



**European  
Movement**  
International

## Background Briefing The Rule of law

# 1. Background information on the Rule of Law

## 1.1 Definition

Article 2 TEU outlines the fundamental values upon which the European Union was founded.

“The 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. These 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”.<sup>1</sup>

The rule of law is one of the founding principles stemming from the common constitutional traditions of the Member States. Consequently, the precise definition of the principles stemming from the rule of law may vary at a national level and according to the national constitutional systems. Nevertheless, based on the case-law of the Court of Justice of the European Union and of the European Court of Human Rights, the European Commission provides a non-exhaustive list of principles. They 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 respect for fundamental rights**; and **equality before the law**.<sup>2</sup>

<sup>1</sup> Article 2 Treaty on European Union.

<sup>2</sup> European Commission (2014) A new EU Framework to strengthen the Rule of Law, 19 March 2014 COM(2014)158, available at [http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf).

## 1.2 Rule of Law Breaches in the EU

The rule of law is one of the political accession criteria as defined after the European Council in Copenhagen in 1993.<sup>3</sup> While any country must respect the rule of law condition to be admitted to the European Union, the protection of the EU's fundamental values *post-accession* is far less developed. In recent years, events in some member states revealed

systemic threats to the rule of law. Since 2010, the Hungarian government under Prime Minister Victor Orbán introduced

a number of measures weakening the legal checks on its authority, interfering with media freedom and undermining human rights protection. More recently, in December 2015, the ultraconservative ruling Law and Justice Party (PiS) in

Poland dismissed five judges appointed by the previous government and prevented the constitutional court from publishing a judgment that criticized new executive controls

over judges and which were passed in a hasty parliamentary vote.<sup>4</sup>

“The 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.”

Article 2 TEU



The Commission has addressed these events by exerting political pressure, as well as by launching infringement proceedings in case of violations of EU law.<sup>5</sup> On 13 January 2016, the Commission decided for the first time to initiate an assessment under the new framework on the rule of law of the situation in a Member State, with regard to two Pol-

<sup>3</sup> European Council (1993) Accession criteria (Copenhagen Criteria), available at [http://eur-lex.europa.eu/summary/glossary/accession\\_criteria\\_copenhagen.html](http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html).

<sup>4</sup> Rankin J. (2016) “Poland's rule of law under systematic threat says EU executive”, 27 July 2016, The Guardian, available at <https://www.theguardian.com/world/2016/jul/27/poland-rule-of-law-systematic-threat-european-commission>.

<sup>5</sup> European Commission (2012) European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and date protection authority as well as over measures affecting the judiciary, Press Release from 17 January 2012, available at [http://europa.eu/rapid/press-release\\_IP-12-24\\_en.htm](http://europa.eu/rapid/press-release_IP-12-24_en.htm).

ish laws – on the powers of the constitutional court and on the management of state TV and radio broadcasters.<sup>6</sup>

The shortcomings of the EU’s existing legal framework to tackle breaches of EU has however been subject to substantial criticisms and academic debate.<sup>7</sup> As

<sup>6</sup> European Parliament Briefing January 2016 [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS\\_BRI\(2016\)573922\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS_BRI(2016)573922_EN.pdf)

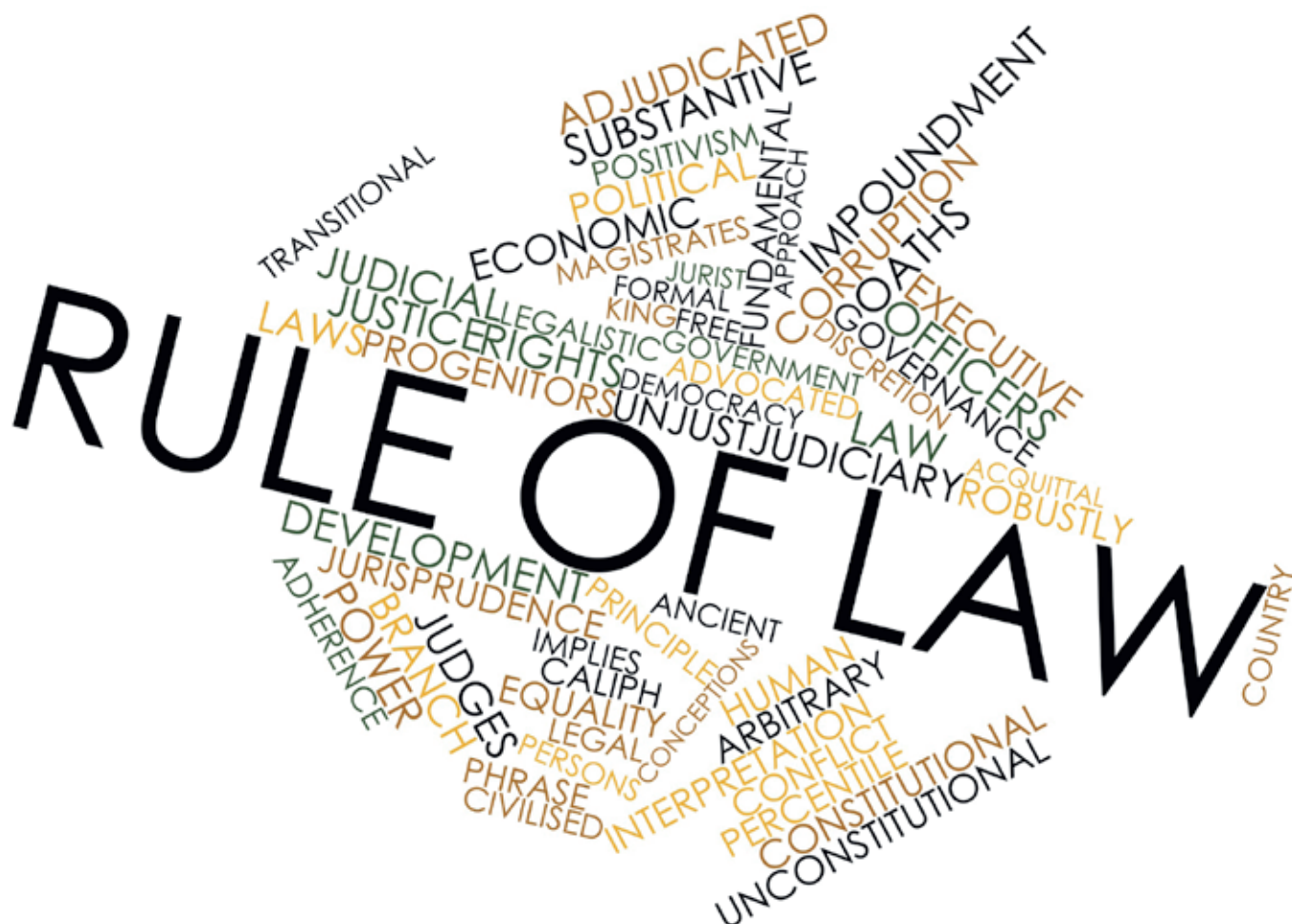
<sup>7</sup> See for instance Müller (2013), Sedelmeier (2014) and Kelemen

it stands in the literature, there appears to be a lack of coherent and effective action to protect the EU fundamental values. Blauberg & Kelemen (2016) point out, “if the Union is to have any hope of reining in such attacks on its core values, heads of government and other EU leaders must back up any judicial sanctions by intervening politically and exerting

& Blauberg (2016).

social pressure or imposing sanctions”.<sup>8</sup> The following chapter describes in more detail the monitoring and enforcement mechanisms in place, as well as current developments and further suggestions for change.

<sup>8</sup> Blauberg M. & Kelemen D. (2016) “Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU”, *Journal of European Public Policy*, available at <http://www.tandfonline.com/doi/pdf/10.1080/13501763.2016.1229357?needAccess=true>, p. 1.





## 2. Protecting the Rule of Law in the EU

### 2.1 Monitoring Mechanisms

The monitoring of developments and potential breaches of the principles inherent to respect for the rule of law is the first step to actually protect and enforce compliance with Article 2 TEU. There are a number of bodies which monitor the whole spectrum of the European fundamental values.

The **Council of Europe** has an expert body on constitutional matters, known as the European Commission for Democracy through law or the **Venice Commission**. The Venice Commission's primary task is to provide states with legal advice in the form of "legal opinions" on draft legislation or legislation already in force which is submitted to it for examination.<sup>9</sup> In the institutional field, the Venice Commission's opinions and reports focus on the functioning of political institutions, the balance of powers between the main state organs, their responsibilities, co-operation and mutual control.

In addition, the European Union **Fundamental Rights Agency** (FRA) provides the EU institutions with independent, evidence-based advice on fundamental rights, including the rule of law. Its tasks include collecting and analyzing information and data; providing assistance and expertise; as well as communicating and raising rights awareness.<sup>10</sup> Its tasks do

however not include the monitoring of the rule of law for the purposes of the Article 7 TEU procedure which will be elaborated upon later in this text.<sup>11</sup>

The **European Economic and Social Committee** (EESC) also promotes the values of European integration and advances the cause of participatory democracy and civil society organizations. Moreover, the Commission has certain monitoring mechanisms in place: The **Cooperation and Verification Mechanism** (CVM) was set up when Bulgaria and Romania joined the European Union under the condition to continue the reforms in the area of justice and rule of law.<sup>12</sup> The **Justice Scoreboard** is an information tool "aiming to assist the EU and Member States to achieve more effective justice by providing objective, reliable and comparable data on the quality, independence and efficiency of justice systems in all Member States".<sup>13</sup> In addition, the Commission publishes so called **Anti-Corruption reports** which explain the situation on corruption in each Member State (i.e. what anti-corruption measures are in place, which ones are working well, what could be improved and how).<sup>14</sup> The last report was published



in 2014.<sup>15</sup> Finally, the **Media Monitor** provides advanced analysis systems for monitoring of both traditional and social media.<sup>16</sup>

As the FRA has pointed out, "the monitoring of human rights performance carried out by these mechanisms at all levels provides a rich amount of information and analysis that should be used in any assessment of the values in Article 2 of the TEU. All of them provide needed context that can situate findings from indicators. Not all of these bodies, however, presently produce data and information that can be used to populate indicators. Their task is first and foremost to assess the states against the standards, which does not necessarily require a modus operandi that enables comparison. For this to happen, the assessments have to be relatively stringent so that comparative conclusions

<sup>11</sup> Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, available at <http://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:32007R0168&from=EN>.

<sup>12</sup> Commission website on the CVM, available at [http://ec.europa.eu/cvm/progress\\_reports\\_en.htm](http://ec.europa.eu/cvm/progress_reports_en.htm).

<sup>13</sup> Commission website on the EU Justice Scoreboard, available at [http://ec.europa.eu/justice/effective-justice/scoreboard/index\\_en.htm](http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm).

<sup>14</sup> Commission website on the Anti-Corruption Report, available at [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm).

<sup>15</sup> Commission Report COM(2014)38 from 3 February 2014, EU Anti-Corruption Report, available at [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr\\_2014\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf).

<sup>16</sup> Commission website of the Media Monitor, available at <https://ec.europa.eu/jrc/en/scientific-tool/europe-media-monitor-newsexplorer>.

<sup>9</sup> The Venice Commission, available at [http://www.venice.coe.int/WebForms/pages/?p=01\\_activities&dang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_activities&dang=EN).

<sup>10</sup> European Union Agency for Fundamental Rights, "What we do", available at <http://fra.europa.eu/en/about-fra/what-we-do>.

can be drawn”.<sup>17</sup>

The European Parliament in April 2016 initiated a legislative own-initiative report on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.<sup>18</sup> In this report, the Parliament proposes an **EU Pact on democracy, the rule of law and fundamental rights** (DRF Pact) which would introduce an annual DRF Report.<sup>19</sup> Such Report would use the abundance of sources and existing tools for assessment and monitoring of the rule of law and present the information in a harmonized format accompanied by country-specific recommendations.<sup>20</sup> An assessment and development of recommendations would be carried out by an Expert Panel composed of one independent expert designated by the Parliament of each Member State and ten further experts designated by the European Parliament with a two-third majority.<sup>21</sup> The initiative by the European Parliament was supported by the European Movement and found broad support for in

17 FRA Opinion on the Rule of Law mechanism, available at [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-opinion-rule-of-law-art-2-02-2016\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-opinion-rule-of-law-art-2-02-2016_en.pdf).

18 Procedural file, available at [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/2254\(INL\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2015/2254(INL)).

19 Draft agreement on a DRF Pact, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0409+0+DOC+PDF+V0//EN>, p.1.

20 DRF Pact Draft Agreement, Article 7.

21 DRF Pact Draft Agreement, Article 8.

plenary session on 25 October 2016.

## 2.2 Enforcement Mechanisms

### 2.2.1. Article 7 TEU – “The nuclear option”

The current EU rule of law mechanism is established in Article 7 of the Treaty on European Union. Article 7 enables the EU to suspend a Member State of certain membership rights if it can be established that there has been “a serious and persistent breach” or the “clear risk” of a breach of the values. Such membership rights include “the voting rights of the representative of the government of that Member State in the Council”.<sup>22</sup>

While in theory Article 7 offers a very strong incentive for Member States to comply with the principles set out in Article 2,

reality looks quite different. There are certain problems inherent to the mechanism itself. It is a politically sensitive issue to strip a Member State from its Council voting rights which is why the application of Article 7 is widely perceived as the “nuclear option”. Naturally, the threshold with which such suspension is decided upon is rather high, the Council having the final say by a four-fifths majority.

22 Article 7 Treaty on European Union.

“The European Parliament in April 2016 initiated a legislative own-initiative report on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.”

First discussions around making use of the procedure arose in 2000 in the so-called Haider-affair in Austria where the very far right and anti-Semitic Austrian Freedom Party and People’s Party formed a coalition government. In the end, Article 7 was however not applied. In 2013, the European Parliament initiated a report on the situation of fundamental rights in Hungary, the so-called Tavares Report.<sup>23</sup> Therein it criticized Hungary for not acting in line with the values of democracy and the rule of law and officially stated that it was ready to take action under Article 7 TEU. Again however, the EU refrained from making use of its “nuclear option”.

Apart from the problematic high threshold and political sensitivity around Article 7 TEU, there is another issue with the procedure. The very idea of such sanctions goes against the EU ethos of respectful compromise, mutual accommodation, and deference to national understandings of political values.

23 European Parliament (2013) Situation of fundamental rights: standards and practices in Hungary, European Parliament resolution of 13 July 2013 on the situation of fundamental standards and practices in Hungary (pursuant to the European parliament resolution of 16 February 2012) (2012/2130(INI)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0315+0+DOC+PDF+V0//EN>.

## 2.2.2. Infringement Proceedings

The European Commission acts as the guardian of the Treaties and can start so-called infringement proceedings where a violation of Union law has been observed. This is laid down in Article 258 of the Treaty on the Functioning of the European Union:

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union”.<sup>24</sup>

The European Court of Justice can then impose a lump sum or penalty payment to be paid by the Member State in question that it considers appropriate for the circumstances.<sup>25</sup> Depending on what the Court considers as appropriate, the amount can be very high.

**The problem with infringement proceedings in the case of a Member State’s breach of fundamental values, is that Article 2 TEU is formulated too vaguely to provide a legal**

<sup>24</sup> Article 258 of the Treaty on the Functioning of the European Union.

<sup>25</sup> Article 260 of the Treaty on the Functioning of the European Union.



**basis.** A violation of the values of the EU alone is not concrete enough for the European Court of Justice to find an infringement of a Member State’s obligation under the Treaties. So far, initiating infringement proceedings thus only serves as an indirect means to protect democratic principles. As has been mentioned earlier, in 2012 the Commission launched three infringement proceedings against Hungary, all of which clearly addressed systemic threats to the rule of law but had a separate legal basis in the treaties.<sup>26</sup>

Learning from the Hungarian experience, scholars since made a case for

<sup>26</sup> The first infringement procedure concerned Hungary’s lowering of the retirement age of judges from 70 to 62. This measure had the direct effect of sending a whole generation of judges into early retirement, enabling the Fidesz government to employ more party-loyal judges. The Commission based its argument on the Directive 2000/78/EC on equal treatment in employment. Hungary subsequently complied. Similarly, the other infringement proceedings on the independence of the data protection authority and the central bank clearly were based on Directive 95/46/EC on data protection and Article 130 TFEU respectively. In both of the proceedings, Hungary complied as well.

the bundling of individual complaints into one systemic infringement action.<sup>27</sup> A set of legal changes within a Member State threatening the rule of law could then be presented as sufficient evidence of systemic violations which pose a threat to the values enshrined in the treaties. This important proposal will be discussed more elaborately in the third chapter of this briefing.



<sup>27</sup> Scheppelle K. (2013) “The case for Systemic Infringement Actions”, available at [http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelle-systemicinfringementactionbrusselsversion\\_en.pdf](http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelle-systemicinfringementactionbrusselsversion_en.pdf).



### 2.2.3. The EU Rule of Law Framework

In March 2014, the European Commission adopted a new framework for addressing **systemic threats to the rule of law** in any of the EU's 28 countries.<sup>28</sup> The rule of law framework is complementary to infringement procedures - when EU law has been breached - and to the Article 7 TEU procedure. The framework allows the European Commission to enter into a dialogue with the EU country concerned in order to prevent the escalation of systemic threats to the rule of law.

“In March 2014, the European Commission adopted a new framework for addressing systemic threats to the rule of law in any of the EU's 28 countries.”

The Framework is based on the following principles: Focusing on finding a solution through dialogue with Member State concerned; ensuring an **objective and thorough assessment** of the situation at stake; respecting the principle of equal treatment of Member States; and indicating swift and concrete actions which would be taken to prevent the use of Article 7 TEU mechanisms.

<sup>28</sup> A New EU framework to strengthen the Rule of Law, [http://ec.europa.eu/justice/effective-justice/files/com\\_2014\\_158\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf).

“The European Union is much more than an economic endeavour. Since the Treaty of Rome in 1957 it is based on shared values: freedom, democracy, equality, the rule of law and respect for human rights.”

Jo Leinen MEP, President, European Movement International

In addition, the Framework is composed of three stages: a Commission assessment, a Commission recommendation and a follow up of the recommendation. In the case that there is no satisfactory follow-up to the recommendation by the Member State concerned within the time limit set, the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU.

Framework does not provide for a mechanism through which expertise and advice stems from civil society organisations monitoring and working to strengthen the rule of law and protection of fundamental rights.

Throughout the process, the Commission may decide to seek external expertise from the EU Agency for Fundamental Rights. Notably, the



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## 3. Proposals for further instruments

### 3.1. Treaty Changes proposed by the European Parliament

In its report on an EU Pact on democracy, the rule of law and fundamental rights, the Parliament considers a number of changes that could be made in the event of future treaty revision.<sup>29</sup> Firstly, the Parliament argues that **Article 2 TEU and the Charter should become a legal basis** for legislative measures to be adopted under the ordinary legislative procedure.<sup>30</sup>

“In its report on an EU Pact on democracy, the rule of law and fundamental rights, the Parliament considers a number of changes that could be made in the event of future treaty revision.”

Moreover, national courts should be enabled under Article 2 and the Charter to bring proceedings relating to the legality of Member State's actions before the Court of Justice. Secondly, the Parliament proposes to **review the procedure of Article 7** in order to provide for relevant and applicable sanctions against any Member State and identifying the rights of Member States at fault (in addition to Council voting rights) that may be suspended, such as financial sanctions or the sus-

<sup>29</sup> European Parliament, EU mechanism on democracy, the rule of law and fundamental rights, 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)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0409+0+DOC+PDF+V0//EN>, Article 20.

<sup>30</sup> This idea is supported by Blauberg & Kelemen in their article “Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU”, *Journal of European Public Policy*, Available at <http://www.tandfonline.com/doi/pdf/10.1080/13501763.2016.1229357?needAccess=true>, p. 6.



pension of Union funding. Thirdly, the Parliament suggests making it possible for Union legislation, after its adoption and before its implementation, to be referred to the Court of Justice by one-third of the Members of Parliament. In addition, natural and legal persons who are directly and individually affected by an action should also be enabled to **bring actions before the Court of Justice** for alleged violations of the Charter either by the Union institutions or by a Member State, by amending Articles 258 and 259 TFEU.<sup>31</sup> Fourthly, the Parliament suggests **abolishing Article 51 of the Charter, and converting the Charter into a Union Bill of Rights**. Lastly, the Parliament proposes to **review the unanimity requirement in areas relating to respect for and protection and promotion of fundamental rights, such as equality and nondiscrimination**.

<sup>31</sup> This was also suggested by Scheppele K. (2015) “Enforcing the basic principles of EU law through systemic infringement procedures”, in: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

### 3.2. Systemic Infringement Proceedings

As touched upon earlier in this briefing, bundling together individual and specific violations of the rule of law could provide a basis for a systemic infringement action – provided that the Article 7 TEU mechanism is not exclusive. As Scheppele proposes, such proceedings could be based either on violations of EU values according to Article 2 TEU or arguing that the systemic violation by a Member State of the EU's basic principles represents a breach of the principle of sincere cooperation (Article 4(3) TEU).

Scheppele further proposes in this context that the Court of Justice be able to suspend EU funding instead of imposing a fine or a lump sum to be paid by the Member State in question. According to Scheppele, this should be possible without Treaty change, since Article 260(2) TFEU does not require that a penalty imposed by the Court be paid from the state treasury.



“Systemic breaches to the rule of law in EU Member States have revealed the need to strengthen the EU’s capacities to effectively and adequately respond to such rule of law threats. The proposed Union Pact for Democracy, the Rule of Law and Fundamental Rights will enable the EU to identify rule of law threats at an early stage and will provide a periodic review of the rule of law situation in Member States based on the principles of objectivity, non-discrimination and equal treatment.”

Excerpt from a joint letter sent by the European Movement International, along with CSOs, trade unions, regions & NGOs, to Frans Timmermans, First Vice-President, European Commission

### 3.3. Copenhagen/Venice Commission

Jan-Werner Müller proposes setting up a politically independent high-level expert body, to be called the ‘**Copenhagen Commission**’ after the Copenhagen European Council of 1993, to monitor and investigate the situation of democracy and rule of law in the Member States.<sup>32</sup> Upon the recommendation of the Copenhagen Commission, the European Commission could cut EU funds for the Member State in question or impose fines.

Others have argued for a stronger involvement of the Council of Europe **Venice Commission**.<sup>33</sup> This would require legal changes to entitle the Venice Commission as an external actor to the EU to monitor compliance with Article 2 TEU values.



## 4. Conclusions

The EU’s policy on the rule of law can be seen as a policy that is still ongoing and many different proposals have been put forward by politicians and academia alike. In terms of monitoring mechanisms, the European Parliament’s own initiative report for an EU DRF Pact, which recently gained broad support in the Parliament, will still need to be taken up by the Commission in form of a legislative proposal. In terms of enforcement mechanisms, the Article 7 TEU procedure has never been used due to political sensitivity and its high activation threshold. The Commission’s EU Framework on the Rule of Law was applied for the very first time to the situation in Poland in July 2016. The result thereof is yet to be seen. However, Poland said it would not put in place any of the Commission’s recommendations.<sup>34</sup>

<sup>32</sup> Müller J.-W. (2013) “Safeguarding Democracy Inside the EU”, Transatlantic Academy Paper Series, available at [http://www.transatlanticacademy.org/sites/default/files/publications/Muller\\_SafeguardingDemocracy\\_Feb13\\_web.pdf](http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf) [accessed 16 November 2016]

<sup>33</sup> Nergelius J. (2015) The role of the Venice Commission in maintaining the rule of law, in A. Von Bogdandy, P. Sonnevend (eds.), Constitutional crisis in the European constitutional area: theory, law and politics in Hungary and Romania, Hart, Oxford 2015, pp. 291f.

<sup>34</sup> Eriksson A. (2016) “Poland defies EU on Rule of Law”, 27 October 2016, EU Observer, available at <https://euobserver.com/news/135698>.

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