as part of the checks and balances of a well-functioning democracy. A well-functioning, independent judicial system, and respect for democratic institutions are indispensable for mutual trust within the European Union, and for gaining the confidence of citizens and investors. (···) This report therefore includes specific recommendations to address the current situation and to help restore respect for principles which are cornerstones of European Democracy”*<sup>34</sup> The Commission is thus willing to extend the scope of the CVM to other fundamental values when one of those ‘foundational stones’ of the EU is jeopardised by the Romania, respectively Bulgaria. Nevertheless, the importance of the flexibility cannot be exaggerated. Adding new benchmarks brings along the opportunity for the Commission to amend their monitoring policy at any time as long as it can be justified by exceptional circumstances.

The CVM shows that there is within the EU a tendency towards open-ended monitoring on the part of the Commission using the system of specific benchmarking, especially in the case of Romania and Bulgaria. This monitoring mechanism does not provide enough leverage to redress non-complying situations. The CVM, after all, does not result in sanctions. The CVM is in fact a monitoring mechanism and consequently it will only result in naming and shaming

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<sup>33</sup> Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism, COM (2012) 410 final, 18 July 2012, 2.

<sup>34</sup> Report from the Commission to the European Parliament and the Council on progress in Romania under the Cooperation and Verification Mechanism, COM (2012) 410 final, 18 July 2012, 2-3 and 19-21.

of the concerned Member State. Therefore, notwithstanding the importance of a permanent and overall monitoring process, this system demonstrates various shortcomings and will not enable the EU to enforce the compliance of the rule of law by the Member States.

### **III. The newly established EU Rule of Law Framework**

The above mentioned shortcomings to enforce the compliance with the rule of law by means of the original legal framework emphasise the need for an effective and efficient enforcement mechanism at EU's disposal.<sup>35</sup> In March 2014, the Commission created, therefore, a new framework to ensure an effective and coherent protection of the rule of law in all the Member States, a framework to address and resolve a situation where a systemic threat to the rule of law emerges. As former President of the Commission José Manuel Barroso stated: *"We need a better developed set of instruments, not just an alternative between the 'soft power' of political persuasion and the 'nuclear power' of Art. 7 TEU"*.<sup>36</sup> The new EU framework to strengthen the rule of law (hereinafter 'Rule of Law Framework') can also be called a 'pre-Article 7 TEU mechanism', as it is created in order to find a solution together with the Member State concerned, avoiding the development of a clear risk of a serious breach within the meaning of Article 7 TEU.<sup>37</sup> Contrary to Article 7 TEU, the Commission's Rule of Law Framework has been activated already. For the first time, the Commission has launched the Framework in January 2016 against Poland. Hence, only the future will tell whether or not the new Rule of Law Framework will be effective in practise. Nevertheless, the Rule of Law Framework will be analysed from a theoretical point of view.

#### **a) A three-stage procedure**

The Framework will mainly focus on dialogue, objectivity and thorough assessment, equal treatment and swift and concrete actions and is divided into three procedural stages, namely Commission's assessment, Commission's recommendation and follow-up.<sup>38</sup>

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<sup>35</sup> European Parliament – Committee on Civil Liberties, Justice and Home Affairs, Working Document on the situation of fundamental rights in the European Union in 2012, 1.

<sup>36</sup> European Commission, "State of the Union address 2013 – speech José Barroso President of the European Commission", SPEECH/13/684, 11 September 2013, 10.

<sup>37</sup> Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, COM (2014) 158 final 2, 19 March 2014, 6.

<sup>38</sup> Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, COM (2014) 158 final 2, 19 March 2014, 7.

The first stage is based on Commission's assessment. This includes gathering information, taking due account of information received from the European Union Agency for Fundamental Rights (hereinafter 'FRA') and other EU- and international bodies. This will enable the assessment whether or not there are clear indications of a systemic threat to the fundamental values.<sup>39</sup> If it follows from the assessment that there is a situation of systemic threat to the rule of law, the Commission will initiate a dialogue with the Member State concerned, by sending a 'Rule of Law Opinion' giving the Member State concerned the possibility to respond.<sup>40</sup> In line with the duty of sincere cooperation pursuant Article 4(3) TEU, the Commission expects that the Member State concerned will cooperate throughout the process and will refrain from adopting any irreversible measure in relation to the concern raised by the Commission.<sup>41</sup> It can be suggested that the Commission is able to launch an infringement procedure pursuant Article 258 TFEU based on a breach of the duty of sincere cooperation against a non-compliant Member State when the Member State concerned does not cooperate during the procedure.

The Commission has recently adopted a Rule of Law Opinion concerning the constitutional developments in Poland, following an intensive dialogue that has been ongoing since 13 January 2016, initiating the first step. In accordance with the Opinion of the Venice Commission in March 2016, the Commission raised three concerns with respect to the rule of law compliance, namely the appointment of judges to the Constitutional Tribunal, the laws amending the functioning of the Constitutional Tribunal and the effectiveness of the Constitutional review of new legislation.<sup>42</sup> Poland has now the opportunity to submit their observations upon which further constructive dialogue will be based in order to find solutions.

During the second stage, the Commission will issue a 'Rule of Law Recommendation' if there is objective evidence of a systemic threat and the Member State concerned is not taking appropriate action to redress it.<sup>43</sup> The recommendation has to clearly indicate the reasons for the Commission's concerns and has provide recommendations to solve the problems within a

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<sup>39</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 7.

<sup>40</sup> Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, COM (2014) 158 final 2, 19 March 2014, 8.

<sup>41</sup> Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, COM (2014) 158 final 2, 19 March 2014, 8.

<sup>42</sup> European Commission, "Commission adopts Rule of Law Opinion on the situation in Poland", MEMO/16/2017, 1 June 2016.

<sup>43</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 8.

fixed time limit.<sup>44</sup> The third and final stage will then be a follow-up. The Commission will monitor the action of the Member State concerned and verify whether the Member State is in compliance with the recommendation.<sup>45</sup>

## **b) Critical overview**

The Commission's Rule of Law Framework cannot be considered as revolutionary.<sup>46</sup> The Rule of Law Framework in essence builds upon constructive dialogue between the Commission and the Member State concerned. When the whole procedure has been gone through without achieving the desired result, the Commission has the possibility to initiate the 'Article 7 TEU mechanism'.<sup>47</sup> However, the shortcomings of this latter procedure have been analysed, suggesting this mechanism likely is never to be invoked. Therefore, it could be argued that the EU is back to square one, unable to enforce the compliance of the rule of law.

### ***Competence Delimitation***

Yet, the fact that the Rule of Law Framework is merely built upon dialogue and is considered to be a 'pre-Article 7 TEU mechanism', ensures that the Rule of Law Framework does not create new legal consequences for the Member States.<sup>48</sup> Nevertheless, criticism has been raised with regard to the competence of the Commission to establish the new Rule of Law Framework. The Council's Legal Service, for instance, has raised the objection of the principle of conferral of powers enshrined in Article 5 TEU. The Council argued that the European Commission has no competence whatsoever to create a new mechanism, as the Treaties do not foresee in a legal basis empowering the institutions to do so.<sup>49</sup>

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<sup>44</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 8.

<sup>45</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 8.

<sup>46</sup> D. KOCHENOV, and L. PECH, "Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction", *Foundation Robert Schuman Policy Paper European issues* 2015, no. 356, 8.

<sup>47</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 8.

<sup>48</sup> D. KOCHENOV, and L. PECH, "Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction", *Foundation Robert Schuman Policy Paper European issues* 2015, no. 356, 8.

<sup>49</sup> Council of the European Union, "Ensuring respect for the rule of law in the European Union", 14 November 2014, 15206/14, 4.

The delimitation of competences, however, should not be a problem for establishing a dialogue among the Commission and the Member State concerned. Moreover, the explicit link with Article 7 TEU has to be emphasised. Analysing the Rule of Law Framework, one can presume that the Communication and the framework established herein are detailed guidelines concerning the working of Article 7(1) TFEU.<sup>50</sup> Moreover, the Commission itself highlights the fact that the Rule of Law Framework is a mechanism to precede and complement Article 7 TEU rather than additional to Article 7 TEU. According to Article 7(1) TEU, “*the European Commission, (...), may determine that there is a clear risk of a serious breach by a Member State (of the fundamental values)*”. This implies, by determining whether there is a clear risk, that the Commission has to investigate any potential risk.<sup>51</sup> Taking independent and external expertise to determine a risk of non-compliance will ensure the non-partisan character of the Commission. Hence, the conferral of power principle can in principle not be an issue considering its link to Article 7 TEU. However, it is exactly this link that will be the main problem of this Framework, making it ineffective to enforce the compliance of the fundamental values by the Member States.

### ***Activating the Rule of Law Framework***

Besides the competence issue, the Rule of Law Framework consists of other characteristics which can potentially hinder its effective application. To begin with, the Commission did not put forward clear criteria and benchmarks for activating the Rule of Law Framework, neither did it specify the concrete meaning and scope of the concepts used, comparable to the Article 7 TEU mechanism. Therefore, it can be argued that the Rule of Law Framework ends up as unworkable as Article 7 TEU.<sup>52</sup> In fact, this Framework has already been triggered, where Article 7 TEU never has been invoked although situations have warranted this. Moreover, the Commission refers in particular to the core meaning of the rule of law, established by the case law of the Court of Justice of the European Union and the European Court of Human Rights

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<sup>50</sup> D. KOCHENOV, and L. PECH, “Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction”, *Foundation Robert Schuman Policy Paper European issues* 2015, no. 356, 8.

<sup>51</sup> D. KOCHENOV and L. PECH, “From bad to worse? On the Commission and the Council’s rule of law initiatives”, <http://eulawanalysis.blogspot.be/2015/01/from-bad-to-worse-on-commission-and.htm>, 19 January 2015.

<sup>52</sup> L. PECH et al., “An EU mechanism on democracy, the rule of law and fundamental rights – Annex 1”, *European Added Value Unit*, PE 579.328, April 2016, 59.



to elucidate which principles are included in the rule of law.<sup>53</sup> Notably, the Commission specifies that “*those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including the respect for fundamental rights; and equality before the law.*”<sup>54</sup>

The fact remains, however, that the Commission has not clarified certain concepts, such as ‘threats to the rule of law which are of a systemic nature’, and has not specified the benchmarks to trigger the Rule of Law Framework. Uncertainty about the reasons which would lead to the activation of the mechanisms can contribute to ambivalence whether the mechanism should be activated or not and (unintentional) to opportunistic behaviour of the Commission. Especially, it has to be taken into consideration that the Commission is the only EU-institution that can activate the Rule of Law Framework and therefore has a wide discretion deciding whether or not to invoke this Framework. The Commission’s decision to launch the dialogue under the Rule of Law Framework regarding the situation in Poland, but not regarding Hungary for instance can be questioned in this regard. So in the end, the Rule of Law Framework might end up as unworkable as Article 7 TEU.<sup>55</sup> Moreover, it raises the additional concern of coordination between the ‘pre-Article 7 mechanism’ and Article 7 TEU. The difference between the various notions ‘threats of a systemic nature’ and ‘clear risk of a serious breach’ is unclear, however decisive for the activation of the Rule of Law Framework and Article 7 TEU respectively.<sup>56</sup>

### ***Fact-finding and Assessment***

Moreover, the Communication on the new Framework does not provide information on how the fact-finding and assessment will be carried out.<sup>57</sup> This contradicts the principle of objectivity and impartiality the Commission has kept in mind by establishing this

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<sup>53</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 4.

<sup>54</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 4.

<sup>55</sup> D. KOCHENOV, and L. PECH, “Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction”, *Foundation Robert Schuman Policy Paper European issues* 2015, no. 356, 9.

<sup>56</sup> D. KOCHENOV, and L. PECH, “Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction”, *Foundation Robert Schuman Policy Paper European issues* 2015, no. 356, 9.

<sup>57</sup> L. PECH et al., “An EU mechanism on democracy, the rule of law and fundamental rights – Annex 1”, *European Added Value Unit*, PE 579.328, April 2016, 62.

Framework.<sup>58</sup> Nevertheless, it enables the Commission to gather information and assess the situation in a flexible and most suitable manner depending on the specific situation of a certain Member State.

It is, however, certain that the Commission builds its fact-finding and assessment upon the expertise of third parties.<sup>59</sup> The FRA will be one of the parties. The FRA is an agency, formally established in 2007, that consists of experts in collecting and analysing data in the field of fundamental rights.<sup>60</sup> Nowadays, the FRA is nothing more than a special body with advisory power, the objective of which is to provide assistance and expertise relating to fundamental rights.<sup>61</sup> The FRA could alert the Commission of any suspected breaches of fundamental rights, although it is only recognised that EU-institutions seek the assistance of the FRA to obtain a report on the situation in the Member State concerned.<sup>62</sup> The authority of the FRA is limited, as the Council Decision establishing the FRA does not refer to the Article 7 TEU mechanism.<sup>63</sup> Hence, issues related to fundamental rights arising within Member States that go beyond the implementation of EU-law will not be incorporated within the mandate of the FRA.

The Commission took into account the limitations the FRA is confronted with and will not only consult EU-bodies, but explicitly refers to other international organisations dealing with the rule of law, such as the Council of Europe and in particular the Venice Commission. However, allowing external bodies to have a strong role in monitoring Member States' compliance of the fundamental values enshrined in Article 2 TEU can also be criticised.<sup>64</sup> Article 2 TEU contains 'EU's' fundamental values. 'Outsourcing' will be most likely insufficient in dealing with specific areas of EU-law, as this requires a EU autonomous

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<sup>58</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 7.

<sup>59</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 8-9.

<sup>60</sup> K. MARGARITIS, "Some thoughts on the interrelation of Article 7 TEU with the EU Fundamental Rights Agency", *Perspectives of Business Law Journal* November 2013, vol. 2, no. 1, (143) 146.

<sup>61</sup> Art. 2 Council Regulation No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, *OJL* 53, 22 February 2007.

<sup>62</sup> C. PINELLI, "Protecting the fundamentals: Article 7 of the Treaty on the European Union and beyond", *FEPS Jurists Network* 25 September 2012, 11 and 14.

<sup>63</sup> G. TOGGENBURG, "The role of the new EU Fundamental Rights Agency: Debating the 'sex of angels' or improving Europe's human rights performance?", *European Law Review* June 2008, no. 33, (385) 389.

<sup>64</sup> C. CLOSA, D. KOCHENOV and J.H.H. WEILER, "Reinforcing rule of law oversight in the European Union", *EUI Working Paper RSCAS* 2014, 18.

interpretation.<sup>65</sup> However, all Member States of the EU are members of the Council of Europe and, therefore, subject to the monitoring of these organisations. So, as far as the standards of the rule of law correspond with these of the EU, the Commission should nevertheless use the information gathered by those international organisations. Moreover, it has to be kept in mind that the Commission based its definition of the rule of law on the case law of the European Court for Human Rights and official documents of the Venice Commission.<sup>66</sup> The EU could thus benefit from the extensive data produced by the Council of Europe, in order to avoid overlap and unnecessary duplication of information, time and money.<sup>67</sup> Moreover, the Commission can gather the objective and impartial evidence it needs to exert political pressure on Member States.<sup>68</sup>

### ***Confidentiality vs. Transparency***

In addition, the Rule of Law Framework is based upon confidentiality. During the first stage of the Framework, the content of the dialogue is confidential, meaning that only the fact that the assessment of the concerned Member State is launched and that the opinion has been sent to the concerned Member State will be made public.<sup>69</sup> For instance, in January 2016, the Commission announced the activation of the Rule of Law Framework for Poland. Five months later, the Commission has finally adopted a Rule of Law Opinion on Poland and announced in a very generalised manner during a press conference its three main concerns, namely the appointment of judges to the Constitutional Court, the amendments to the functioning of the Constitutional Court and the effectiveness of the Constitutional review of new legislation.<sup>70</sup> The Opinion itself has not been published. Meanwhile, the Council of Europe, in particular the Venice Commission, has already delivered an extensive Opinion on

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<sup>65</sup> C. CLOSA, D. KOCHENOV and J.H.H. WEILER, “Reinforcing rule of law oversight in the European Union”, *EUI Working Paper RSCAS* 2014, 18.

<sup>66</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 4.

<sup>67</sup> L. MOXHAM, and J. STEFANELLI, “Safeguarding the rule of law, democracy and fundamental rights: a monitoring model for the European Union”, *Bingham Centre for the Rule of Law* 15 November 2013, 10.

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<sup>70</sup> European Commission – Press Release, “Commission adopts Rule of Law Opinion on the situation in Poland”, 1 June 2016.

the situation in Poland which has been made public in March 2016. Only at a very late stage – the second stage, the recommendation of the Commission will be available for public.<sup>71</sup>

Hence, the confidential nature of the Rule of Law Framework and in particular the dialogue between the Commission and the Member State concerned will prevent the pressure ‘naming and shaming’ can provide. Moreover, publishing the Rule of Law Opinions would contribute to the impartiality and objectivity of this mechanism – values upon which the Rule of Law Framework is based. It would even clarify how information gathering is carried out and how the procedure evolves from one stage to another. Moreover, it would oblige the Commission to motivate its actions extensively and increase legal certainty for the Member States.

### *A dialogue based procedure*

Last but not least, the Framework is based on dialogue between the Commission and the Member State concerned. However, dialogue will only result in a positive outcome, if the Member State concerned is willing to cooperate. Poland, for instance, has shown little cooperative spirit.<sup>72</sup> Moreover, the leader of the ruling Law and Justice Party is of the opinion that the Framework is contrary to EU law.<sup>73</sup> Uncooperative behaviour will lead to unconstructive dialogue, potentially jeopardising the effective functioning of the Rule of Law Framework. Of course, one should keep in mind that uncooperative Member States can be brought before the Court of Justice of the European Union by the Commission under the Article 258 TFEU procedure for a breach of the duty of sincere cooperation, which can ultimately lead to the imposition of a lump sum and a penalty payment, forcing a Member State to cooperate.<sup>74</sup>

Hence, the Rule of Law Framework will not improve the situation nor serve as an added value for the current legal framework to enforce the compliance of the rule of law. The mechanism depends too much on dialogue and therefore, resembles extensively at the CVM, which is a

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<sup>71</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 8.

<sup>72</sup> A. ERIKSSON, “EU still shy of ‘nuclear option’ on values”, *EUobserver*, 1 June 2016, <http://euobserver.com/institutional/133649>.

<sup>73</sup> A. ERIKSSON, “EU still shy of ‘nuclear option’ on values”, *EUobserver*, 1 June 2016, <http://euobserver.com/institutional/133649>.

<sup>74</sup> Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law , COM(2014)158 final/2, 19 March 2014, 8.

lacking any sanctioning power as well. The incentives are too low – dialogue and recommendations will not force unwilling Member States to redress the situation.

#### **IV. Conclusion: Monitoring, Cooperation and Coordination**

In the EU a gap emerges between the proclamation of the rule of law by the Treaties and the actual compliance with the rule of law by the Member States. On the one hand, article 2 TEU does not explicitly define this value, nor does it prescribe the specific obligations of the Member States to comply with this value. However, the meaning and the scope of the rule of law for instance can be derived not only from national case law, but also from case law of the Court of Justice of the European Union, and international case law and European and international legal instruments. Thus, most international organisations have already established working definitions on the rule of law – such as the Venice Commission. Some Member States take measures contrary to these values eventually resulting in a systemic compliance deficiency. But at the same time, the EU is unable to enforce effectively and efficiently the compliance of the rule of law through the existing legal framework. The mechanisms are going from too political-oriented such as the ‘nuclear option’ of Article 7 TEU, to too case-specific such as the infringement procedure enshrined in Article 258 TFEU. In turn, the CVM will have a too constrained scope of application to tackle systemic infringements against the fundamental values. In fact, all these mechanisms are crisis-driven and focus on redressing the infringement.

The Rule of Law Framework can be considered to be “*a timid step in the right direction*”.<sup>75</sup> The creation of new legal instruments suggests the raise of awareness among the EU-institutions to acquire an effective enforcement mechanism of the rule of law. This is the first step towards the effective enforcement of the compliance with the rule of law by the Member States. It is necessary to focus on what the rule of law is and how the rule of law can be enforced before the rule of law is infringed. It is the degree of rule of law compliance that potentially causes problems, as it requires a case-by-case assessment. The relevant facts have to be analysed in order to determine whether a specific component of the rule of law has been breached. An effective enforcement of the rule of law compliance therefore requires a comprehensive and periodic monitoring mechanism, comparable to the CVM. Further, the

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<sup>75</sup> D. KOCHENOV, and L. PECH, “Upholding the Rule of Law in the EU: On the Commission’s ‘Pre-Article 7 Procedure’ as a Timid Step in the Right Direction”, *Foundation Robert Schuman Policy Paper European issues* 2015, no. 356, 1.

Rule of Law Framework should mark clear indicators which warrant its activation, establishing legal certainty for the Member States. Member State will be aware of the fact that they are monitored on a regular basis. Moreover, they know what actions will lead to a reaction of the Commission – namely the activation of the Rule of Law Framework.

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

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