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TITOLO

EU Fundamental Values and the Rule of Law Crisis: The Polish Case

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TABLE OF CONTENTS

INTRODUCTION

In 2014 the European Court of Justice, while delivering its Opinion on EU accession to ECHR, underscored the peculiarity of the Union's Structure, this being: *"based on the fundamental premise that each Member State shares with all the other member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States".*

Rule of law, Democracy, Fundamental Rights are the fundamental premises on which EU Legal Order has been laboriously construed, without them the legal edifice of European Union, and thus its profound identity is at risk of crumbling. Born to regenerate peace throughout Europe Continent, moved forward on economical premises, the European project has, above all, enshrined the power of law, by establishing a "community of law". In 2015, during a speech to the University of Tilburg, Frans Timmermans compared European Union to the Greek hero Odysseus, demanding to be roped to the mast of his ship to be able to resist the call of the Sirens: *"take me and bind me to the crosspiece halfway up the mast"* Homer describes him as saying, *" If I beg and pray you to set me free, then bind me more tightly still".* In this light, Member States tied themselves to the mast of democracy, rule of law and fundamental rights whose guarantee has shaped a Community of law in which mutual trust and mutual commitment are the fundamental premises. The very existence of EU legal order is anchored to them. However, these values are to be preserved. In the view of emerging rule of law crisis in Hungary and Poland of latest years, we should be interpreting this moral imperative in a "*Gattopardian fashion*". Indeed, we affirm that "*If we want things to stay as they are, things will have to change*". Putting it into perspective, European Union, has to set itself up as the defender of its own identity undermined by economic crisis, legitimacy crisis and crucial to our scopes, by pernicious rule of law crisis. The only condition for the European Union to survive is, indeed, to put an end to internal threats. The following assumption is our point of departure: several rule of law crisis are seriously undermining European Union's raison d'être, so the European Union has to respond adequately.

In our first chapter, we will reconstruct the case law on fundamental rights and rule of law. Once the great efforts of European Union are acknowledged, the same being for

its fundamental significance for EU legal order, we will present the protection of rule of law and fundamental rights as it appears in relevant provisions of the Treaties. With this in mind, our second chapter will establish a link between the respect of rule of law and fundamental rights and obligations arising from EU membership, by introducing the principle of conditionality in the context of Copenhagen Rounds. At a later stage, we will speculate on the notion of "systemic deficiency" and thus describe the instruments that European Union possesses to address systemic deficiencies such as rule of law crisis.

In our third chapter, we will assess the rule of law crisis in Poland stressing the fundamental developments of the ongoing event. Clarified all the steps of the rule of law crisis and how European Union's Institutions deployed the legal instruments to address the systemic breach we will shed light on the actual inconsistencies between European Legal Order and Polish reforms in the judicial area. Before drawing our conclusions, we will emphasize the inherent limits showed by existing European instruments for countering rule of law crisis.

CHAPTER I: RULE OF LAW AND FUNDAMENTAL RIGHTS. THE MILESTONES OF EUROPEAN IDENTITY

In the first chapter, we will analyse the origins and significance of Article 2 of TEU and values it claims to defend. An accurate analysis of the provision will not be solely conducted on static bases, considering its isolated meaning, what we deem as fundamental is instead the longstanding and dynamic process through which European Union has cemented its own identity on the firm foundations of rule of law and respect for fundamental rights.

Nevertheless, recent events regarding alleged 'systemic EU Law breaches' by the Member States) risk to compromise the laboriously reached goals and shake the foundations of the mechanism provided for the prevention thereof. [1] Assessing the meaning of the legislative framework drawn up by the Treaties is of fundamental importance for further evaluations. In this spirit, a timely analysis regarding the effectiveness of the abovementioned mechanism can indeed come only afterwards.

ARTICLE 2 OF THE TREATY ON EUROPEAN UNION.

Article 2 of the Treaty on European Union (TEU) provides that 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'.

The promotion of these values is a core aim of the European Union, as enshrined in Articles 3(1) and 13(1).[2]

[1] i.e. Article 7 of TEU

2 See for further considerations Treaty on European Union (TUE), Articles.3(1) and 13(1)

1.1 History and Genesis of a Community of Law

Article 2 has not to be considered an invention provided by the Lisbon Treaty. Though it is undisputed that through this latter the provision found its first systematisation, we cannot ignore its longstanding presence in the common constitutional traditions of MS. Actually, the formulation of a "principle of homogeneity"[3] i.e. Article 2 is one with the very reasons that prompted the creation of a supranational order.

Prior to referring to the core elements contained in the provision, we deem as fundamental to reconstruct the milestones of the process of European integration and simultaneously direct our attention to the role of European Court of Justice (from now on ECJ) in introducing the notion of "*Community of Law*" by means of its Case Law. The primary impulse for what we call today European Union was to avoid that, after the bloodshed of Second World War, another ferocious war[4] could occur on the continent. The consequences of violence were plain to see: another conflict would have been fatal for the people of Europe. In this light, the call from a plethora of visionary intellectuals to "devise a basis for a more intensely co-operative relationship among States"[5]. From this change of perspective forth, national leaders of France, Italy, Netherlands, Luxembourg, Belgium and Germany furthered an economic-oriented project of European Integration[6] that gathered broader support over the years.[7] This project, however, with the passing of time became much more than just economic, up

[3] Article 2 is referred to as a "homogeneity clause". This term derives from reading into Article 2 whereby a similar rule of law standard applies both vertically between the Union level and the Member States' level and horizontally among the Member States themselves. Every public authority, irrespective of whether it has its origin on the Union or national level, shall be assessed according to this standard. This description of homogeneity clause comes from Tuori, K. 2017, *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation*, Aspen Publishers, Inc, volume 54, p.9.

[4] The Penultimate paragraph of the Preamble to the ECSC Treaty gives a strong indication on this point. Explicitly, the resolution commits the signatories to "to substitute for-age old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long since divided by bloody conflicts…"

[5] Weatherill, S. & Weatherill, S. 2016, *Law and values in the European Union,* First edn, Oxford University Press, Oxford, p.3

[6] A thorough illustration of the whole project of integration falls outside our scope. For a *more* detailed reconstruction see Dedman, M.J. 2010, *The origins and development of the European Union 1945-2008: a history of European integration,* 2nd edn, Routledge, London; New York.

[7] We are referring to the several enlargements having increased the member states of the Present Union. 1973: Denmark, Ireland, UK. 1981: Greece. 1986: Portugal, Spain 1995: Austria, Finland, Sweden. 2004: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia. 2007: Bulgaria, Romania. 2013: Croatia. For more details read Hillion, C. 2004, *EU enlargement: a legal approach,* Hart, Portland (Or.);Oxford.

to becoming an attempt to lay the foundations of "an ever-closer union". Indeed, if the Treaty establishing the European Coal and Steel Community" pursued a dual objective of "stripping the very foundations of war-making out of a national grip[8]" and "contributing to economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the institution"[9] the Treaty of Rome (1957), founding the European Economic Community (EEC) began with the expression of determination "to lay the foundations of an ever closer union among the peoples of Europe"[10]. At this stage, however, the project of the Community presented no value-driven vocation[11].

Indeed, drivers for integration as Economic freedom, Customs Union, and the protection of competition[12] formed the basis for a common order that was intended in the course of time as a "community of law"[13], according to the Case Law of the European Court of Justice.[14] We must clarify that, being the "Common Market" and "Market freedoms" at the heart of the process of integration, the foundations of the "community of law" took several decades.[15]

[8] Weatherill, S. & Weatherill, S. 2016, *Law and values in the European Union*, cit, p.3

[9] See Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951), Title I, Article 2.

[10] The European Court of Justice (ECJ) has made use of the notion "ever-closer union" in some recent rulings, so reflecting the crucial role played by the Treaty of Rome towards a broader integration. In the following, we will mention some rulings of the Court related to the notion of "ever closer union."
ECJ, opinion 2/13, *Accessing of the European Union to the European Convention on Human Rights [2014]* ECLI:EU:C:2014:2454
ECJ, judgement T-561/12, *Beninca v Commission* [2013], ECLI:EU:T:2013:558
ECJ, judgement C-477/10 P, *Commission v Agrofert Holding [2012]* ECLI:EU:C:2012:394

[11] Given the structure of the Treaty of Rome one can infer the absence of any value-driven vocation. Article 1 merely proclaimed the existence of the European Economic Community. Article 2 set out the objective of establishing a common market through the convergence of national economic policies. Nonetheless, Article 3 listed a series of economic objectives the majority of them concerning economic activity.
For further insights see
Weatherill, S. 2016, "*Law and Values in the European Union*", Second edn, Oxford University Press, GB, p.394

[12] Established for the first time through The Treaty of Rome, their aim was, in the words of J. Fairhust a common market of economic interests. For further investigation see J. Fairhurst, 2010,
Law of the European Union, 8th edition, Pearson Education Ltd, pp. 3-33.

[13] The term was first coined by Walter Hallstein in 1960 but was subsequently taken up by the Court of Justice, shortly becoming an essential element of Union Law doctrine.

[14] In this regard, a significant example is:
ECJ, Order C-295/83 - *Les Verts v Parliament* [1984], ECLI:EU:C:1984:292. Cannot but be mentioned also Opinion 1/91 about the *European Economic Area* [1991], ECLI:EU:C:1991:490

[15] Regardless, the evolution from a "common market" to a "community of law" was envisaged by the founding fathers of the European Union. See for instance Rust, M.J. 1978, "J.Monnet, 1976, *Mémoires*, Paris: Librairie Arthème Fayard, p. 642. Quoted in The Journal of Economic History, vol. 38, no. 2, pp. 587-589.

In the attempt to reconstruct the origins of Article 2 one should, at least briefly, clarify what the community was intended for and then recollect the problem posed by the definition of European Identity.

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On the other hand, the issue of "European Identity" came to the fore after the first Enlargement of the European Community (1973). During the Head of State or Government Summit Conference of Copenhagen of the same year, a fundamental Declaration connected the common values of the MS[16].

The contents of declaration we want to underline are as follows:

"The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to preserve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate
goal of economic progress – and of respect of human rights. All of these are fundamental elements of the European Identity."

Since the adoption of the above statement, it is apparent the willing of EU's heads to adopt a "homogeneity clause"[17] both at horizontal (among member states) and vertical (EU-member states) level. Moreover, the linkage between Article 2 and the concept of "principle of homogeneity" will now appear to have been corroborated.

However, not all the various elements of Article 2 followed the same path of codification:

I. Regarding the rule of law and recognition of fundamental rights, they have a jurisprudential root and have been recently given constitutional value (Lisbon Treaty, 2009), following a slow process of codification.[18]

[16] Declaration on European Identity (Copenhagen, 14 December 1973)
[17] See Footnote[2] to find a definition of homogeneity clause.
[18] Codified for the first time in the Charter of Fundamental Rights of the European Union" (EUCFR), proclaimed at Strasbourg on 12 December 2007. Exactly one day before the Lisbon Treaty was signed.

II. Democracy, for instance, has become a legal basis of the European order through political and constitutional debate[19]. Direct elections for the European Parliament (from now on EP) in 1979 indeed were an example in this regard. Moreover, a principle of democracy was envisaged with the passing of time as a "precondition for respecting the identity of MS by the Union"[20], constituting a core element of the complete "principle of homogeneity" whose renewed version dates from Lisbon Treaty (2009).

Taken into consideration the relevant differences in terms of paths of codification among the various elements of Article 2, we cannot overlook the specificity of each process and the complementary role of the European Court of Justice. In this spirit, in relation to the notion the Rule of Law we will now highlight the critical stages of its reconstruction as a "cornerstone of EU legal order" operated by the Court of Justice.[21]

1.2 Towards a Community of Law

At the time of Maastricht Treaty, when the European Union was formally established, Rule of Law was not yet part of the black letter law of the Communities, the same applying to fundamental rights. This, to further demonstrate that even if today Article 6(1) TEU as modified by Lisbon Treaty (2009) refers to a "*Union founded on the rule of law*"[22] and to the binding nature of the "EU Charter of Fundamental Rights", the process of integration was primarily devised on economical premises[23].

[19] More details regarding the slow process of codification at lanke, H., Mangiameli, S. & Blanke, H, 2013, *The Treaty on European Union (TEU): a commentary*, Springer, New York, p.118-150.

[20] Article F TEU-Maastricht (1992): "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy."

[21] Without denying the nature of the "integration as a genuinely political process", it is quite evident that the rule of law is a truly fundamental factor for the supranational European Union which appears in legal texts as in legal practice as a real cornerstone of the entire construction.
See von Danwitz, T. 2014, "*The rule of law in the recent jurisprudence of the ECJ"*, Fordham International Law Journal, vol. 37, no. 5, pp. 1312

[22] The EU is based on the rule of law because "everything that it does is derived from treaties, which are agreed on voluntarily and democratically by all Member States. See http://europa.eu/abc/treaties/index_en.htm
(accessed on January 5, 2009).

[23] The original European Communities were indeed heavily focused on achieving economic reform and growth in part because of the vital need to reshape and re-energise shattered Europe. For some involved, that was of itself quite enough: for them, there was no desire for any more radical transformation of State structures. For others, by contrast, the expectation was that the institutions and rules that were designed to achieve economic reform through coordinated activity would "spill over" and promote an ever deeper and ever-wider pool of common action, as the economic slid inexorably into the social and

For our purposes of research, it is indeed very instructive to recall the words pronounced by Walter Hallstein in March 1962 with reference to "*a European Economic Community as a Community of law*" at the University of Padua". What must be given immediate consideration is the concept of "*Community of Law*"[24], because from its first appearance forth, the notion's remarkable career has paved the way for the adoption of Rule of Law as a "general principle of EU legal order". As evidence thereof, the concept of "Community of Law"[25] was taken up by the European Court of Justice (from now on ECJ) from a landmark judgement on and now represents an essential element of Union Law Doctrine[26]. One can argue that already before that defining case, the rule of law was implicitly embedded in the constitutional structure of the Community, especially former Art. 164 TEC (later Art. 220 TEC), akin to Art. 31 of the ECSC Treaty, indicated the rule of law by stipulating that "t*he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed"*[27]. In the same vein, founding treaties of the European Communities

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the political domains. States, choosing to manage their interdependence through the EU, would accelerate that very interdependence and with it would come to an ever more prominent and influential EU.

For thorough studies on the topic of "spillover" and "economic premises of the Union" check the materials listed below.

SPILLOVER: E.B. Haas, The Uniting of Europe", 1964, *Revue Internationale de Droit comparé*, vol. 16, pp. 240-241. ECONOMIC PREMISES OF INTEGRATION: Moravcsik, A. 1999, *The choice for Europe: social purpose and state power from Messina to Maastricht*, Routledge, London; New York; Gillingham J, 2003, *European Integration, 1950–2003: Superstate or New Market Economy?* Cambridge: Cambridge University Press

[24] In the words of Walter Hallstein "This community was not created by military power or political pressure but owes its existence to a constitutive legal act. It also lives in accordance with fixed rules of law and its institutions are subject to judicial review. In place of power and its manipulation, the balance of powers, the striving for hegemony ad the play of alliances we have for the first time the rule of law. The European Economic Community is a Community of law [..] because it serves to realise the idea of law."

[25] The idea of a Community of Law can be equated to the idea of a "government of laws and not of men" first appeared in the 1780 Bill of Rights of the Constitution of Massachusetts. Its Article XXX provides that "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." The formula "A government of laws and not of man" was therefore successfully recalled in *Marbury v. Madison* case by Chief Justice Marshall.

[26] DOCTRINE: Tuori, K. 2017, *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation*, p.3, cit

CASE LAW: We will soon put it in perspective. For the moment, have the sentence we consider a "landmark judgement" ECJ, Order C-295/83 - Les Verts v Parliament [1984], ECLI:EU:C:1984:292, cit.

[27] See Fernández Esteban, M.L. & Esteban, M.L.F. 1999, *The rule of law in the European Constitution*, Kluwer law international, London and L. Den Hertog, L. 2012, "*The rule of law in the EU: Understandings, development and challenges*", *Acta Juridica Hungarica*, vol. 53, no. 3, pp. 204-217. Accordingly, we can hypothesise that the Court considered the Treaty of Rome a "constitutional document of a polity based on the rule of law".

contained articles that could have had a direct bearing on the protection of the rights of individuals. With that in mind, we owe to several rulings of European Court of Justice the status of Rule of Law and the Respect of Fundamental Rights as Constitutional Principles of the EU.

1.3 The Foundations of the Jurisprudence of the ECJ on the Rule of Law and the linkage with Fundamental Rights

During the case "*Les Verts v Parliament*" the European Court of Justice referred to European Economic Community as a "*Community based on the rule of law*" inasmuch as neither the Member States nor the EC institutions can avoid review of the conformity of their acts with the EC's "constitutional charter," the EC Treaty.[28] The formula the Court thus aligned with the French notion of *Communaute de Droit* (or German notion of *Rechtsgemeinschaft.*). This notion signals indeed the post-nationalist nature of the EU; in contrast to the *Reechststat* (that comes from German and Means "*State of Law*"). [29] In the words of Werner Schroeder, "*the terminology*

Working Paper 04/09 at http://jeanmonnetprogram.org/wp-content/uploads/2014/12/090401.pdf

[28] ECJ, Order C-295/83 - Les Verts v Parliament [1984], ECLI :EU:C:1984:292, para. 23. Parts of the paragraph we are focusing on: "...the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. (...) The Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. (...) The general scheme of the Treaty makes a direct action available against 'all measures adopted by the institutions ... which are intended to have legal effects' (...) An interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty."

29 *The rule of law in the EU: Understandings, development and challenges*", cit, p.208.

The reference to the wording used in France, UK and Germany reflect not only a terminological issue; thus it is strictly linked to the nation-state judicial sovereignty. The most likely explanation for the Court's reluctance to rely on the more classic national concepts – a reluctance which is difficult for English speakers to note as the English phrase does not refer to a state or government – is that Community judges were reluctant to use terms which could give ammunition to those who have feared continuously and denounced the emergence of a European"Superstate." The use of the term Gemeinschaft/communauté de Droit– "community based on law" if literally translated – leaves indeed open the statehood question and the Member States themselves might not have welcome a judicial description of the Community as one which is governed by the principle of a "State" Staat/Etat/ governed by law.

Another remark is worth mentioning is that as conceived at first by Walter Hallstein the concept of "community of law" didn't suggest that all the Member States were to be governed by rule of law. He rather aimed at emphasising that the "Community did not dispose of coercion powers". Legal powers were the only thing at the disposal of the Community, and the legitimating attribute of its power."

For further investigations, see Tuori, K. 2017, *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation*, cit, p.3 and concerning the "Community of Law"

applied by the Court of Justice implied that in Union law there exist certain principles and structures related to the rule of law which are familiar to the national constitutional level". It is quite clear, that in its understanding of the Community of law, the Court of Justice was focused on its role in the European Court System". Indeed, against this background, the ECJ derived from the principle of the Community of Law claims for the autonomy of the Union and, above all, for its position as the Union's Constitutional Court.[30] . As a first conclusion, In *Les Verts*, the Court introduced the rule of law principle to extend its own jurisdiction and the judicial protection offered.[31]. In subsequent cases, the Court invoked the principle of the "Community based on the rule of law" to make similar strides to embolden judicial review. [32]. In the wake of *Les Verts* Judgement, in *Sogelma*[33] the Court of First

definition of Hallstein read W.Hallstein *Der unvollendete Bundesstaat: europäische Erfahrungen und Erkenntnisse*, Düsseldorf: Econ, p.33

[30] *Ibidem*, p.3, cit. Accordingly, the Court of Justice uses the statement that the treaties constitute "the Constitutional Charter of a Community based on the Rule of Law".

[31] Advocate General Mancini interestingly derived from the Court's case law the principle that "the obligation to observe the law takes precedence over the strict terms of the written law." As a result, whenever required in the interest of judicial protection, the Court is prepared to correct or complete rules which limit its power in the name of the principle which defines its mission. See AG Opinion in Case ECJ 294/83 *Les Verts v Parliament* [1986], ECLI:EU:C:1985:483 p. 1350.

[32] L. Den Hertog, L. 2012, "*The rule of law in the EU: Understandings,* development and challenges", cit, p.208

What we must recall is that during the extension of the jurisdiction of the Court and thus of the judicial protection it offered, numerous judgements, clearly part of a "constitutionalisation strategy of the rule of law" had been laying the foundations for a definition of the "substantive principles" that make up rule of law. Among these judgements, the following cannot but be mentioned:

i. ECJ Judgement 7/56 - *Algera and Others v Assemblée commune* [1958], ECLI:EU:C:1957:7. This judgement laid the foundations of the Principle of legality

ii. ECJ Judgement 7/56 - *Algera and Others v Assemblée commune* [1958], cit. ECJ judgements 42 and 49/59 - *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and* Steel Community [1961**],** ECLI:EU:C:1961:5. ECJ Judgement C-265/78 - H. Ferwerda BV v Produktschap voor Vee en Vlees, ECLI:EU:C:1980:66. These judgements laid the foundations of the principle of legal certainty EJC Judgement, C-23/68 - *Klomp v Inspectie der belastingen* [1969], ECLI:EU:C:1969:6 para 12-14. This judgement laid the foundations of the principle of confidence in the stability of the legal situation ECJ Judgement C-11/70 - Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970], ECLI:EU:C:1970:114.

This judgement laid the foundations of the principle of proportionality. This useful recollection has been possible through the document released during the Briefing of March 2017 EPRS European Parliamentary Research. This reconstruction is a work of Rafał Mańko, *"The EU as a community of law Overview of the role of law in the Union."*

[33]ECFI, Judgement T-411/06 - *Sogelma v EAR* [2008], ECLI :EU:T:2008:419

Nevertheless, there would seem to be a need for a specification. In this case, as it was with *Les Verts* "purposive interpretations" by European Courts are both legitimate and necessary when the objective is to correct eventual existing gaps in the legal system in order "to meet the requirements of the rule of law." Mentioning the words of Tridimas " as the Community develops, the ensuing increase in the powers of the institutions has to be accompanied by adequate control mechanisms, if the rule of law is to be observed".

What he meant is that when gaps in the legal system are evident, the Court may exercise "a creative function" and act in a quasi-constitutional capacity, which is exactly what the Court did both in Les

Instance[34] held that an EU agency act, *in casu* of the European Agency for Reconstruction (EAR), could fall under the action for annulment even if it was not foreseen in the Treaty. One of the most prominent points made by the court was that "it cannot be acceptable, in a Community based on the rule of law, that such acts escape judicial review".[35] In the *Commission v. EIB* case[36] the Court employed a similar argument to adjudicate an act of the Management Committee of the European Investment Bank (EIB) under the action for annulment. As for *Les Verts* and *Sogelma*, this was also not explicitly foreseen in the Treaty text. The Court, with some judicial activism, thus produced dynamic interpretation to fix gaps in judicial review in the EU legal system. [37].

What seems very interesting is that the Court thus understood the rule of law mostly in procedural terms of judicial remedies: a complete system of remedies needed to be effectively put in place so that decisions of public authorities can be reviewed independently.[38] It seems that the Court has increasingly moved towards linking this "procedural" or "formal" rule of law concept (dominated by judicial protection) with fundamental rights protection.[39] Rule of law has increasingly been framed as

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Verts and later in Sogelma. Judicial activism by the Court, when the abovementioned conditions are met, is not necessarily illegitimate and beyond its competences. This expansion of the competencies can be easily justified in Les Verts. Indeed, it was obvious in 1986 that ex Article 173 EEC had not kept pace with the expansion of the Parliament's powers since the signing of the EEC Treaty in1957. We need to mention: T. Tridimas, 2006, *The general principles of EU law*, 2nd edn, Oxford University Press, Oxford] pp.52-53, H. Schermers, D.Waelbroeck, 2001, *"Judicial Protection in the European Union"*, Kluwer Law International, 6 edn, p. 24 and J.P. Jacqué in his case note " *Recours en annulation,campagne d'information pour l'élection du Parlement européen*" (1986) and L.Pech, 2009 "*The Rule of Law as a Constitutional Principle of the Rule of Law*, cit, p.14.

[34] along with the Court of Justice, the Court of First Instance, from Lisbon on named General Court, is one of the EU's judicial institutions making up the Court of Justice of the European Union. Their purpose is to ensure a uniform interpretation and application of EU law. Decisions of the General Court can be appealed to the Court of Justice, but only on the point of law.

[35]L. Den Hertog, L. 2012, "*The rule of law in the EU: Understandings,* development and challenges", cit, p.209-211

[36]ECJ Judgement C-15/00 - *Commission v EIB* [2003], ECLI :EU:C:2003:396

[37] As we did before for AG Mancini, we want to give greater priority on the matter to the words pronounced by AG Mischio in the opinion released in the 1990 Busseni case: "...the Court has on a number of occasions relied on Article 164 of the European Community Treaty and the principles deriving from it for the purpose of giving broad and coherent interpretation to those provisions of the Treaty which deal with the various means of redress, even going so far, when the need arises, as to remedy omissions and lacunae within it"

[38] The abovementioned point made by the Court during the Sogelma case explains the importance of a complete system of remedies.

[39]L. Den Hertog, L. 2012, "*The rule of law in the EU: Understandings,* development and challenges", cit, p.209-211.

By the way, for the sake of clarity, we have to make at least one point. Some elements of the formal rule of law are easy connected to fundamental rights protection, as they are fundamental rights on their own. See for example the right to an effective remedy (Article 47 of the EU Charter of Fundamental Rights)

connected to general fundamental rights protection at large. In this connection, one of the most controversial cases of the longstanding jurisprudence of ECJ is perhaps one of the most revelatory: therefore, it is crucial to witness the meaning of *Kadi* in our attempt of linking rule of law with fundamental rights.[40]

Kadi case concerned a so-called "blacklisted" individual (i.e. under anti-terrorist policies) whose assets had been frozen; he sought to annul that measure. [41]. The Court of First Instance had held that no judicial remedy could be offered within the EU legal order as the origin of the contested Regulation was a UN Security Council resolution[42]. The Court of Justice, in the wake of the previous rulings, decided otherwise. By arguing in favour of widening the jurisdiction and of judicial review, the Court pronounced the following words to justify its competencies[43].

"...the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty. (...) Review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a Community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system". The clear link between the "formal" rule of law requirements and the "substantive" protection of fundamental rights is thus clear. "

In this ruling, the Court referred to "constitutional principles" the respect of which it had to guarantee, inasmuch it claimed its position as the Union's Constitutional Court.

[40] ECJ Judgement C-584/10 P - *Commission and Others v Kadi* [2013], ECLI:EU:C:2013:518

[41] L. Den Hertog, L. 2012, "*The rule of law in the EU: Understandings,* development and challenges", cit, p.215.

[42]**.** In this context, we need to quote the provision related to the subject-matter of the proceedings *Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan*, and repealing *Regulation (EC) No 337/2000 [2001] OJ L67/1*; *Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 [2002] OJL139/9*.

[43] See already mentioned Cases C-402/05 P and C-415/*05 Kadi and Al Barakaat[2008*].
Answering the applicants' argument that the Court of First Instance wrongly held that the contested Regulation could not be subject to judicial review of its internal lawfulness, save with regard to its compatibility with the norms of *jus cogens* , the Court of Justice refers to its previous case law and in particular to the fact that "the Community is based on the rule of law" (para.281)
The issue needs to be examined more deeply at See L.Pech, 2009, "*The Rule of Law as a Constitutional Principle of the Rule of Law*, Jean Monnet, cit.

At that time, however, the constitutional rhetoric within the ECJ was yet accompanied by process of legal constitutionalization of the Rule of Law. With the advent of the interpretation of the Treaties as a "constitution which organizes and legitimizes supranational public authority not only in economic but also in highly political fields", Member States firmly committed to giving an explicit status to the constitutional principles as democracy, fundamental rights and rule of law.[44] The first step of this process is the wording of Article F paragraph 1 of Treaty on European Union (TEU) as introduced in Maastricht (1992), the provision however solely acknowledged that the governmental system of the Member States was founded on democratic principles[45]. Besides, Article 11 TEU assigned to the EU's foreign policy the objective of developing and consolidating democracy and the rule of law and respect for fundamental rights. Nonetheless, we believe that a considerable step forward was made via Amsterdam Treaty (entered into force in 1999).[46] Indeed, the new wording of the article recognised "*liberty, democracy, respect for human rights and fundamental freedoms*" as foundational principles of the Union. As brilliantly noted by Laurent Pech [47]. At this stage the provision did not offer any definition of the primary principles on which the EU is said to be found. By making reference to the "*languages relevant differences*" at footnote [26] and considering in this regard the wording of ECJ when it stated that "t*he Union is a Community of Law*", the provision becomes difficult to interpret. Contrary to the formula used by the Court, Article 6 refers to a "State of Law", a difference that can emerge when translations in other languages are carried out. Since it is abundantly clear that EU is not a State, could a comprehensive approach that takes account of the Case Law ECJ, together with Article 6 lead to the conclusion that the principles are only binding on the Member States? This is soon to be proved wrong.

In the English language, the notions of a community based on the rule of law (Court of Justice's phrasing) and of a Union founded on the principle of the rule of law (Article 6(1)TEU) do not appear dramatically different from a conceptual point of

[44] See for more Tuori, K. 2017, *Strengthening the Rule of Law in Europe. From a Common Concept to Mechanisms of Implementation*, cit, p.25. The renewed interpretation of the Treaties has been the main focus of F.Snyder, 1998, *"General course constitutional law of the European Union"* , 6th edn. , book 1, p.41-156.
[45] Ibidem
[46] Article 6(1) TEU, Amsterdam Treaty (1997): The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
[47] L.Pech, 2009 "*The Rule of Law as a Constitutional Principle of the Rule of Law*, cit, p.20.

view. As we shall see, this may be for the best as the principles of *Rechtsgemeinschaft/ Communauté de Droit* and of *Rechtsstaat/ Etat de Droit* give the wrong dichotomy when in same basic idea: the exercise of public power is subject to the law. In other words, Article 6(1) means that the EU is a polity that complies with this principle rather than being itself a State founded on the rule of law. Article 2 TEU of Lisbon, latest constitutional revision we want to highlight of the concept of Rule of Law, changed the wording instead from "principles" to "values", something that has perhaps caused confusion[48]. Also, over the course of the Treaty revisions, the rule of law has been worded in the Treaty as an objective for EU's foreign policy (Articles 21 and 2b of TEU), as a condition for the accession of new Member States (Art. 49 TEU)[49], and as a ground for punitive measures against the Member States in (or risking) "serious and persistent" breach of the rule of law (Art. 7 TEU). Article 49 and Article 7 will be part of the next section and the next chapter respectively.

[48] While the EU speaks in Article 2 TEU about "the values of the Union", it is absolutely clear that what is meant by "values" in this context is actually fundamental principles of EU law, a reference is thus made to something more important than a set of vague extravagant proclamations, unlike what "values" sometimes imply in other constitutional contexts. Principles would be the established way of referring to the foundational, enforceable, and legally meaningful assumptions informing every aspect of the functioning of a given legal system, such as rule of law. It is thus necessary to see beyond the dual confusion introduced by the Treaty of Lisbon. This contribution derives from: Lanke, H., Mangiameli, S. & Blanke, H, 2013, *The Treaty on European Union (TEU): a commentary*, cit, p. 10, N.Lavranos, 2009, Revisiting Article 307 EC: *The Untouchable Core of Fundamental European Constitutional Law Values and Principles* (July 31, 2009)., Shaping The Rule Of Law Through Dialogue, Carrozza, ed., Europa Law Publishing, 2009. Available at SSRN: https://ssrn.com/abstract=1441915, Bogdandy, A.v. & Bast, J. 2010, *Principles of European constitutional law*, 2nd revis edn, Hart, Portland. The new wording of Article 2 of Lisbon:
"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"

[49]Article 49 TEU says that "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."

1.4 The Foundations of the Jurisprudence of the ECJ in the field of fundamental rights.

The "*quasi-constitutional capacity*" of ECJ and its "*creative role*" were nonetheless exerted in the field of fundamental rights.

Like the US Constitution as originally drafted, the original European Treaties contained no enumeration of fundamental rights, even if some norms are retrospectively considered bearing on fundamental rights.[50] An explicit reference to fundamental rights at Treaty Level appeared only when the Treaty of Maastricht entered into force.[51] But still, unlike the US Constitution, there was no provision (now as it was then) in the European Treaties to the effect that rights and duties under EU law would prevail or had primacy over national laws in the Courts of Member States[52]. Primacy does not rest in any text of the European Treaties but was built up by ECJ over the years and is based on the repeated claims of the CJEU. This process, of whose complexity we are discussing soon, evolved in the wake of the process of "*juridification of fundamental rights*"[53] of which the ECJ is the undisputed initiator, from *Stauder* onwards[54].

For our purposes, we cannot but mention *Costa v Enel*[55], of paramount

[50] For example, in the EEC Treaty we find rules on the general prohibition on discrimination on the grounds of nationality (Article 7), that ensure freedom of movement for workers (Article 48). Not to forget rules on improved working conditions and an improved standard of living for workers (Article 117). And even more at articles 119 and 220.

[51] The wording of Article F of the Maastricht Treaty of 1993: the Eu was obliged to "*respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States as general principles of Community Law"*.

[52] The legal notion under consideration is the "Principle of Primacy of European Law". See A. O'Neill, 2011 "*The EU and Fundamental Rights – Part 1*", Judicial Review, 16:3, pp. 216 and Coppel, J. & O'Neill, A. 1992, "The European Court of Justice: Taking Rights Seriously?", Common Market Law Review, vol. 29, no. 4, p. 669.On Principle of Primacy of European Law: JURISPRUDENCE: ECJ, Judgement C-6/64, *Costa v E.N.E.L* [1964], ECLI:EU:C:1964:6. ECJ, C-167/73 *Commission v France* [1973], ECLI:EU:C:1974:35, ECJ, C-167/73 Commission v France [1973], ECLI:EU:C:1974:35, ECJ, Judgement, C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermitte*, ECLI:EU:C:1970:114
DOCTRINE: Alter, K.J. 2010, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford. Baratta, R. 2017, *Lezioni di diritto dell'Unione Europea*, LUISS University Press, Roma. Blumann, C., Dubouis, L. & Dubouis, L. 2016, Droit institutionnel de l'Union européenne, 6e édition. edn, LexisNexis, Paris.

[53] See F.Ferraro, 2014, "*Lo spazio giuridico Europeo tra sovranità e diritti fondamentali. Democrazia,valori e rule of law nell'Unione al tempo della crisi*, *Editoriale Scientifica*," p.20

[54] ECJ, Judgement C-29/69 *Stauder v Stadt Ulm* [1969], ECLI:EU:C:1969:57. It is the seminal Judgement in which ECJ referred to " fundamental rights as being part of the general principles of Community Law and underlined their protection by the Court".

[55] ECJ, Judgement C-6/64, *Costa v E.N.E.L* [1964], ECLI:EU:C:1964:66
According to the ECJ's argument at p.594 "The integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent

importance, as to establishing the principle of primacy according to which "membership of the EU entailed a permanent limitation of the sovereign rights of the Member States, to the extent that national laws passed after entry into the EU could not be given effect to if and in so far as they were contrary to EU law" . The ratio was to "repeal national laws that were found to be contrary to EU Law"[56], "*dis- applying*" them even if it the incompatibility emerged between an EU Law and fundamental constitutional norms.[57]. However, claims of the absolute primacy of EU law over national constitutions could not be accepted in their entirety by National Courts of Member States for at least two reasons:

i. National Courts had the duty to preserve the integrity of their written constitution and any enumeration of fundamental rights contained therein.
ii. There being no catalogue of fundamental rights in EU Treaties, more than the danger of "conflict of competence" between national courts and ECJ, it was a primary concern of National Courts to avoid legal effects incompatible with fundamental rights within their jurisdiction.[58]

The contrast between the standpoint of national constitutional courts and the ultimate duty of ECJ became diametric when *Internationale Handelsgesellschaft* judgement was pronounced[59] . National courts, among which Bundesverfassungsgericht (*BverfG*, German Federal Constitutional Court) was the most reluctant, claimed the

measure over a legal system accepted by them on the basis of reciprocity . Such a measure cannot, therefore, be inconsistent with that legal system . the executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in article 5 (2) and giving rise to the discrimination prohibited by article 7"

[56] Wording that has been used by the court during ECJ, C-167/73 Commission v France [1973], ECLI:EU:C:1974:35

[57] ECJ, Judgement, C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermitte*, ECLI:EU:C:1970:114. Court's line reasoning clarified that "[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of the national constitutional structure"

[58] See Principle of Primacy of European Law". See A. O'Neill, 2011 "*The EU and Fundamental Rights – Part 1*", cit, p.218. Notably, Italian and German Constitutional Courts maintained their reservations regarding the compatibility of the Court of Justice's doctrine of the supremacy of EU law over national law. Famous judgement in this field are:
Sentenza della Corte Costituzionale Italiana, C-183/73 *Frontini v Ministero delle Finanze* [1974] 2 CMLR 383, Bundesverfassungsgericht decision, *Internationale Handelsgesellschaft mbh v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1973] 2 CMLR 540

[59] ECJ Judgement, I*nternationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114. Argument of the Court " The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of the national constitutional structure".

role of "fundamental rights defenders" by failing to recognize the supremacy of EU Law without sufficient guarantees for fundamental rights at Community level[60]. The discrepancy is well summarised by some extra-judicial words of Paul Kirchoff, a very famous former justice of BverfG:

"If... Community Law were to seek to abridge the fundamental rights protection deemed immutable by the Grundgesetz (German Constitutional Law) would then have the mandate and the power to reject this imposition as not being legally binding"[61].

This line of reasoning can be fully applied to the several National Courts of 70's. Faithful to their ultimate duty as being to guarantee the integrity of their constitutions and any list of rights enumerated therein, National Courts contested the doctrine of *primacy*[62] and the eventual disapplication of National Law in favour of European Law using, in addition, the legal shield of the absence of expressly contained fundamental rights in European Treaties.[63]

Once more, BverfG led the front in being the ECJ's chief interlocutor in matters of fundamental rights. In its *Solange I* [64] German Federal Court expressed the view that Community law did not, at that time "*ensure a standard of fundamental rights corresponding to that of German Basic Law*"[65]. Similarly, *Corte Costituzionale*

[60] F.Ferraro and J. Carmona, 2015, *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty, cit, p.4*

[61] Words of P.Kirchnoff in his contribution Kirchnoff P. , 1999, "*The Balance of Powers between National and European Institutions",* European Law Journal

[62] Rivendications of National Courts became a common occurrence in 70's.
Cases such as *Crotty v An Taoiseach* [1999] 2 CMLR 666 (Irish Supreme Court) or contributions like Garcia R.A, 2005, "*The Spanish Constitution and the European Constitution: the script for a virtual collision and other observations on the principle of primacy*", German Law Journal 577.

[63] Another problem that occurs when normativity of EU Law is at issue involves different lines of legitimacy and understanding of EU Law. While national judges seek to place and understand EU law in the context of their own national Constitutions, judges of European Communities seek to the trace the validity of EU law to the original foundation treaties. The Treaty of Rome has in this spirit, acquired the legal value of Grundnorm, the validity of which cannot be questioned by any National Constitution. This clarification comes from the work of A. O'Neill, 2011 "*The EU and Fundamental Rights – Part 1*" cit.

[64] BverfG, Judgement 37, 271 2 BvL 52/71 *Solange I-Beschluß [1974]*

[65] This certainly has to be put in perspective. Post-Second World War German's Constitutions contains certain unalterable principles, notably in relation "to the duty of the German authorities to show respect for certain enumerated fundamental rights". By the very terms of Grundgesetz, fundamental rights provision cannot be amended, modified or departed from. In this context, for instance, art. 20 of Grundgesetz requires respect for a democratic form of government and the sovereignty of German People, so each EU act with legal force must comply with Art.20 of German Grundgesetz. Contrasts between Grundgesetz unalterable principles and EU law have occurred several times. We recall the case of incompatibility of Grundgesetz with Maastricht and Lisbon Treaty and a judgement.

Italiana expressed reservations as such in *Frontini.*[66].

The response by the CJEU to the abovementioned tensions – and implicit and express - challenges to – the claimed primacy of EU law over fundamental rights contained in national constitutions, was to address legal uncertainty by discovering, notwithstanding the failure of drafters to include any Bill of Rights in original Treaties, the presence of unwritten principles requiring the protection of fundamental rights. This was done, through the process of "*juridification*" we have mentioned in this section. A laborious legal process whereby "*CJEU gradual uncovered that implicitly to be recognized and protected EU fundamental rights substantially echo the terms of, and in substance reflect, many of those rights already expressly embodied in the various national constitutions, as well as in human rights treaties to which the EU Member States were all signatories, most notably among these the ECHR"*.[67] Thus, the court stated in *Nold*[68]:

"International Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of EU law".

However, it is much later with *Kremzov*[69] that ECJ will unquestionably illustrate its fundamental rights approach, posing an end to the coexistence on the basis of a "*creative ambiguity*" [70] between National Courts and ECJ.

BverfGE, *Brunner v European Union Treaty* [1994]. For more see A. O'Neill , 2011 "*The EU and Fundamental Rights – Part 1*",cit, p.219

[66] C. Cost. Giudizio di Legittimità Costituzionale in via incidentale, *Frontini v Ministero delle Finanze* [1973], ECLI:IT:COST:1973:183

[67]From A. O'Neill, 2011 *"The EU and Fundamental Rights – Part 1*", cit, p.221

[68] ECJ Judgement C-4/73 *Nold KG v Commission* [1974], ECLI:EU:C:1974:51

[69] ECJ Judgement C-299/95 Kremzow v Republik Österreich [1997], ECLI:EU:C:1997:254.
For the sake of brevity we will indicate the line of reasoning of the Court, dividing it up in three arguments:
(1) ECJ claims to draw inspiration from constitutional traditions common to the Member States, but is not bound by these common traditions in establishing the extent and content of fundamental rights is aiming to protect
(2)ECJ claims to draw inspiration from international agreements concerning fundamental rights of which the Member States are signatories. However, again, ECJ claims is not bound by the terms of such treaties.
(3) Provisions of ECHR are assigned a "special significance" by virtue of the exceptional nature of ECHR.

[70] Credits for the notion of Creative Ambiguity go to Beck, G. 2011, "*The Lisbon Judgement of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor*, European Law Journal, vol. 17, no. 4, pp. 470.

Back at *Nold*, the protection of fundamental rights was still a matter of dispute between national courts and ECJ.

1.5 Two legal solutions to ensure the protection of fundamental rights.

Two legal solutions were favoured to bring the conflict of competence to an end. On the one hand, attempts were made to permit the European Community accession to European Court of Human Rights, on the other European Institutions took action to provide the Community with its own Charter of Fundamental Rights, granting the ECJ the power to ensure its correct implementation. The accession of European Communities first, and now of European Union to ECHR perhaps would deserve a separate chapter, in the view of its complexity and potential implications. For present purposes, however, we will solely summarise the different stages hereof.The idea of the accession by the European Community to the ECHR has been mooted consistently since the 1970s[71], but obstacles did exist in the notable lack of political will expressed by the several Member States. This became self-evident when Opinion 2/94 on *Accession by the EU to ECHR*[72] was issued. The Court noted that "no Treaty provision expressly conferred on the EU institutions any general power to enact rules on human rights, or to conclude international conventions in this field, and felt unable to construe an *implied power*[73] to this effect". Not a refusal, simply as many commentators have noted, a consideration based on the sphere of competences of the Court. The argumentation of the Court drew its inspiration by two considerations:

[71] The Commission as stated in a Communication on "*Community accession to the European Convention for the Protection of Human Rights and some of its protocols*" urged to cure "a conspicuous gap in the Community Legal System", a gap deriving by the fact that Acts of EC were not subject to review of ECtHR and basically immune from the Convention, even if the Member States had subscribed it"

[72] ECJ Opinion 2/94, *Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996], ECLI:EU:C:1996:140. Governments of Spain, Ireland, Uk, France and Portugal submitted that "*neither the Ec Treaty nor TEU contained a provision allocating specific powers to the EC in the field of human rights capable of being the legal basis of the envisaged accession*.".
See on the topic Moriarty, B. 2001, "*EC accession to the ECHR*", Hibernian Law Journal, vol. 2, pp. 13-34

[73] See ECJ Judgement, C-3/76 - Cornelis Kramer e a. [1976], ECLI:EU:C:1976:114
Article 308 (Ex Article 235 EC) provided " If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures".
For the theory of Implied powers see Douglas-Scott.S, 2002, "*Constitutional Law of the European Union"* Longman Pearson Publishers, p.160. See also A. O'Neill, 2011 "*The EU and Fundamental Rights – Part 1*", Judicial Review, 16:3, pp. 216-247.

I. Such accession would have meant as we read at Paragraph 34 of the Opinion the "entrance in a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order" a step of fundamental constitutional significance and therefore requiring explicit Treaty authorization.[74]

II. Central Institutions of EU would have been directly subject to the jurisdiction of ECtHR, causing to ECJ the loss of court of final reference for EU in matters concerning fundamental rights[75].

At that time, however, the push toward a "codification" of the fundamental rights jurisprudence of the ECJ was bearing fruit. Avowed aim was to give further legitimacy to the EU project, as the enumeration contained in a Bill of Rights would have given concrete form to how EU ensured the protection of individual citizens.[76] From the 1970s the fundamental rights dimension of Community Law developed into being an instrument of promotion of European Identity all over the globe and not a sole concern of ECJ. We must refer to the worth emphasizing *"Declaration on European Identity*" of 1973[77] and also, to the *"Joint Declaration on Fundamental Rights of 1977",* the first real catalogue of fundamental rights[78].

A year after the abovementioned *Opinion 2/94* the Parliament seized the reference made by ECJ regarding a "*treaty revision*" [79] and hence called by resolution for "a *specific charter of fundamental rights*" whose preparation heralded the signing of Amsterdam Treaty. The innovation that Amsterdam concerned the "Area of Freedom, Security and Justice[80] that European Union wanted to develop and maintain, but the objective of giving birth to a European Chart of Fundamental Rights was frozen, albeit for a short time. A new impulse was given during the Cologne Summit of 1999, in which European Council adopted conclusion

[74] A. O'Neill , 2011 "*The EU and Fundamental Rights – Part 1*", Judicial Review, 16:3, pp. 216-247,
[75] *Ibidem*
[76] A. O'Neill, 2011 "*The EU and Fundamental Rights – Part 2*", Judicial Review, 16:3, pp. 375-399,
[77] Its significance lies in the link established between the principles of democracy, rule of law, social justice, respect for human rights and European International identity.
[78] Actually, a declaration without any luck as it was unsuccessfully submitted to the Intergovernmental Conference which negotiated the Maastricht Treaty."
[79] One of the two arguments used by the Court within Opinion 2/94
[80] New Legal Basis were added to preserve fundamental rights, among which we have articles dealing with:
anti-discrimination policies (Article 13 TEC) see Council Directive 2000/43/EC 29/06/200 and Council Directive 2000/78/EC 27/11/2000
access to documents (Article 255 TEC) see Regulation (EC) 1049/2001 30/05/2001
data protection (Article 286 TEC)

according to which, ascertained the need for "*fundamental rights applicable at Union Level and consolidated in a Charter*", the sources of the forthcoming Charter were set out.[81]

The adoption of the Charter was "solemnly proclaimed" by European Commission, European Parliament and Council of European Union dates back to 7 December 2000 in Nice[82]. The resulting innovation effects were partly blocked by the vetoes of Member States (notably guided by the United Kingdom) which ran contrary to the legally binding nature of the Charter. Downplaying its effect, on the guise of it being hardly innovative, United Kingdom intended to make the new provisions not enforceable. Once again, the soft law found a way of hardening, this process beginning before the ECJ.[83] Despite supporting the existence of a number of fundamental rights recognised within the EU, the ECJ failed to make explicit reference[84] to the provision of the Charter, at least until 2006. On this date, the decision of the Court of Justice in *Parliament v Council: reimmigration and family reunification had the effect of making the Charters'* provisions a source of hard law only by the fact that it had been adopted as a source of law by the ECJ and taken up within its existing fundamental rights.[85]

We are finally prepared to introduce the outlook for the Charter of Fundamental Rights.

[81] Conclusions of the Presidency during the meeting of European Council in Cologne 03/06/1999 made explicit the legal heritage coming from " *common constitutional traditions, European Social Charter and the "Community Charter of the Fundamental Social Rights of Workers*"

[82] As a testimony of the constitutional scope of the adoption, the Charter was the outcome of a Convention composed of 15 representatives of Heads of States or Government, 30 representatives of the national parliaments, 16 representatives of the European Parliament and one representative of the Commission and chaired by Roman Herzog. A "genuine constitutional convention", as reported in the Conclusion of the Presidency, Nice European Council, 7-10 December 2000.

[83] A. O'Neill, 2011 "*The EU and Fundamental Rights – Part 2*", cit p.376

[84] ECJ Judgement C-270/99 *P-Z v Parliament* [2001] ECLI:EU:C:2001: 639. If we read at Para.40 the opinion of Advocate-General Jacobs, he notes that EU Charter "may be said to proclaim legal principles which are already generally recognised and protected within EU law".
ECJ Judgement C-173/99 *BECTU v Secretary of State for Trade and Industry* [2001], the opinion of the Advocate-General "I*n proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored*".

[85] ECJ Judgement C-540/03 *Parliament v Council* [2006] ECLI:EU:C:2006:429 See A. O'Neill, 2011 "*The EU and Fundamental Rights – Part 2*" cit. P. 379

1.5.1 Outlook for the Charter of Fundamental Rights

The Charter of Fundamental Rights became a legally binding catalogue of fundamental rights when Lisbon Treaty entered into force on 1 December 2009[86].

The Charter is divided into six titles, to this, we must add a seventh one devoted to clarifying the scope of application of the Charter and the principles governing its interpretation. It is organised to reflect the importance of EU principles: TITLE I: Dignity (Articles 1-5). TITLE II: Freedoms (Articles 6-19). TITLE III Equality (Articles 20-26). TITLE IV Solidarity (Articles 27-38). TITLE V Citizens' Rights (Articles 39-46). TITLE VI Justice (Article 47-50). TITLE VII concerning the General Provisions governing the interpretation and application of the Charter (Article 51-54).

Article 6 of the Treaty of TEU recognizes the Charter "the same legal value as the Treaties". The Charter, therefore, constitutes primary EU law[87], serving as a parameter to assess the validity of secondary EU legislation and national measures.

1.5.2 Scope of the Charter of Fundamental Rights

Since the beginnings, ECJ has claimed its jurisdiction on fundamental rights is limited only to domains which fall within the scope of its competence[88] and to Member States' activities whenever they act within the scope of Union Law. [89]. In this connection, the

[86] As Marek Safjan has said in its "Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union" the Charter" the reference to Charter in rulings "i*nfluence the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provide for the enlargement of the field of application of the European rules in the national legal orders*". See Safjan M., 2014, *"Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union",* EUI LAW; Centre for Judicial Cooperation DL; 2014/02.

[87] The second subparagraph of Article 6 will subsequently be a matter of interest as " T*he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties*.". A clear limitation on the scope of the Charter.

[88] Seminal cases in this sense are ECJ Judgement C-5/88 *Wachauf v Federal Office for Food and Forestry* [1989] ECLI:EU:C:1989:321 and ECJ Judgement C-260/89 ERT [1991] ECLI:EU:C:1991:254.

[89] See F.Ferraro and J. Carmona, 2015, *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty cit.* p. 10. With regards to the Charter, this is clarified with Article 6 of TEU according to which "EU Charter's provisions shall not extend in any way the competences of the Union as defined in the Treaties"." This is nothing but the compliance to the Principle of Conferral, by which EU acquis is inspired after the Lisbon Treaty. We read in article 5 that "The limits of Union competences are governed by the Principle of conferral. The use of Union Competences is governed by the principles of subsidiarity and proportionality. [..] Under the Principle of Conferral the Union shall act only within the limit of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

four conclusive articles of TITLE VII of the Charter identify the way to interpret and apply in practice the Provisions contained therein.

Article 51 notes that provisions of the EU Charter "a*re addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union Law.*"[90]

This provision serves to draw a boundary between the scope of the Charter and that of National Institutions. The Charter covers the acts of EU institutions bodies and State institutions that fall within the scope of EU legislation. Outside of it, National Court retains their competence as arbiters of fundamental rights. Article 52 certifies the compliance to the Principle of Conferral (Article 5 TEU), already mentioned in footnote [89] and according to which "*it is the scope of EU Law which determines EU jurisdiction on fundamental rights and not the reverse*"[91]. Indeed, the wording of the Charter indicates that "*rights recognised by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within limits defined by those Treaties ".* This means that in areas where the same subject matter is regulated by an Article of the Treaty and equally by a provision of the Charter, both have to be taken as a reference in the final judgement of the Court.

The Charter's application is grounded on the basis of both principles of effectiveness[92] and loyal cooperation, as clarified both in *Melloni a*nd *Åkerberg Frannson*[93] .The Charter insists in preserving the application of national standards in the protection of human rights, namely when Member States action is not entirely determined by EU Law (See *Melloni* at footnote [93]). In these cases, as prescribed by

[90] ECJ Judgement C-149/10 Chatzi [2010] ECLI:EU:C:2010:534. On a Preliminary reference specifically referring to provisions of Charter seeking guidance as to whether the national authorities had correctly implemented a directive.

[91] See F.Ferraro and J. Carmona, 2015, Fundamental Rights in the European Union: "*The role of the Charter after the Lisbon Treaty"*, cit, p.11

[92]. The exercise of rights conferred by the European legal order cannot be rendered impossible or extremely difficult without prejudice to EU Acquis. See for clarification the Opinion of General Advocate Jääskinen in ECJ Preliminary ruling C-536/11 - Donau Chemie e a. [2013] ECLI:EU:C:2013:366

[93] Both sentences are seminal judgements. In *Fransson* according to ECJ " the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of European Union Law", and thus guaranteeing to individuals a complete protective framework." On the same day, the Court during Melloni's Judgement stated that "Only in situations in which an action of a Member State is not entirely determined by European Union Law National courts to remain free to apply national standards of protection of fundamental rights. In any case, the Charter and the principle of Primacy must not be compromised.
ECJ Judgement C-617/10 - Åkerberg Fransson [2013] ECLI:EU:C:2012:340
ECJ Judgement C-399/11 - Melloni [2013] ECLI:EU:C:2013:107

the Court of Justice" in *Melloni: "Only in situations in which an action of a Member State is not entirely determined by European Union Law National courts to remain free to apply national standards of protection of fundamental rights. By the way, the Charter and the Principle of Primacy must not be compromised".*

1.5.3 The relationship between EU Fundamental Rights and the ECHR

The ECJ has to date, been clear that EU law always takes precedence[94]Over all other international law sources. This being imperative rule in case of conflicts over fundamental rights guaranteed under national law and under agreements concluded within the ECHR[95].

One result of the fact that, in the development of its jurisprudence, ECJ proposed itself as a European Supreme Court and therefore interpreted provisions initially conceived within the scope of ECtHR (at least if issues arise in a field covered by EU law) is that the Member States are subject two Master Courts' ruling and cannot find any escape routes from the damnation of one of the Courts in case of divergent views.[96] Problems of divergence have been experienced in matters of the extent of the privilege against self-discrimination under Article 6 of ECHR[97], where sexual orientation was a

[94] We were referring to the already mentioned *Costa v E.N.E.L* when the Court of Justice made primacy up as a cornerstone of EU legal order ECJ Judgement C-6/64 - *Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66. Albeit not explicitly mentioned in the Treaties, Primacy has been the main subject of Declaration n.18 following the entry into force of Lisbon Treaty. Notably "the Conference recalls that, in accordance with the well-settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.

[95] This has not created any situation of legal uncertainty in so far EU law was more favourable to individuals. A related case is, therefore, ECJ Judgement C-137/84 - *Ministère public v Mutsch* [1985]ECLI:EU:C:1985:335

[96] ECtHR Judgement, *Matthews v. the United Kingdom* [1999] ECLI:CE:ECHR:1999:0218JUD002483394.
Again this is the most famous case of conflict of competence, but also a seminal case in the context of fruitful dialogues between ECJ and ECtHR.
United Kingdom was held responsible by ECtHR for the denial of voting rights to the European Parliament to British citizens resident in Gibraltar contrary to those individual's rights expressed in Protocol 1, ART. Three regarding the right to "participate in free elections", notwithstanding that the extent of voting rights in EU Parliament was a matter of EU institutions rather than the individual Member States.
Another famous case for different interpretations within the Courts is ECtHR Judgement, 17862/91 *Cantoni v France* [1996].
There is a danger of that happening: State authorities within the Council of Europe may breach the requirements of the ECtHR where the matter falls within the scope of EU law and where, as ECJ has claimed primacy of EU law, member states do not have any power of discretion.
See for further insights: A. O'Neill, 2011 "The EU and Fundamental Rights – Part 2

[97] See ECJ Judgement C-374/87 *Orkem v Commission* [1989] ECLI:EU:C:1989:387
ECJ Judgement C-60/92 - Otto / Postbank [1993] ECLI:EU:C:1993:876
ECJ Judgement T-112/98 - Mannesmannröhren-Werke v Commission [2001] ECLI:EU:T:2001:61

prohibited subject of discrimination according to Article 14 of ECHR[98] the final result of the fundamental rights jurisprudence of the CJEU is that from the standpoint of National Courts there are two masters to obey. Even if the abovementioned divergence of views has been present and has marked relations between ECJ and ECtHR, we cannot deny that equal interpretations have been the rule up to our days. In this spirit, we have to consider at least three aspects before continuing with our research:

i. In the famous *Opinion 2/92* (previously recalled in the text) ECJ recognised special significance to the provisions of ECtHR, thus recognizing the huge step the Convention represented in the field of protection of Human Rights
ii. When the Charted was drafted, the European Council had mandated the Convention to draw up a Charter in which the main task was one of "revelation rather than creation, of compilation rather than innovation"[99]. So drafting a Charter, that notwithstanding its peculiarity[100], could follow in the footsteps of ECHR.
iii. Acknowledged the absence of any machinery for the formal reconciliation of competing judgements[101]. In the wake of existing dialogues between the two Courts, ECtHR has established a presumption according to which the protection of fundamental rights afforded by EU legal order is deemed to be equivalent to the one offered by ECHR.

The last attempt to bridge the existing legal uncertainty we want to recall is the *Opinion 2/13* issued by ECJ regarding an eventual *accession of the EU to the ECtHR.*[102]

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[99] CC Commission Communication (EU) n.599 [2000] , paragraph.7

[100] One of the specificities is the further protection accorded to disability, age and sexual orientation as new grounds of discrimination. See Article 21 of the Chapter within which " 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on the grounds of nationality shall be prohibited. On the matter, the Charter ensures greater protection than ECHR

[101] See on this point Turner C. 1999, "*Human Rights Protection in the European Community: Resolving Conflict and Overlap Between the European Court of Justice and the European Court of Human Rights*", European Public Law, vol. 5, no. 3, pp. 453-470.

[102] ECJ Opinion 2/13 on the *Accession of the EU to ECtHR* [2013]
EU accession to the European Convention on Human Rights (ECHR) became a legal obligation under Article 6(2) of the Treaty of Lisbon. As we have already stated the purpose of the EU's accession to the ECHR was to contribute to the creation of a single European legal space, achieving a coherent framework of human rights protection throughout Europe and so to solve the problem of the "two masters"
The draft Accession Agreement of the EU to the ECHR between the 47 Member States of the Council of Europe and the EU was finalized on 5 April 2013. The Commission then asked the Court to deliver

Following close scrutiny, the European Court of Justice identified problems and gave a contrary opinion in its opinion of 18 December 2014. Argumentations of the Court will follow[103].

At Paragraph 153 the Court clarifies that "before any analysis of the Commission's request can be undertaken, it must be noted as a preliminary point that, unlike the position under Community law in force when the Court delivered Opinion 2/94 (EU:C:1996:140), the accession of the EU to the ECHR has, since the entry into force of the Treaty of Lisbon, had a specific legal basis in the form of Article 6 TEU."[104]

That being said, the Court expresses doubts about the ensuing autonomy [105]. Right after, ECJ motivate its concerns on the grounds of incompatibility with article 344 TFEU.

At paragraph 201 "t*he Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein...* [..]

And it continues at Paragraph 207 by saying that "*Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or the Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.*"

an opinion, pursuant to Article 218(11) of the Treaty on the Functioning of the EU (TFEU), on the compatibility of the draft agreement with EU law.

[103] As clarified before, Accession of EU to ECHR is a broad subject. We hope this is noted as we are going to report the main argumentations of the Court exclusively. For further insights anyway, we recommend some publications on the subject: Krstić, I. & Čučković, B. 2016, "*Eu accession to the ECHR: Enlarging the human rights protection in Europe*", Anali Pravnog fakulteta u Beogradu, vol. 64, no. 2, pp. 49-78. Eckes, C. 2013, "*EU Accession to the ECHR: Between Autonomy and Adaptation*", The Modern Law Review, vol. 76, no. 2, pp. 254-285. Storgaard, L.H. 2015, "EU law autonomy versus European fundamental rights protection-On Opinion 2/13 on EU accession to the ECHR", *Human Rights Law Review*, vol. 15, no. 3, pp. 485-521.

[104] In this case, no reference was made by ECJ regarding a necessary "treaty revision", as it happened in 1992. ECJ this time declares EU competent to join ECHR

[105] The ECJ observed that, while after accession, the Strasbourg Court's interpretation of the ECHR would bind the EU, including the ECJ, nonetheless it would be unacceptable for the ECtHR to call into question the ECJ's findings in relation to the scope of EU law. Specifically, what was questioned are Article 53 ECHR, the underline of the Principle of Mutual Trust, See Douglas-Scott. aS "*Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice" at* VerfBlog, 2014/12/24, https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/.

The Court concludes in Paragraph 208 that "*The very existence of such a possibility undermines the requirement set out in Article 344 TFEU*".

This Opinion without any doubts complicates the accession of EU to ECHR. The draft agreement was only achieved after complicated negotiations in which redrafts were mainly promoted by EU institutions. Yet, were the EU to accede to the ECHR, in full compliance with the Court's requirements in *Opinion 2/13*, human rights protection in the EU would not be enhanced, for the EU would be shielded from many human rights claims. A situation to solve as soon as possible for at least two compelling reasons:

i. Lisbon Treaty prescribes the accession of EU to ECHTR, a refusal or a non-action by Member States can cause the opening of an "*infringement procedure*"[106]
ii. This is far from being a precise answer, but an appeal is worth making with the words of I. Canor: "*The relevance of deciding the relations between the jurisdictions which might influence the human rights' standard of protection in European law is increasing rather than declining in recent years. Who in the end should be the final arbiter of human rights in Europe*?[107]

107 Article 258 of TFEU: " If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a 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"

[107] Canor, I. 2000, "Primus inter pares: who is the ultimate guardian of fundamental rights in Europe?", *European Law Review*, vol. 25, no. 1, pp. 3.

CHAPTER II: LEGAL INSTRUMENTS TO ADDRESS SYSTEMIC BREACHES

The first chapter had the declared purpose of reconstructing from a normative perspective the meaning of fundamental rights and rule of law for European Identity. In our attempt, we have analysed both sides of ECJ's *"juridification process"* and ensuing *"constitutionalization*" of notions referred to as "*cornerstones of EU Legal Order*". But, leaving aside for a moment the monumental work carried out by ECJ and EU institutions, intended, once again, to safeguard and ensure an important set of individual remedies and continuous protection of human rights, another huge step was made by way of Copenhagen's Accession criteria. Our second chapter will take Copenhagen Summit of 1993 as a significant point of departure. This will be followed by a clarification of the notion of "*systemic deficiency*". At a later stage, we will provide a deeper examination of the instrument that EU has designed to address "*breaches to acquis*".

2.1 Copenhagen Criteria: a critical assessment

European Council Summit of Copenhagen held in 1993 is a crucial date for the history of European Integration. After the Soviet Union collapsed, many Central and Eastern European Countries had to reorient themselves as new and independent states. For those involved, accession to European Union represented an attractive opportunity[108], but primarily an ambitious challenge. If not completely, the European Union had hitherto based its enlargements rounds on the basis of "*political compatibility"*[109]. However, the unprecedented number of applicants required the creation new mechanism for assessing candidates. In the light of the above, Copenhagen Summit

[108]. It is useful to recall a fortunate wording "Now, once again, after the collapse of Soviet Communism, the opportunity was a vehicle or the renovation of political and economic structures in Europe. Once again it was a source of optimism.
Credits for this statement go to Emiliou, N., Weatherill S., 1997, "*Law and integration in the European Union*" -, Kluwer Academy Publ. , Dordrecht, p. 1

[109] What we are going to maintain in the next lines will clarify our assumption. However, before moving forward, we should recall at least two events demonstrating the validity of what we have just affirmed.

took place, and Copenhagen Criteria were formalised. According to the Presidency Conclusions, in addition to a geographic criterion, candidates were required to [110] " have achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of the political, economic and monetary union.[111]

Hence the European Council of Copenhagen established three formal criteria to be fulfilled in order to become a member of European Union: a political criterion, concerning democracy, rule of law and protection of minorities, an economic one and third acquis criterion.[112] to maintain an acceptable accuracy threshold, we will restrict ourselves to discuss the political criteria solely.[113] Identified the matter we are debating, we have to consider no less than three aspects of Copenhagen political criterion, last of which will bring us to system deficiencies.

2.1.1 Copenhagen Summit is not Copenhagen criteria's birthplace but remains innovative.

Importance of democratic structures and the elements composing political criteria dates back to the very foundations of European Communities and *Mattheus v Doego*[114] there is evidence of it, the Court having stated that "a *state is a European State and if its constitution guarantees [..] the existence and continuance of a pluralistic*

[110] Former Article 0 of TEU (now Article 49) indicated a material condition that candidate country had to meet: the applicant must be a "European State", this to be extensively interpreted in geographical, cultural and political terms. A classic example is an application submitted by Morocco in 1987 and rejected the Council on the grounds that Morocco was not a "European State."

[111] This statement is part of the broader Presidency Conclusions, Copenhagen European Council of 1999. Full text at http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf.

[112] European Union Membership is entrenched in Article 49 of TEU. Another slightly enriched version could be found in the rejected Treaty establishing a Constitution for Europe.

[113] The choice appears very logic, being the compliance to political criterion considered as a "pre-requisite to negotiate accession to EU" as can be easily concluded if one examines the submission of the Court in *Mattheus v Doego* (see next footnote). This assumption is confirmed by Presidency Conclusions of the European Council of 1997 in which is held at para. 25 that "compliance with the Copenhagen Political Criteria is a prerequisite for the opening of any accession negotiation". For a critical analysis of Copenhagen, rounds see Kochenov, D., 2004. *"Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law*", European Integration Online Papers, Vol. 8, No. 10, pp. 1-24.

[114] ECJ Judgement C-94/78 *Mattheus v Doego* [1978] ECLI:EU:C:1978:206 led by a Commission interpretation of Article 237 of EECT.

democracy and [..] effective protection of human rights"[115]. In this spirit, Copenhagen should be seen as an effort to "guarantee peace and security all over Europe"[116] and to respond to a precise customary regulation according to which ECJ reveals and Treaty amendments codify.[117]

Concerning the innovative character of Copenhagen Summit, we cannot but mention the unprecedented formula of "*Association Agreements between Candidates and European Union*", that brought the EU application of the "*principle of conditionality*"[118] to a different scale.

Introduced by means of Council Regulation 622/98[119] on assistance to applicants Accession Partnership Agreements were signed. Quoting from Regulation text "*Financial aid provided by the European Union during pre-entrance stage was conditional upon respect of the commitments contained in the Europe Agreements and upon progress towards fulfilment of the Copenhagen Criteria"*[120]. In other words, Accession Partnerships achieved two considerable results:

(i) They "rendered Copenhagen Criteria enforceable"[121].

[115]. This undoubtedly explains why Franco's Spain could never accede to European Communities as its application remained unanswered. Another similar case is the one of Greece whose Association Agreement with European Communities was frozen.
For Greece see: Contogeorgis, G., 1978 *The Greek View of the Community and Greece's Approach to Membership".* A Community of Twelve, pp.22-31.
For Spain see: Carrillo Salcedo, J.A., 1978. "*L'impact de l'adhésion sur les institutions et le droit des pays candidats : Espagne*. " . A Community of Twelve.
See also Marktle, T. 2006, "*The Power of the Copenhagen Criteria*", Croatian Yearbook of European Law and Policy, vol. 2, no. 2. p. 346

[116] Words that can be found in the Conclusions of the Presidency of the European Council in Copenhagen.

[117] See for further considerations Arts, K. 2005, "*Elena Fierro, The EU's Approach to Human Rights Conditionality in Practice*" Martinus Nijhoff Publishers, The Hague 2003, xvii and 423 pp., € 135. ISBN 90-411-1936-1", Netherlands International Law Review, vol. 52, no. 1, pp. 135-137.

[118] We found this contribution of great interest. Grabbe, H., 1999. "*A partnership for accession?: the implications of EU conditionality for the Central and East European applicants*." European University Institute, Robert Schuman Centre. We have also checked out: Schimmelfennig, F. and Sedelmeier, U. eds., 2005. *"The Europeanization of central and eastern Europe"*, Cornell University Press.

[119] Council Regulation (EC) No 622/98 "on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships" of 16 March 1998

[120] Council Regulation (EC) 622/1998 of 16/03/1998 on assistance to applicant states in the framework of the pre-accession strategy and in particular on the establishment of Accession Partnerships.
The utility of the mechanism is recognised as well in the publication of Hillion. C. 2004, *"EU enlargement: a legal approach"*, Hart, Portland (Or.); Oxford; cit.

[121] Inglis, K., 2000. *"Europe Agreements Compared in the Light of Their* Pre*-Accession Reorientation"*, The. Common Market L. Rev., *37*, p.1173.

(ii) Combined with the criteria set within Copenhagen round[122] , they established for the first time a link between accession and membership obligations, finding in Article 49 of TEU its legal base.[123]

Another element introduced by Copenhagen rounds was the mandatory issuing of early Progress Reports[124] accompanied with a summarising document containing " *a synthesis of the analysis in each of the regular reports as well as a series of recommendations (and) also set out the state of play on the negotiations and the reinforcement of the pre-accession strategy*."

2.1.2 Shortcomings of Copenhagen and reflections on the current systemic deficiencies affecting the Union.

The declared objective of Copenhagen Criteria was to reach the "*complete depoliticisation of the Criteria*" and to render criteria for accession not anymore, a "*wish list*" but an effectively workable tool in governing accession.[125] However, these promises became, for the most part, empty.

In view of this, if we take into account our political criteria, we will find no ascertained definition of what is meant by *Rule of Law* and *Democracy*. This is a *lack of clarity*, partially compensated by some specific requirements found in the flood of documents produced during Copenhagen rounds.[126]. Furthermore, in hindsight, Commission seemed to have assessed candidates' compliance in a rather superficial or excessively

[122] See 1998 Composite Papers "Reports on progress towards accession by each of the candidate countries."

[123] However, this link essentially is where the problem lies, as "monitoring of EU institutions has never been insufficient " and "Criteria are not precise enough to be a tool for the progress made by the candidate countries towards accession ". See Kochenov, D., 2004. *"Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law". cit. p.3*

[124] Release of the document needs to be framed in the broader context of a Communication entitled "Agenda 2000) of 15/07/1997 and together with the Opinions on the Applications of Ten CEE Countries for Membership of the European Union. See for example DOC/97/18 "Romania Opinion" or DOC/97/19 on "Slovenia Opinion."

[125] Both statements are taken by the precious collaboration of Kochenov, Dimitry, 2004, *"Behind the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law "*. cit. p. 7

[126] But still exacerbated by the fact that Rule of Law and Democracy were treated as a single notion.
By the way, some indispensable requirements for having them can be found in: 1998 Regular Report on Bulgaria's progress towards accession "a national parliament satisfying the political criteria continues to operate satisfactorily, its powers are respected, and the opposition plays a full part in its activities". Or the separation of powers principle to be found in a report where is clearly stated that "any extraordinary legislative procedure should be limited and well justified". See for this 1999 Regular Report on Bulgaria's progress towards accession.

optimistic manner, laying the groundwork for a" formalistic *judgement*"[127]. In the words of Dimitry Kochenov " *The Criteria are met even when the Constitutional Court decisions concerning parliamentary election systems are ignored for years, or the Parliament operates so slowly that it does not satisfy even the most urgent needs of the candidate country.*"[128]

It appears, in this line of reasoning that the *threshold* to meet to pass the "political test" was quite *low*. Even if several countries presented documented deficiencies linked to lack of reliability of judiciary systems[129], only Slovakia failed to fulfil the political requirements of Copenhagen Criterial. Moreover, equal treatment to candidates was not always assured, failing to prevent criticism of scholars[130].

Misgivings affect the whole structure construed through Copenhagen Rounds. What concerns us for the most is, however, the absence of a "*mechanism for continuous post-accession monitoring for the Member States*".[131]. As a result, executive, legislative and judiciary system together with human rights' level of protection of accessing country were anything like the" ideal standards" desired by the Commission and still far from existing Member States. Alongside" two-*speed European Union"* in the economic field,[132] a new chasm started to run through European Union Legal Identity a "*chasm in respect of founding values*."

What we want to assume is that "*the weakness of the Copenhagen Criteria and the lack of their post-accession application caused a discrepancy between EU accession conditions and membership obligations."*[133].

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[127] The analysis of Rule of Law, Democracy and Human rights situation in candidate countries has been squeezed in 2 pages for each candidate. Not far enough, if we compare this assessment to the much more detailed performed for economic and acquis criteria.

[128] Kochenov.D," Behind *the Copenhagen Facade. The Meaning and Structure of the Copenhagen Political Criterion Democracy and the Rule of Law"* (2004), cit, p.18.

[129]. Judiciary System Shortcomings of Hungary concerning "protection of minorities" were ignored for years.

[130] Maresceacu, for instance, wondered why " n certain sensitive political issues the Commission seems unable to perform its reporting function in a truly objective and independent manner" See Maresceau M., 2003 "*Pre Accession*", The Enlargement of European Union p. 9-42

[131] This being implemented for Romania and Bulgaria by introducing the Cooperation and Verification Mechanism (CVM). Indeed, when they joined the EU on 1 January 2007, Romania and Bulgaria still had progressed to make in shortcomings in the field of judicial reform, corruption and powerful organized crime to eradicate. The Commission set up the Cooperation and Verification Mechanism (CVM) as a transitional measure to assist the two countries to remedy theseshortcomings. See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assistance-Bulgaria-and-Romania-under-cvm/cooperation-and-verification-mechanism-Bulgaria-and-romania_en

[132] Alesina, A. and Grilli, V., 1993. *" On the feasibility of a one-speed or multispeed European Monetary Union*." Economics & Politics, 5(2), pp.145-165. Ellison, D.L., 1998. The Eastern Enlargement:" A *New, or a Multi-Speed" Europe?* East European Integration and New Division of Labour in Europe, p. 87.

[133] See Marktle, T. 2006, "*The Power of the Copenhagen Criteria*"

Countries had the opportunity to enter this twilight zone and for backsliding new Member States had an easier ride not to comply with EU values and principles

2.1.3 Systemic deficiencies and the threat they pose

Both 2012 and 2013 "*State of the Union*" speeches[134] of former President of the Commission Barroso[135] had for subject matter the existing challenges to rule of law. Specifically, Member States cooperation in spirit of openness was required in order to respond to "a serious, systemic, risk to the rule of law"[136]. The question of Europe's *raison d'être*, in the light of its "systemic deficiencies"[137] is as acute as ever now. Answering this question is fundamental since it is likely to "*shed light on how to address some of the outstanding problems originated in the context of failures in accession through conditionality*". In the latest years it was common occurrence hearing speeches from representatives of Hungary and Poland advocating sovereignty[138] and popular legitimation against a progressively indisposed Europe. This concept of the Union as" interfering in national domains" fails to do justice to the European idea of" *Community of Law*" we have extensively discussed in our first

[134] State of Union 2012 Barroso, Address, Plenary Session of the European Parliament in Strasbourg. See at http://europa.eu/rapid/press-release_SPEECH-12-596_en.htmS.
State of the Union 2013, Barroso, Address, Plenary Session of the European Parliament in Strasbourg. See at http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

[135] Jean Claude-Junker, former prime minister of Luxembourg, is the President-in-office of European Commission since November 2014

[136] . As we shall see, the crisis that has expanded in the countries fiercely named "illiberal democratic regimes" concerns an area not restricted to "the rule of law", but one that involves human rights and democracy as well. For interpretation of the Rule of Law see the brilliant contribution: Magen, A., 2016" Cracks *in the foundations: understanding the great rule of law debate in the EU.* " JCMS: Journal of Common Market Studies, 54(5), pp.1050-1061.

[137]. A term that, since this Memorandum, has been persistently used (38 times) for describing systemic shortcomings. See Commission MEMO/12/165 "*Hungary – infringements: Commission takes further legal steps on measures affecting the judiciary and the independence of the data protection authority, notes some progress on central bank independence, but further evidence and clarification needed*" at http://europa.eu/rapid/press-release_MEMO-12-165_en.htm. It is also the title of a contribution we thoroughly took into account: Bogdandy, A.V. and Ioannidis, M., 2014." *Systemic deficiency in the rule of law: What it is, what has been done, what can be done"* Common Market Law Review, 51(1), p.59

[138] A centerpiece of one statement made by Orbàn deserves to be quoted interim. The picture that emerges from it perfectly defines the size of the challenge brought by democratic backsliding. It is Resolution 69/2013 of Hungarian Parliament, adopted after the acceptance of the Tavares Report that enabled the Commission to set up a new system of monitoring and assessment, namely New Framework to Strengthen the Rule of Law (2013).
The text reads "*We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain*."

chapter. Such an attitude is intolerable if we want to" safeguard *our own self-understanding*"[139].

European Integration is founded on the values entrenched in Article 2 of TEU, laying down the constitutional profile of both Union and States taken individually. [140] Article 49 of TEU requires prospective Member States to comply with those values. The legal consequences of the obligation posed by EU membership form a triangular relationship with the reading of Article 2 and 7 in combination and *"gives the legal expression to the presumption that current EU members have attained and sustain them*"[141] in a spirit of mutual trust[142]. As outlined by Von Bogdandy and Ioannidis it is" *the existence of that presumption to be fundamental for the safeguard of EU Legal System*"[143]. Presumption of respect of values laid down in Article 2 is what gives meaning to essential principle constituting the basis of the EU Legal system, as mutual trust[144]. If the direct relationship and mutual reinforcing mechanism set by Treaties and designed through decades of compliant jurisprudence is presumed to be valid, any breach of such values can be interpreted as being anything other than an episodic violation, occurring in a framework of "institutional normalcy".[145] What, instead seriously undermines EU legal order and thus "*our own self-understanding*" is the continuous violations of values entrenched in Article 2 of TEU. In the current situation, the Member States responsible of breaches are fiercely defying their own constitutional courts' rulings[146] and interfering with the independence of national

[139] See von Bogdandy, A.: *"How to protect European Values in the Polish Constitutional Crisis, VerfBlog*, 2016/3/31, https://verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis/, DOI: https://dx.doi.org/10.17176/20160331-132159.

[140] Communication from the Commission to the Council and European Parliament Brussels on 15/10/2003" Article *7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*". Referring to the values of former Article 6 (now Article 2 of TEU*) "*This enumeration of common principles, or to use the terminology of the draft Constitution, of common values puts the person at the very centre of the European integration project. It constitutes a hard core of defining features in which every Union citizen can recognise himself irrespective of the political or cultural differences linked to national identity. "

[141] Bogdandy, A.V. and Ioannidis, M., 2014. *"Systemic deficiency in the rule of law: What it is, what has been done, what can be done"* cit. p.60

[142] See the paramount ECJ Opinion 2/13 on the *Accession of the EU to ECtHR* [2013] As we can read at para 167: "This legal structure is based on the fundamental premises that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premises implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected."

[143] *Ibidem*

[144] Von Bogdandy, A.V. and Ioannidis, M., 2014. "Systemic deficiency in the rule of law: What it is, what has been done, what can be done", cit p.60

[145] *Ibidem, p.61*

[146] This aspect will be the prime focus of Chapter III

judiciary systems[147]. At this rate, the EU legal order is seriously at risk of crumbling. The depth of the threat has convinced both scholars and EU leaders to define it as "systemic". Response to systemic violations requires systemic and collective reactions.

In the next Section of this Chapter we will analyse what measures are provided for in the Treaties to protect the rule of law, which means the existence of a European Legal Order.

Further than evaluating the available legal tools, we will also make assumptions about the effectiveness of them in the context of past cases.

2.2 Commission's infringements procedures as measures to protect European Values

According to the duties conferred upon the Member States by the Treaty and pursuant to its role of "*Guardian of Treaties*" Commission has the power to oversee the application of EU law, under the supervision of ECJ.

In accordance with Article 258 (former Article 226 TEC) of the *Treaty on the Functioning of the European Union* (from now on TFEU) Commission can initiate a formal infringement procedure against a member State whenever it considers that this latter has breached Community Law[148], the purpose of the procedure being to bring the infringement to an end. Once having briefly presented the phases of the procedure [149] consisting in an administrative process and another one being purely judicial, what we will consider is whether infringement proceedings can constitute a valuable legal instrument in order to protect fundamental values of the Union as laid down in Article 2 of TEU.

The infringement procedure starts with a letter of formal notice, by which the Commission allows the Member State to present its views regarding the breach

[147] See for Poland Commission Press Release of 20/12/2017 "Rule of Law: European Commission acts to defend judicial independence in Poland". Kim Lane Scheppele referring to autocratic leaders hijacking constitutional democracies with democratic methods has coined the notion of" autocratic legalism". See Scheppele K.L 2018, "*Populist Constitutionalism? (6): on Autocratic Legalism"* in the collection Constitutionalism and Politics at https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-6-kim-lane-scheppele-autocratic-legalism/

[148] Commission can initiate an investigation ex officio and at the request of a Member State. (Article 259 TUE). Another possibility is the emergence of a failure to comply with the EU law by means of a parliamentary question.

[149] We desire not just to inform on the existence of the procedure, but to, albeit, in short, present our view and other opinions concerning the possibility to use infringement proceedings to protect fundamental rights. That said, in our description of what is an infringement procedure we will assume that the subject is already known.

observed. The letter has a fundamental significance as sets out Commission's official stall and alerts the Member State to prepare its defense.[150].If no concrete justification to the letter of formal notice is received, or if the observations presented by the Member State in reply to that notice cannot be considered satisfactory, the Commission will move to the next stage of infringement procedure, which is the reasoned opinion, a document setting out the default of the Member States and that eventually will constitute prosecution 's argument before the judge. Reasoned opinion[151] concedes an amount of time to the Member State to remedy indicated deficiencies. Regardless, if necessary, the Commission will then refer the case to the Court of Justice. The possibility to decide it *lies within its discretionary powers.*
We would like to emphasise this last statement since it can serve as a starting point for our analysis.

2.3.1 The discretionary power of the Commission.

"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.".[152] Wording of Article 258 TFEU does not leave room for interpretation, but by reconciling Article 258 with Article 259[153] of TFEU the framework appears even more clear. While the submission of a reasoned opinion for failures of compliance stands as an obligation for the Commission, the subsequent step of referring the matter to the court is discretionary. As" *the Commission shall promote the general interest of the Union and take appropriate initiatives to that end.*"[154] it is logical that Commission cannot be forced to commence infringement proceedings."[155]

[150]An essential procedural requirement that has been clarified in several cases. In the reasoning of the Court "*the scope of infringement proceedings*" is delimited both by the preliminary administrative procedure provided for by [Article 258 TFEU] and by the conclusions set out in the application and that the Commission's reasoned opinion and its application must be founded on the same grounds and submissions". See Para. 8 of ECJ Judgement, C-211/81 Commission v Denmark [1982] ECLI:EU:C:1982:381. See also Jakab A., Kochenov D., 2016 "*The enforcement of EU law and values: ensuring member states' compliance*", Oxford University Press, p.65

[151] Collective deliberation is the rule for the Commission to issue not only a reasoned opinion, but also the letter of formal notice and ultimately to bring the matter before the Court.

[152] Article 258 of the Treaty on the Functioning of the European Union (TFEU)

[153] Article 259.3 of Treaty on the Functioning of the European Union" The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing."

[154] Commission's mandate according to Article 17 of Treaty on European Union

[155] This has been reiterated on several occasions as ECJ Judgement C- 48/65 *Alfons Lüttike GmbH et al. v Commission* [1966] ECLI:EU:C:1966:8 or ECJ Judgement, C-371/89 *Emrich v Commission* [1990] ECLI:EU:C:1990:158. At paras 6–7 we can read " Within the context of the infringement

When EU legal order is at stake, a discretionary logic can hinder any attempt of resolution. But if timing cannot prevent the Commission to initiate an infringement proceeding[156]. What indeed renders the mechanism of infringements ineffective is a common practice. As argued by Gormley "More than one cabinet responsible for the area concerned lost credibility with its peers by "*frankly doing the bidding of the Member State from which its member of the Commission comes, instead of actually following the advice of the services that proceedings should be commenced against the Member States"*[157].

2.3.2 The ratio of Infringement Procedures: Potential and Limits.

If the penalty logic of Article 7 of TEU is beyond dispute[158], the logic of infringement procedures is not to punish the non-compliant Member States. Advocate General Roemer very clearly explains this as the prime objective of the infringement is that Member States do not abandon their path of legality[159].The last resort[160] but not a nuclear option.

Though the question of mutual cooperation that a sound use of Article 258 should enhance remains unsolved[161], and even if the recourse to Article 258 was sometimes

procedure laid down by Article 169, the only measures which the Commission may be induced to take are addressed to the Member States. Consequently, without its being necessary to rule on possible irregularities in the application, the application must be declared inadmissible even before it is served on the party against whom it is made, pursuant to Article 92(1) of the Rules of Procedure"

[156] ECJ Judgement, C-317/92 *Commission v Germany* [1994] ECLI:EU:C:1994:212. At para 44 this is accurately explained: "*It is for the Commission to judge at what time it will bring an action for failure to fulfil obligations; the considerations which determine its choice of time cannot affect the admissibility of the action"*

[157] Jakab A., Kochenov D., 2016 "*The enforcement of EU law and values: ensuring member states' compliance*" cit, p. 65-78

[158] José Manuel Barroso, former President of Commission, has explicitly called Article 7 a" nuclear option" during his" State of the Union 2012" speech. See at http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm

[159] This precious indication can be found at ECJ Judgement, C- 7/71 Commission v France [1971] ECLI:EU:C:1971:121, para 1034

[160] Since December 2016 European Commission declared it would make more" strategic "use of its powers under article 258, Press Release of 13/12/2016 *"Commission steps up enforcement of EU law for the benefit of citizens, consumers and businesses".* You can find the document at http://europa.eu/rapid/press-release_IP-16-3963_en.htm
De Shutter O., 2017 "*Infringement proceedings as a tool for the enforcement of fundamental rights in European Union"*, Open Society European Policy Institute, p.4

[161] Remarkable line separates scholars. Supporters of the positive impact of infringement procedures on mutual cooperation among States always refer to ECJ Judgement, C-404/15 - *Aranyosi and Căldărar* [2016] ECLI:EU:C:2016 198.. Critics instead consider Article 258 and the following as "leeway provisions for merely channeling national political interest and thus of small, if not quite non-existent, EU law value". Thus they refer to ECJ Judgement C-364/10 *Hungary v. Slovakia* [2012] ECLI:EU:C:2012:630 and ECJ Judgement C-145/04 - Spain v United Kingdom [2006] ECLI:EU:C:2006:543

excessively praised[162], we cannot fail to acknowledge that infringement proceedings have great potential and could be used as a useful tool to protect fundamental rights and the values of the acquis.

To initiate infringement proceedings is not required to meet the high threshold of Article 7, nor the individual ability of litigants to file claims before domestic courts. Further, the margin for maneuver of infringement proceedings can be decisive in the field of fundamental rights. Indeed, infringement proceedings, can be "*filed even prior to the adoption of individual measures applying general rules or policies to specific situations: they can thus operate preventively forcing a state to comply with the requirements of EU law before specific measures are adopted that might affect individual*s "[163]. This is decisive, especially as regards fundamental rights, where exist conditions whereby violations are irreversible, and compensation cannot be equated to prevention. Another valuable asset in the armory of the Commission is the possibility to resort to *"umbrella proceedings*"[164]. Conditions for the admissibility governing umbrella proceedings are that" each individual act brought before the Court must have been drawn to the attention of the Member State involved in the letter of formal notice"[165] Thus, following the abovementioned logic of "path of legality ". Anyway, this mechanism is flawed by the possibility that" a *more general practice or a pattern of non-compliance is likely to keep recurring*"[166]. In this spirit, following the persuasive argument of Advocate General Gallhoed in *Commission v Ireland* a structural deficit of infringement proceedings is that" Restricting *the remedial action to identified cases of non-compliance, infringement proceeding, after all leave other*

[162] A contribution we have taken into consideration underlines the overestimation of the potential of Article 258 and following. Kochenov, D., 2015. *" Biting Intergovernmentalism: the case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool"* Hague Journal on the Rule of Law, 7(2), pp.153-174.

[163] De Shutter O., 2017 "*Infringement proceedings as a tool for the enforcement of fundamental rights in European Union,* cit. pp. 4-68.

[164] Umbrella proceedings are the result of the merger of singular infringements.

[165] See ECJ Judgement C-309/84 - *Commissione v Italia* [1986] ECLI:EU:C:1986:73 paras 14-16
By the way, at a later stage, the Court has recognised the "a*dmissibility of infringement proceedings which in part relate to a string of specific incidents and in part to a general and continuous approach by the national authorities to which specific incidents testified, even if some of them were not included in the letter of formal notice.*" In these cases, occurs what has been called "structural and general infringement or general and persistent infringement". DOCTRINE: See Jakab A. , 2016 "The enforcement of EU law and values: ensuring member states' compliance, cit.
JURISPRUDENCE: ECJ Judgement, C-494/01 *Commission v Ireland* [2005] ECLI:EU:C:2005:250 paras 127 136, 139, 151, 170–1, 174, 184, 194 and ECJ Judgement, C-135/05 *Commission v Italy* [2007] ECLI:EU:C:2007:250, paras 22 and 45

[166] See Jakab A. , 2016 "The enforcement of EU law and values: ensuring member states' compliance, cit. See again ECJ Judgement C-494/01 *Commission v Ireland* [2005] ECLI:EU:C:2005:250, this time at para.

situations of non-compliance intact until they too have been identified and challenged by the Commission in new infringement proceedings" [167].

2.4 ARTICLE 7 TEU

2.4.1 Reasons behind the introduction of Article 7

The keystone to understand what truly represents Article 7 of TEU for European Union is to recognize its special bond with Article 2 of TEU, the homogeneity clause we have thoroughly discussed in Chapter I. Each assessment of the mechanism that sets the upper level of EU intrusion[168] must be carried out considering this peculiarity. Values of Article 2 are not strictly speaking within the scope of the ordinary acquis, in the sense that even today they are not legally enforceable by the provision alone. Stemming from "c*onstitutional traditions common to the Member States*"[169] and standing as" *cornerstones* of European Legal order" the enforcement of values envisaged by Article 2 has emerged as vital in the context of the EU Eastern Enlargement Round[170]. Candidacy for the accession of former Communist countries was accompanied by two distinct, albeit supplementary responses of EU institutions. The first was a proactive response, based on a logic of promotion and strengthening of fundamental rights, notably the Copenhagen Criteria ambitious goal of linking accession and membership obligations. The second, namely the enactment of what is currently is Article 7 of TEU was in line with a dissuasive rationale[171], a safety lock for the liberal values of the Union[172]. It also dealt with the conditionality policy we already discussed: Union's willingness to assist "democratic transition in Eastern

[167] ECJ Judgement C-494/01 *Commission v Ireland* [2005] ECLI:EU:C:2005:250, para 48.
[168] i.e. Article 7 of TEU
[169] See also Article 6 of TEU
For a thorough examination of the impact, see Baldwin, R.E., Francois, J.F. and Portes, R., 1997, *"The costs and benefits of Eastern Enlargement: the impact on the EU and central Europe*" Economic policy, 12(24), pp.125-176[170]
[171] Actually, the resort to Article 7 was considered almost impossible among EU Leaders and scholars. This clearly emerges in the contributions of Bermeo, N., 2016. "*On democratic backsliding"* Journal of Democracy, 27(1), pp.5-19 and Mueller, J.W., 2014 " *The EU as a militant democracy, or: are there limits to Constitutional mutations within EU member States"* Revista de Estudios Políticos, (165), pp.141-162.
Anyway, once the commonality of values ceased to be a shared trait of all the Member States, a deterrent mechanism to discourage any eventual rule of law backsliding was deemed necessary
[172] See Margaritis, K., 2013 *"Some thoughts on the interrelation of article 7 TEU with the EU Fundamental Rights Agency"* Persp. Bus. LJ, 2, p.144.

Countries" was conditional upon the maintenance of values established throughout Copenhagen Rounds and now enshrined in Article 2 of TEU. In case Candidate Countries had failed to comply with EU fundamental values, the sanctions under Article 7 could have been enacted. Against this background, it is now possible to put emphasis on Article 7.

2.4.2 Historical Overview

The provision was first envisaged in the Amsterdam Treaty Revision of 1997, but its first wording implied a narrow scope. Indeed, Article 7 formerly referred to Article 6 of TEU[173] And the way of addressing serious and persistent breaches of EU values.[174]. Aside from the definition of *serious and persistent breach* of EU law[175] on which certainly lacks unanimous consensus,[176] the mechanism of early days was not empowered to address "dormant threats"[177] even if the risk was highly visible. It is indeed the participation of the far-right People's Party to the Austrian Government Coalition of 1999 to trigger the increase in the scope of Article 7.

As a matter of fact," bilateral sanctions"[178] for the creation of a "*cordonne sanitaire around Austria"* [179] could not be considered as a Community response to systemic

[173] Intervened in cases of serious violation of fundamental rights as recognised by ECHR and common constitutional traditions of Member States. For the provision see Article 6 of TEU. The reconstruction has been facilitated by reading Margaritis, K., 2013 *"Some thoughts on the interrelation of article 7 TEU with the EU Fundamental Rights Agency" p.* 144

[174] See Article F.1 of Amsterdam Treaty

[175] In accordance with a "thick" notion of rule of law, many commentators have defined crisis of European values as "rule of law crises", "democratic backsliding", "constitutional crisis". For our purposes, all these expressions can be attributed to a distinct phenomenon: the existence of threats "to the legal and democratic fabric in some of our European states." as they were called in State of Union 2012 Barroso, Address, Plenary Session of the European Parliament in Strasbourg. See at http://europa.eu/rapid/press-release_SPEECH-12-596_en.htmS. For the vital importance played by European Values in European Legal Order see also Baratta, R., 2016 *"Rule of Law 'Dialogues' Within the EU: A Legal Assessment"* Hague Journal on the Rule of Law, 8(2), pp.357-372.

[176] The complicated issue will, however, ,albeit in a nutshell, be part of our next discussions.

[177] For "dormant threats" we mean a situation in which a potential violation is more than likely, and it is only a question of time before the threat substantiates in an effective violation. A situation that, from our standpoint, perfectly suites the conscious rule of law backsliding that Jörg Haider (namely the leader of the People's Party) was projecting for Austria. The question draws our attention and is rigorously explained by Lachmayer, K., 2016. *"Questioning the basic values–Austria and Jörg Haider"* The Enforcement of EU Law and Values

[178] Historically known as EU 14's measures, they included suspension of diplomatic contacts beyond the "technical level", freezing of bilateral contacts with other high officials, and no support for Austrian candidates for positions in International Organizations

[179] See Statement from the Portuguese Presidency of the EU, 1/31/00, 31 January 2000 at http://www.cvce.eu/content/publication/2009/12/16/8a5857af.

threats alleging the violation of EU Legal Order[180] on the contrary, the forerunner of Article 7 fell short of providing any EU official response, due to an evident lack of competence. It therefore went without saying that Article 7 scope required to be widened. Hence, with Nice Treaty Revision a new paragraph was inserted in the initial provision, thus foreseeing the possibility that "a clear risk of a serious breach" fell within the remit of Article 7.[181] The objective of the review stood as a clear one. Article 7 as was adopted in Amsterdam just carried an "implicit but serious reproach of Member State policy". The Nice Treaty Amendment, by contrast, offered the opportunity to address systemic breaches by adopting a more constructive approach.[182] A further amendment of Lisbon solely led to minor[183] changes.
The current three parts structure of Article 7 follows.

I) The determination of a "clear risk of a serious breach";
II) The determination of a "serious and persistent breach"
III) The decision to impose sanctions.

Before we embark in the core of the debate it is interesting to anticipate the "non-linear" structure of the Article. Precisely, the *"determination of a serious and persistent breach" at II)* does not depend on a "previous detection of a *clear risk of serious breach*" at I) while the decision to impose sanctions at III) is conditional upon the occurrence of conditions of "*serious and persistent breac*h" at II).

[180] First , because the response was not conceived on a supranational level or in any case legally anchored to Treaties. Second, because the threat was not "serious and persistent" but just hypothetically, though very likely. See for more Besselink, L., 2016. *"The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives",* Oxford University Press p. 13.
[181] We endeavor to enrich the discussion by reporting a quote that has inspired one of the contributions we have consulted to complete our work. As Sadurski puts it " A*rticle 7 Mechanism in its original form was no more than bark in practice; or more accurately, a bite without a previous bark, which is not how it should be- except for really mean dogs*". The metaphor is far from being complex but succeeds in highlighting the shortcomings of Article 7 procedure before Nice Amendment. Once the procedure changed, more instruments were at the disposal of the Union to intervene at earlier stages and thus to weakening the last resort measure character that Article 7 had acquired. ." See Sadurski, W., 2010 "*Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider'"* Columbia Journal of European Law, *16*, p.385.
[182] As pointed out in a famous Communication of the Commission " Article 7 of the Union Treaty provides a means of sending a warning signal to an offending Member State before the risk materializes".
COM(2003) 606 final, 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.*
[183] Except the point of controversy about whether paragraph 1 confers to Council monitoring of Member States, that we will take into account in a short time. See Besselink, L., 2016. *"The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives",* cit. p. 131

2.4.3 The sanctioning system of Article 7.

As regards the substance of sanctions that can be adopted under Article 7, the ambiguity of wording leaves room for interpretation. As the sanctioning system of the Article 7 was never activated against a Member State, all we can provide though is short speculation about "*the suspension of certain rights deriving from the application of the Treaties to the Member States in question*" indicated in the provision.

Primarily, the wording of Article 7 restricts the range of sanctions to those concerning "rights deriving from the application of the Treaties". This given, we shall infer that *"suspension or cessation of membership"* are not envisaged in the context of Article 7. With the consequence that, in view of the discretionary and political nature of the provision, perpetual non-compliant Member States that refuse to fulfill the obligations of EU membership cannot lose this latter unless they spontaneously withdraw from the Union, a decision that may occur if political pressure is exerted.[184]Nor can be considered under Article 7 the set of measures taken by EU 14's against Austria, since they were not communitarian responses to the risk of systemic breaches, but bilateral ones. What could, by contrast, be considered within the range of sanctions envisaged by Article 7 is the use of "conditionality" in terms of suspension of EU funding in cases where a *serious and persistent breach* is detected[185].

Besides the condition of suspending "rights deriving from the application of the treaties" what further restricts the scope of sanctions under Article 7 is its paragraph 3 claiming that "*sanctions must take into account the possible consequences of such a*

[184] *Ibidem* p.130. This does not mean that non-compliant States are forced to stay in the Union. In spite of the absence of relevant precedents, we can draw a parallel with what happened to Greece when the democratic government was overthrown by colonels in 1967. In that case, before the decision under Article 8 of the Statute of the Council of Europe (a mechanism comparable with the one foreseen by Article 7 TEU) were activated, Greece that was found "contrary to the reinstate of a democracy" withdrew from Council of Europe. This digression has been possible thanks to the work of van Boven, T.C., 2000. "*Human Rights from Exclusion to Inclusion; Principles and Practice: An Anthology from the Work of Theo Van Boven*." Martinus Nijhoff Publishers.

[185]. According to the author, conditionality is legally anchored to the duty of sincere cooperation laid down in Article 4 TEU and effective implementation of EU law as a common interest at Article 197 TFEU. A further basis is article 292 TFEU. Moreover, conditionality is a sound response to put an end to the existing paradox for which EU is funding autocracy i.e. States who consciously turned to "illiberal democracies" such as Hungary and Poland.
See Kelemen,R.D. , Scheppele, K.L 2019 " *How to Stop Funding Autocracy in the EU"* VerfBlog, 2018/9/10, https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/, DOI: https://doi.org/10.17176/20180910-094901-0.

suspension on the rights and obligations of natural and legal persons". [186] This wording, anyway, does not exclude the application of sanctions that do not have an impact on the executives of non-compliant Member States. To the contrary, the provision should be interpreted as a way to secure the imposition of sanctions mandatorily inspired on the principle of proportionality[187].. As a result of evaluations carried out by the Council, restrictions on the rights and obligations of natural and legal persons can be justified by objectives of general interest pursued by the Community[188].

2.4.4 The scope of Article 7

In the words of Article 7 TEU what falls within the remit of Article 7 is the determination of a "*risk of serious breach*" and the determination of "*a serious and persistent breach"*. The issue of *"systemic breach*[189] has been briefly presented in a previous section of CHAPTER II and we are yet to put it into perspective. By the way, the extent to which solutions to *systemic breaches* are empowered in Article 7 must be framed in the context of an illuminating Opinion delivered by Legal Service of Council[190]. Within the framework of Article 7" Union *has the competence to supervise the application of the rule of law, as a value of the Union, in a context that is not related to a specific material competence or that exceeds its scope*".

[186] Dumbrovsky.T 2018 "*Beyond Voting Rights Suspension Tailored Sanctions as Democracy Catalyst under Article 7 TEU"* EUI Working Paper RSCAS 2018/12 p.5

[187] The principle is one of the few to be explicitly expressed in EU Treaties, precisely at Article 5(3). But at first appeared as a general principle of EU Law in the above-mentioned landmark ruling ECJ Judgement, C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECLI:EU:C:1970:114

[188] Reference has to be made to the paramount case ECJ Judgement C-84/95 - *Bosphorus v Minister for Transport, Energy and Communications and Others* [1996] ECLI:EU:C:1996:312. In fact, at para.21 we read "It is settled case-law that the fundamental rights invoked by Bosphorus Airways are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community". At the same para. we have indications about case-law dealing with restriction of fundamental rights in the name of general interest. See for example ECJ Judgement C-44/79 - *Hauer v Land Rheinland-Pfalz* [1979] ECLI:EU:C:1979:290 ECJ Judgement C-280/93 - *Germany v Council* [1994] ECLI:EU:C:1994:367

[189] i.e. Systemic deficiency, both terms are part of EU Jurisprudence.

[190] See Council Legal Service Opinion on Commission's Communication on a new EU Framework to strengthen the Rule of Law - compatibility with the Treaties (doc. 10296/14) and Hillion, C., 2016. "*Overseeing the Rule of Law in the EU. Reinforcing the Rule of Law Oversight in the European Union"* Cambridge University Press p.4

In other words, contrary to the EU Charter of Fundamental Rights, the scope of Article 7 is more far-reaching and includes all actions or inactions of Member States.[191] In view of the fact that the scope of Article 7 is wide-ranging, the stringent procedural requirements and threshold for activation of Article 7 are a logical consequence.

Outlined the broad scope of Article 7, and in the wake of the continuous calls to address "*systemic risk to the Rule of Law*"[192] we must clarify the two notions of R*ule of Law* and s*ystemic breach/risk/deficiency.*

I. *Rule of Law,* to which we have devoted a section of CHAPTER I, is one of the most elusive legal concepts to be ever developed and consequently literature on it is voluminous.[193] . But still, after years of uncertainty on its precise meaning, in a similar fashion to research carried out by Venice Commission, a Communication of European Commission[194] provided a single and agreed-on definition of Rule of Law. As the Commission puts it Rule of Law entails the compliance to six legal principles:

a. Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws.
b. Legal certainty.
c. Prohibition of arbitrariness of the executive powers.
d. Independent and impartial courts.
e. Effective judicial review including respect for fundamental rights
f. Equality before the law.[195]

Even if some nuances of the notion can still be found at national level, and conceptual uniformity among the States is virtually impossible, Commission has attached the utmost importance to the fact that elements of the definition stem from the

[191] As opposed to the scope of EU Charter of Fundamental Rights, the mechanism under Article 7 is not circumscribed to situations where Member States, 'implement EU law' See Title VII about the application of the Charter with a particular view to Article 51

[192] See footnote[136]

[193] It is worth mentioning at least these contributions: Baratta, R., 2016 *"Rule of Law 'Dialogues' Within the EU: A Legal Assessment"* pp.357-372 - Grote, R., 2001.*"Rule of Law, Rechtsstaat,/y Etat de Droit."* Pensamiento Constitucional, 8(8), pp.127-176 Starck, C., 1999. "*Constitutionalism, Universalism and Democracy. A Comparative Analysis*. " Nomos, Baden-Baden Tamanaha, B.Z., 2004. "*On the rule of law: History, politics, theory"* Cambridge University Press.

[194] COM (2014) European Commission Communication 11/03/2014 *"A New Framework to Strengthen the Rule of Law"*

[195] See also Kochenov, D. and Pech, L., 2015 "*Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality".* European Constitutional Law Review, 11(3), pp.522

constitutional traditions common to Most European Legal system and so define "*the core meaning of the rule of law within the context of EU legal order*"[196]

II. In the dedicated section of this Chapter, we already have maintained the presumption of adherence to values entrenched in Article 2 as being inseparably linked with Article 7 and 49 in what we have named a "*triangular relation*". The validity of this presumption is indeed essential to the preservation of EU Legal order, entirely built on the edifice of Rule of Law, in a duty of sincere cooperation.[197] In witness of this undeniable fact, several provisions[198] of Treaties come to explain the cornerstone role of Rule of Law within EU legal order. When the presumption mentioned above is affected by systematic threats to values enshrined in Article 2 we can speak of *systemic deficiency*. Even if the concept lacks an unambiguous definition and competent institutions of EU retain ascertained discretional power on the determination of cases of" risk *of serious breach*" and" serious *and persistent breach*", therefore rendering far more complicated their detection, we shall refer to a distinction provided by Council of Europe in its time. Following a resolution of 2014[199], indeed, the ECHTR and the Committee of Ministers expanded on the notion of "systemic" or "structural" problem as a legal concept, aiming at distinguishing simple and episodic violations (in that case of Convention for the Protection of Human Rights and Fundamental Freedoms**)** and structural ones.[200] EcTHR was entrusted with this task and started to identify systematic violations in its case law, thereby simultaneously suggesting general measures to adopt in the operative part of delivered judgements.[201]. Although

[196] See COM (2014) European Commission Communication 11/03/2014 *"A New Framework to Strengthen the Rule of Law"* and Kochenov, D. and Pech, L., 2015 "*Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality "cit. P.513*

[197] See footnote [143] and Article 4 of TE.U

[198] Besides the already mentioned provisions, Article 3(1) TEU foresees that the Union is to '*promote*... its values and the well-being of its peoples'. Article 13(1) TEU reiterates this broadly defined EU value-promotion *mandate*, by stating that EU institutions' cooperation has a binding nature. Moreover, Article 197 of TFEU stipulates that " effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest". Ultimately, Article 291 (1,2) states that "Member States shall adopt all measures of national law necessary to implement legally binding Union "act

[199] Committee of Ministers, Resolution N.3 (2004) of the Committee of the Ministers on Judgements Revealing an Underlying Systemic Problem at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd190

[200] Von Bogdandy, A.V. and Ioannidis, M., 2014. *"Systemic deficiency in the rule of law: What it is, what has been done, what can be done"* cit. p.68

[201] *Ibidem*

See for instance ECtHr no.31443/96 *Broniowski v. Poland* [2004] ECLI:CE:ECHR:2005:0928JUD003144396 paras 189 and seq. ECtHR no. 42525/07 60800/08 A*nanyev and others v. Russia* [2012] ECLI:CE:ECHR:2012:0110JUD004252507

no official definition of "systemic breach" is offered [202], once we have evaluated the general measures offered by EcTHR in correlation with the alleged systemic breach, we can conclude that, according to EcTHR systemic breaches are associated with" dysfunctions" in the national legal system that affects a significant number of persons and calls for general measures"[203]. It certainly could be a valuable insight for EU law when it is time to preserve the integrity of EU Legal order.

2.4.5 Procedural aspects of Article 7 and critics.

To assess the procedural aspects of Article 7 what we need is to carry out two tasks simultaneously:

i. Report the exact wording of Article 7.
ii. Comment and critically assess Paragraph 1 and Paragraph 2 of Article 7). The main subject of Paragraph 3 i.e. the sanctioning phase) already found space in a section of this chapter.

(Article 7.1)

"On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four-fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure".

What we can infer from paragraph 1 of Article 7 is the fact that there can be four different actors on the stage when it comes to deciding whether exists or not a *clear risk of serious breach.* It is evident that the European Parliament and Council act in their framework of "shared responsibility"[204] that characterise EU legislation, even if,

[202] Susi, M., 2012 *"The definition of a 'structural problem' in the case-law of the European court of human rights since 2010."* German Yearbook of International Law, 55, pp.385-417.
[203] Von Bogdandy, A.V. and Ioannidis, M., 2014. *"Systemic deficiency in the rule of law: What it is, what has been done, what can be done"* cit. p.69
[204]Council and European Parliament after Lisbon Treaty shares responsibility in the legislative procedure. The mechanism of co-decision is set in article 289 of TEU

as a matter of fact, Parliament power goes beyond what is merely suggested by the provision.[205]

It is worth noting that the "exceptional character" of the provision is further is substantiated by the fact that before making a determination of serious breach, the concerned State can exert its right of being heard on the matter.

Another aspect we must consider is that the wording of the provision was a source of uncertainty. Indeed, it was at the origin of an interinstitutional controversy regarding whether the Paragraph 1 of the Article confers upon competent EU institutions the power to monitor the situation of Member States. The matter has been ironed out in favor of " the logical assumption according to which

powers of monitoring are inherent in the powers of the Council and the right of initiative of the Parliament, Commission and Member State"[206]. In this spirit. Communication furtherly adds that" Article *7 places the institutions under an obligation to maintain constant surveillance on the Member States* '. Furthermore, we found evidence in support of this claim in the existing literature.[207]

In view of the following Paragraph 2 of Article 7, we maintain once more than the preventive procedure under Paragraph 1 constitutes a separate and different mechanism from the sanctioning procedures under Paragraph 2 and 3. In case the breach is already serious and persistent, Paragraph 2 can be discretionally activated without a previous resort to Paragraph 1. We remind that the enactment of both procedures follows a discretionary and thus political logic, no institution has a duty to act.

(Article 7.2)

The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a

[205] Even if Parliament has no formal and recognised right of initiative, the legislative body can, according to its Rules of Procedures and by means of a vote, call on the Commission or the Member States to submit a proposal or the Council to ac.t

[206] Besselink, L., 2016. *"The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives", cit* p. 133

[207] See Bogdandy, A.V., 2000. "*The European Union as a human rights organization: Human rights and the core of the European Union*", Common Market Law Review, p.1308. De Burca, G., 2003. "*Beyond the charter: How enlargement has enlarged the human rights policy of the European Union*." Fordham Int' LJ, 27, p.679.

Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

In case the procedure has followed the path outlined in Paragraph 1, the Procedure now requires the participation of another institutional actor that in order to determine a "serious and persistent breach" must reach unanimity of consensus. If the threshold set out in Paragraph 1 of Article 7 is tremendously high, the second Paragraph requires the most intergovernmental of decisions. We need hardly say that here is where Article 7 procedure weak point lies. Thresholds are virtually impossible to meet and effective veto powers of Member States[208] can easily deadlock the progress of the procedure. Adding to this the problems caused by "political feasibility"[209]Off the procedure, that always hides behind the retards and inactions of EU Institutions we can safely say that the procedure is flawed by structural limits. To those listed, we could argue that the total absence of the Court, merely involved in procedural questions. Indeed, *de lege* the Court cannot decide on the merit of the question, even though it should be self-evident that an eventual finding of the Court could give further legitimation to initiatives of Commission, Council and all the institutions involved.

A New Framework to Strengthen the Rule of Law

"There are [..] situations where threats relating to the rule of law cannot be effectively addressed by existing instruments. A new EU Framework to strengthen the Rule of Law as a key common value of the EU is needed in addition to infringement procedures and Article 7 TEU mechanisms. The Framework will be complementary to all the existing mechanisms already in place at the level of the Council of Europe to protect the rule of law. It reflects both the objectives of the EU to protect its founding values and to reach a further degree of mutual trust and integration in the area of freedom, security and justice without internal frontiers".[210]

[208]. Needless to say, the member state to be sanctioned do not take part in the vote, as pointed out by article 354 TFEU

[209] Leaving aside complication deriving from party politics, the continuous reference to Article 7 as a "nuclear option" has tacitly declared the impossibility to use it, for at least two reasons. First, the term coined by Barroso has undermined the dissuasive nature of Article 7. Then, because it is probably inappropriate, as there is nothing nuclear about the detection of a "serious and persistent breach".

[210] Communication from the Commission to the European Parliament and the Council *"A new EU Framework to strengthen the Rule of Law"* COM/2014/0158 final Para.3

Paragraph 3 of Communication concerning "*A new EU Framework to strengthen the Rule of Law"* clarifies, in line with State of Union Speeches of 2012 and 2013, a compelling need: the need of an alternative device to address threats related to rule of law. Acknowledged the impossibility to deal with threats by means of the limited infringements procedure laid down in Article 259 and seq. and the intrusive albeit high-demanding nature of Article 7 revealed the necessity to devise a mechanism midway set between the two existing procedures. A less-intrusive but broader in scope instrument was recommended in order to face increasing threats in the context of emerging rule of law crisis at the national level throughout Europe. Hence, the numerous attempts of soliciting the creation of a new device.[211]

The mechanism was set and presented during the Communication mentioned above concerning "*A new EU Framework to strengthen the Rule of Law*". We are about to assess in a nutshell certain of its most relevant aspect.

2.5.1 Nature and Meaning

The New EU Rule of Law Framework is not designed to be triggered by individual breaches of fundamental rights or by a miscarriage of justice[212]. On the contrary, its declared aim is to address *systemic breaches* before the preventive mechanism of Article 7 (Article 7.1) is enacted and preferably attempts to prevent it.[213] The *ratio is evident:* before escalating to Article 7, and in view of its high-demanding thresholds, the Commission provided itself with an "early-warning legal tool"[214] whose primary purpose was to "enter in a structured dialogue with the member state concerned" [215]. It's nature of a" subsidiary instrument"[216]lies within the fact that even if the dialogue within the New Framework proves to be unfruitful and so the suggested legal measures

[211] See Council Conclusions of June 2013- Rui Tavares Report of 2013 obtaining the majority in Parliament and underlining the need for a new framework concerning the preservation of values enshrined in Article 2.
See also Louis Michel and the Kinga Göncz Reports of 2013

[212] Communication from the Commission to the European Parliament and the Council *"A new EU Framework to strengthen the Rule of Law"* COM/2014/0158 final Para.4.1

[213] It is clear how this mechanism put emphasis on a shift on the Commission's approach in the prevention of breaches of EU values. Not only "does it refrain from reviving the idea of regular monitoring based on Article 7(1) TEU, but the framework is also set to operate *outside* of the mechanisms of Article 7 TEU"

[214] Kochenov, D. and Pech, L., 2015 "*Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality",* cit, p.521

[215] *Ibidem.*

[216] Baratta, R., 2016 *"Rule of Law 'Dialogues' Within the EU: A Legal Assessment"* cit. p.365

are [217] not implemented, there is no obligation upon Commission to activate the procedure under Article 7, this option being within its discretional powers.[218].

2.5.2 Three stages of the Process

The Communication on the "New Framework to Strengthen the Rule of Law" describes the new mechanism devised by the Commission as consisting of three distinct stages.

1) After having collected all available data and information on a Member country suspected of constituting of a systematic threat to the rule of law in a Member State, the Commission commits itself to send a *rule of law opinion* to target Member State, which substantiates its concerns and gives the national authorities the possibility to respond to the warning. In accordance with the principle of loyal cooperation enshrined in Article 4(3) TEU the opinion, at this stage, is not made public. [219]
2) Should the matter not be resolved satisfactorily, the Commission is empowered to issue a '*rule of law recommendation*', which furtherly clarifies the reasons underlying concerns, propose a solution for the deficiency, and fixes a deadline within which the Member State has to solve the existing problems.
This once the recommendation is made public and the Commission additionally request to be promptly informed of the steps taken.
3)The third phase is the one within which Commission "follows up" the development of the question at stake. If unsatisfied by the Member State's efforts, the Commissions the authority to resort to the mechanism laid down in Article 7.

[217] We are referring to rule of Law opinion issued in the first Stage and Recommendation in the second.
[218] This is probably the reason because of the informal name the New Framework has been given: the "pre-article 7 procedure". See V. Reding " *A new Rule of Law Initiative"*, Press Conference, European Parliament, Strasbourg, 11/03/2014"
[219] Hillion, C., 2016. *"Overseeing the Rule of Law in the EU. Reinforcing the Rule of Law Oversight in the European Union"* p.12

CHAPTER III : A Case Study: Systemic breaches in Poland and the EU Response

By the time of the biggest enlargement of EU History, completed in 2004, the majority of scholars and most prominent figures of EU agreed on keeping unquestioning faith on the democratisation of new Member States.[220] And truth be told, official statistics confirmed overconfidence.[221] As Linz and Stepan pointed out, by the time of 2005 no new Member State besides Slovakia had failed to fulfil the political test of Copenhagen, indeed each single new Member State was officially classified as "consolidated democracies"[222]

Ten years later, however, the context was drastically changed, democracy and its guarantees faced serious threats, and overconfidence was nothing more than a distant memory. Consolidated democracy, to the detriment of any excess of optimism, could indeed "fall from grace"[223]. The recourse to "last resorts measures"[224] became to concern no more a solely theoretical scenario.

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[220] Having said this, a minority group of intellectuals warned intellectual community on the potential adverse impact of a simultaneous and massive accession. Among them, we suggest reading the contributions of Brissman, D.M. and Rupnik, J., 1995 *"The post-totalitarian blues"* Journal of Democracy, 6(2), pp.61-73 and Tismaneanu, V., 2009. *Fantasies of Salvation: Democracy, nationalism, and myth in post-communist Europe*. Princeton University Press.
On the topic also: Szente, Z.,2017 "*Challenging the Basic Values - Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them"* in: The Enforcement of EU Law and Values: Ensuring Member States' Compliance. Oxford University Press, Oxford, pp. 456-475.

[221] *"Freedom further consolidated in Central Europe. Five of the new EU countries-the Czech Republic, Estonia, Hungary, Poland, and Slovakia-achieved the highest possible survey rating: 1 for political rights and 1 for civil liberties." S See Report "Freedom in the World*" carried out by "Freedom House" at https://freedomhouse.org/report/freedom-world/freedom-world-2005. Now compare the findings with those of 2017 at https://freedomhouse.org/report/freedom-world/2017/poland. According to the latter report "*Since taking power in late 2015, the conservative PiS party has enacted measures that increase political influence over state institutions, raising serious concerns about Poland's democratic trajectory*."

[222]See the classic Linz, J.J. and Stepan, A., 1996. "*Problems of democratic transition and consolidation: Southern Europe, South America, and post-communist Europe"* JHU Press.

[223] See Kovács, K. and Scheppele, K.L., 2018 *"The fragility of an independent judiciary: Lessons from Hungary and Poland–and the European Union"* Communist and Post-Communist Studies, pp.1-12

[224] Even in 2015 Commission referred to Article 7 as a measure of last resort – not to be excluded, but I would hope that we never let a situation escalate to the stage that it would require its use. See "*The European Union and the Rule of Law* " Keynote speech at Conference on the Rule of Law, Tilburg University, 31 August 2015.

Against that background, this final chapter aims to illustrate the serious threats Poland's PiS Government has posed to the respect of Rule of Law both at national and supranational level. For enhanced clarity, we will divide the chapter into three parts. First, we deem fundamental to describe all the stages of the Polish case. Only then we will focus on the existing incompatibility of such measures with EU Acquis. A third part will be dedicated to a brief assessment of measures implemented to address the rule of law crisis.

Until Polish Constitutional Court powers were boycotted and freedom of Polish media to a great extent, narrowed, European Commission had committed to state its reasons warranting the "non-activation" of the New Framework to Strengthen the Rule of Law against Hungary. Despite a firm intervention of the Commission was requested numerous times by EU Parliament and other institutions [225] and besides the issuing of Communications containing explicit references to the "Activation of Article 7" [226], Commission made clear that "there was no such thing as illiberal democracy in Hungary". Reasons of non-activations and an ensuing critical assessment of them is not among our subject matters; however, this short reference to the incredibly patient approach used against Hungary can serve instead to testify as opposed to the swift and forceful response adopted by the Commission in the case of Poland. Next paragraph will outline the different stages of the ongoing process with Poland, but still, in doing so, legal provisions and documents we need for further analysis will be highlighted.

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[225] See Opinion no. 621 / 2011 of *Venice Commission "On the New Constitution of Hungary"* 20/06/2011.
Opinion no. 663/2012 of *Venice Commission on "On Act CLXII of 2011 on the legal status and remuneration of judges"* 19/03/2012 "Opinion no 664/2012 of *Venice Commission on "ACT CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities*" 19/03/2012.
Opinion no. 720 / 2013 of *Venice Commission "On the Fourth amendment to the fundamental law of Hungary*."
17/06/2013 etc. Calls on the Commission were made by the Parliament in a plethora of occasions:
V. Reding "*The EU and the Rule of Law*" - What next? Speech/13/677, 04/09/2013
European Parliament resolution " *On the situation of fundamental rights: standards and practices in Hungary* " (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)) 03/07/2013
European Parliament Resolution "*on the Situation in Hungary "*2015/2700(RSP) - 10/06/20 at para 10 we read " that Parliament "U*rges the Commission to activate the first stage of the EU framework to strengthen the rule of law, and therefore to initiate immediately an in-depth monitoring process concerning the situation of democracy, the rule of law and fundamental rights in Hungary*"

[226] Commission Statement "O*n the situation in Hungary*' " Speech/15/5010, 19 May 2015. In the words of Timmermans "a*s far as the Commission is concerned, there is no doubt that the reintroduction of capital punishment would be contrary to the EU's fundamental values. A reintroduction of the death penalty by a Member State would, therefore, lead to the application of Article 7 TEU."*

Polish case: the events.

To be clear, we can divide Polish case into two distinct phases: a first one concerning the first activation of "New Framework to Strengthen the Rule of Law" and a second one, still ongoing, that involves the first trigger of the mechanism devised in Article 7 TEU.

As already maintained in the previous paragraph, once a "*systemic risk of breach of EU values*" was determined, the Commission showed unprecedented readiness to intervene to engage in a constructive dialogue with Poland.[227] The primary justification offered by Timmermans [228] was that "binding rules of the Constitutional Tribunal are currently not respected", which "is a serious matter in any rule of law-dominated State"[229]. In fact, Poland's Constitutional Court[230] had already been hijacked by the ruling *Law and Justice Party* (from now on *PiS*) and further, passed legislation on public service broadcasters clearly undermined the freedom of Polish media. [231] However, Commission stated that before issuing its official Rule of Law Opinion[232] would have waited until Venice Commission had spoken out[233].

[227] European Commission, Press Release Weekly meeting "*Rule of law in Poland: Commission starts dialogue"* 13/01/2016 http://europa.eu/rapid/press-release_WM-16-2030_en.htm . As stated in the Press Release "*Recent events in Poland have given rise to concerns regarding the respect of the rule of law." The Commission had therefore requested information on the situation concerning the Constitutional Tribunal and the changes in the law on the Public Service Broadcasters."* As a testimony of the nature of the instrument, Commission reiterated that the New Framework serves to find solutions in "a spirit of dialogue."

[228] Franz Timmermans serving actually serves as a First Vice-President of the European Commission. He is also in office as a European Commissioner for Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights. His mandate started in 2014.

[229] See Timmermans, F. (2016) 'Readout of the College Meeting of 13 January 2016'. Available at http:// europa.eu/rapid/press-release_SPEECH-16-71_en.htm?locale=en.

[230] The amendment to the Act on the Constitutional Tribunal of whose effects PiS sapiently took advantage was, however, a desperate attempt of Civic Platform (previous ruling party) to pack itself the Court. It concerned the composition of Constitutional Tribunal. By taking advantage of the new amendment, Pis leaded by Andrzej Duda appointed five judges instead of 2. Constitutional Tribunal spoke out on 9th of March 2017 declaring that three of the justices sworn in by PiS should have been appointed instead by Civic Platform. However, PiS Government refused to publish the decisions and to dismiss illegally nominated judges claiming it had "no legal standing" Trybunał Konstytucyjny Judgement K 47/15 *"Assessment of Constitutionality of Act on Constitutional Tribunal*" delivered on 22 December 2015

In detail at See Kovács, K. and Scheppele, K.L., 2018 *"The fragility of an independent judiciary: Lessons from Hungary and Poland–and the European Union"* cit. P.6.

[231] Given the scale of the threat posed to the rule of law and the consequent "*permanent imbalance between legislative, executive and judicial powers*" a Committee for the Defense of Democracy was set in Poland. See http://komitetobronydemokracji.pl and Jankovic, S., 2016 *"Polish democracy under threat? an issue of mere politics or a real danger*?." Baltic Journal of Law & Politics, 9(1), p.51

[232] As we previously said, Rule of Law Opinion is a specific feature of the first stage of the New Framework set up by the Commission

[233] European Commission, College Orientation Debate on "rece*nt developments in Poland and the Rule of Law Framework*": Questions & Answers 13/01/2016. Indeed, Polish Government requested a legal assessment from the Venice Commission before the enactment of the Framework but has proceeded

Venice Commission's Opinion was published on 11 March 2016, and its findings confirmed the level of seriousness of the threat. Accordingly, we read in the report "*As long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger but so is the democracy and human rights.*" Moreover, the report urged the Commission to move to phase 2 of the Framework "*should it wish to remain a credible institution*"[234]. After an overwhelming condemnation of EU Parliament[235] and once having acknowledged the unaltered determination of Polish Government to ignore the report of Venice Commission, European Commission formalized the first stage of "New Framework to Strengthen the Rule of Law" by sending its Rule of Law Opinion [236]and inviting Polish government to submit eventual observations"[237]. Upon receipt by Polish Authorities, the Opinion was met both with anger by Jaroslaw Kaczinsky[238] and skepticism by some journalists.[239]

What happened next provides a clear picture of the size and gravity of the threat posed by PiS Government to rule of law. Despite the condemnation of European Bodies (specifically, as we have seen Parliament and Commission) and the harsh assessment provided by the expertise of Venice Commission, Poland Authorities further advanced their *"illiberal crusade*" by adopting a new Act on the Constitutional Tribunal on 6 August, only two months after the reception of the Rule of Law Opinion. The law in question (Act of 6 August), beyond further crippling the Constitutional Tribunal, verbatim reintroduced provisions already disqualified by Venice Commission and

with the conclusion of the legislative process before receiving the Venice Commission's opinion, even if asked not to do so.

[234] Venice Commission, opinion no. 833/2015 on "Amendments on the Act of 25 June 2015 on the Constitutional Tribunal of Poland " para. 135. At para 143. we can also read a reiterated invitation to publish the decision of the Polish Constitutional Tribunal of 9th March, largely ignored by the ruling PiS

[235] European Parliament Resolution "On the situation in Poland" of 13/04/ 2016. The vote has been preceded by an open debate on 19th January of the same year, a few days after the first Communication with which the Commission activated for the first time its New Framework.

[236] European Commission - Press release Commission " *Rule of Law Opinion on the situation in Poland*" 1/06/2016. Available at http://europa.eu/rapid/press-release_IP-16-2015_en.htm

[237] See also Halmai, G., 2018 "*How the EU Can and Should Cope with the Illiberal Member States*" Quaderni Costituzionali, 38(2), p. 320.

[238] Though not formally elected, Jaroslaw Kaczinsky belongs to the political milieu of the most influent intellectuals in Poland. Current Party Leader of PiS. it is not an unfair assessment to say that with his ideas and charisma he can be considered the man behind the success of PiS.

[239] We suggest reading the following article in order to acquaint different views on the matter.

B. Gray 05/07/2016 "*The European Union Shows Poland Why We Have Brexit*" Article published on Politico.eu Available at https://www.wsj.com/articles/the-european-union-shows-poland-why-we-have-brexit-1467747768

criticised as unconstitutional by Polish Constitutional Tribunal in its fundamental judgement of 9th of March 2016[240]. A direct challenge that, albeit initially, had as a counterpart some fine declarations of principles on the rule of law and its meaning.[241]. As Koncewiz brilliantly added[242] "the attacks to the court led by Polish Government clearly have an internal and an external dimension"[243]. Despite some clear albeit attempt at compromise[244] made by Polish authorities, raising concerns of the Commissions were substantiated into the initiation of the second stage of the New Framework to Strengthen the Rule of law [245] and thus the issuing of a public Rule of Law Recommendation[246] addressed to Polish Authorities.
Concerns were raised by Commission on three real issues:

(1) the appointment of judges of the Constitutional Tribunal and the lack of implementation of the judgments of the Constitutional Tribunal of 3 and 9 December 2015 relating to these matters.
(2) the lack of publication in the Official Journal and of implementation of the judgement of 9 March 2016 and of the judgments rendered by the Constitutional Tribunal since 9 March 2016;
(3) the effective functioning of the Constitutional Tribunal and the effectiveness of Constitutional review of new legislation, in particular in view of the law on the

[240] See footnote [230]
[241] Commission's lukewarm approach cannot but be synthesized by some statements released by Franz Timmermans during its Rule of Law Opinion.
"T*he rule of law is one of the foundations of the European Union. There have been construc*tive talks which should now be translated into concrete steps to resolve the systemic risk to the Rule of Law in Poland". See European Commission, Press Release "Commission adopts Rule of Law Opinion on the situation in Poland" of 1/06/2016 available at http://europa.eu/rapid/press-release_IP-16-2015_en.htm
[242] Koncewicz, T. T., "*Farewell to the Polish Constitutional Court, VerfBlog*, 2016/7/09, Available at https://verfassungsblog.de/farewell-to-the-polish-constitutional-court/, DOI: http://dx.doi.org/10.17176/20160710-100611.
[243] According to Koncewiz at internal level "the provisions tie the court's and cripple its ability to act in a timely and speedy fashion. Turning to the external dimension of the threat "the government has found a way to unconstitutionally interfere in a way that makes the Court dependent on outside forces". See also See also Halmai, G., 2018 "*How the EU Can and Should Cope with the Illiberal Member States*" cit p. 320.
[244]Minor changes to the Law deemed unconstitutional by the Constitutional Tribunal of Poland on the day 9 March 2016
[245] We have to add precious information:
1) The activation of the Second Stage was already urged by Venice Commission when it delivered its Opinion on the situation of Rule of Law in Poland on 11/03 /2016 See footnote [234]
2) During its first opinion Commission stated that "If the concerns have not been satisfactorily resolved within a reasonable time, the Commission may decide to issue a Rule of Law Recommendation. This would mean entering the second phase of the Rule of Law Framework" Concerns were clearly not assuaged by the conduct of Polish authority. On the contrary, they grew substantially. See footnote [236.]
[246] Commission Recommendation 2016/1374 of 27 July 2016 regarding "The rule of law in Poland."

Constitutional Tribunal adopted by the *Sejm* (lower house of Polish Parliament) on 22 July 2016.[247]

Beyond that, Commission stated in its recommendation to be once more committed to *"pursue a constructive dialogue with Polish authorities"*.[248] However, in accordance with Communication "*A new Framework to Strengthen the Rule of Law*" of 2014, [249] Commission invited Polish authorities to address the issues it had identified within three months as from the receipt of the recommendation and to update the Commission on the status of the process. Unfortunately, and notwithstanding the efforts of the Commission in maintaining a dialogical approach with Polish authorities, [250] those latter clearly demonstrate their unwillingness to hold back with illiberal changes endangering the independence of judiciary system.

Frustrating to an even higher extent the wishes of Commission, Polish Authorities approved the contested *Act on Constitutional Tribunal* only a few days after the warning of Commission, [251]was received, but above all, refused to publish another ruling of unconstitutionality[252] rendered by Constitutional Tribunal[253], this time concerning the just amended new version of the *Act on Constitutional Tribunal*[254]

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[247] List of concerns has been reported utilizing the same wording of the Commission Recommendation at Section 1. *"Scope of the Recommendation"* 2016/1374 of 27 July 2016 regarding "The rule of law in Poland" available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016H1374

[248] Commission Recommendation 2016/1374 of 27 July 2016 regarding "The rule of law in Poland" para 77.

[249] See Footnote [210] Communication from the Commission to the European Parliament and the Council *"A new EU Framework to strengthen the Rule of Law"* COM/2014/0158. At para 4.2 we read that "*In its recommendation, the Commission will clearly indicate the reasons for its concerns and recommend that the Member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect. Where appropriate, the recommendation may include specific indications of ways and measures to resolve the situation*."

[250] Official correspondence between European Institutions and Polish authorities has been and still is conspicuous. As a proof of this, we can list some relevant letters sent to the Polish government.
Letter of 7 January 2016 from Undersecretary of State Mr Stepkowski to First Vice-President Timmermans.
Letter of 11 January 2016 from Minister of Justice Mr Ziobro to First Vice-President Timmermans.
Letter of 13 January 2016 from First Vice-President Timmermans to Minister of Justice Mr Ziobro.
Letter of 19 January 2016 from Commissioner Oettinger to Minister of Justice Mr Ziobro.
Letter of 19 January 2016 from Minister of Justice Mr Ziobro to First Vice-President Timmermans.
Letter of 1 February 2016 from First Vice-President Timmermans to Minister of Justice Mr Ziobro.
Letter of 29 February 2016 from Minister of Foreign Affairs Mr Waszczykowski to First Vice-President Timmermans.
Letter of 3 March 2016 from First Vice-President Timmermans to Minister of Foreign Affairs Mr Waszczykowski.

[251] i.e. The Rule of Law Recommendation issued by the Commission

[252] Trybunał Konstytucyjny, Judgement K 39/1 "*Judgement in the name of the Republic of Poland"* , delivered on 11 August 2016

[253] Opposition parties sent the Act on Constitutional Tribunal to the court for scrutiny soon as it was adopted. The result of the constitutional review was consistent with the first ruling rendered on 9 March 2016. As a matter of fact, even the revised version of the Act on Constitutional Tribunal was declared unconstitutional on 16 August 2016

[254] Approved on 22 July 2016, some days after the Recommendation by Commission was received.

previously decreed unconstitutional by the same Constitutional Tribunal. It goes without saying, that the intent of Polish Authorities was to deprive the ruling of its legal effects by preventing its publication on Official Journal. This further indicator of Polish authorities ' indulgence in negligent behaviour must not take us by surprise, as it was, once again abundantly predictable.[255].

No less, repeated non-compliance of Polish Authorities not only worsened the existing conflict between hijacked Constitutional Tribunal and ruling PiS government, but also exacerbated the already tense relationships with EU Institutional bodies, whose *"light-touch approach*"[256] underwent hard tests dealing with *"illiberal forces*" and their "*strategy of constitutional capture*"[257]. Since no progress was made as regards the respect of the rule of law, Venice Commission committed itself to overstate, once more, the absence of adequate safeguards of impartiality of the judiciary and the resulting threats to the rule of law[258] . This time, Venice Commission made clear Polish authorities' persistence of non-compliance". In fact, "*instead of unblocking the precarious situation of the Constitutional Tribunal, the Parliament and Government continue to challenge the Tribunal's position as the final arbiter of constitutional issues and attribute this authority to themselves*." Mentioned as well in the report, is a deterioration of the already precarious situation "*have created* (i.e Polish Government and Polish Parliament) *new obstacles to the effective functioning of the Tribunal instead of seeking a solution on the basis of the Constitution and the Tribunal' s judgments, and have acted to undermine its independence"*[259] .

However, once again, the Venice Commission's stance barely had any visible effect, not to say that it was ignored entirely. Far from being solved, Rule of Law crisis

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[255] See Koncewicz, T.T : *"Polish Constitutional Tribunal goes down with dignity"* VerfBlog, 2016/8/25, https://verfassungsblog.de/polish-constitutional-tribunal-goes-down-with-dignity/, DOI: http://dx.doi.org/10.17176/20160826-092339.
According to the Constitutional Tribunal, the majority of provisions of the New Act on Constitutional Tribunal substantially replicate these already found to be unconstitutional in the judgement of 9 of March 2016 (case K 47/15). Therefore "in view of the repetitive nature of most of the claims" Tribunal opted for a reasoned order, rather than a judgement. In addition, the Tribunal, mindful of the neglected first judgement, reiterated that its rulings had to be published immediately in the shortest possible time given the circumstances of each case.

[256] Credits for the expression go to Kochenov, D. and Pech, L., 2015 "*Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality".* European Constitutional Law Review, 11(3), p. 514

[257] Müller, J.W., 2013. Safeguarding Democracy inside the EU. *Brussels and the Future of the Liberal Order "*Uppsala Forum Lecture. See also Kochenov, D. and Pech, L., 2016 *"Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation"* JCMS: Journal of Common Market Studies, *54*(5), pp.1072

[258] Venice Commission, Opinion no. 860/20 on "*The Act on the Constitutional Tribunal*" 14/10/2016 Adopted by the Venice Commission at its 108th Plenary Session. Para.128

[259] Venice Commission further, Opinion no. 860/20 on "*The Act on the Constitutional Tribuna*l" 14/10/2016 Adopted by the Venice Commission at its 108th Plenary Session. Para.108

received a further boost when EU institutions assisted, yet again, to Polish Autorithies reneging on their duty of "sincere cooperation" enshrined in Article 4 of TEU. This happened when the deadline of three months set by Commission in its Recommendation expired without any real attempt of Polish authorities to comply with the requests. [260]

Rather than meeting the demands of the Commission, the day after the expiration of the alleged deadline, Polish authorities asserted their desire to resolve the issue domestically.[261] In addition to this, the customary reference to the interest of Polish citizens was used to justify the entirely missing implementation of the recommendation.[262].

Regardless of pessimism permeating what seems to be far-fetched way out from the Rule of Law Crisis[263], Commission resorts once again to a Recommendation under Rule of Law Framework[264].

The second "complementary" Rule of Law Recommendation sets another deadline by which addressing the situation and communicating the results, this time only lasting two months. Furthermore, in the section "Next Steps" a clear reference to the possibility to enact Article 7 is made[265], thus, in general, a more dissuasive approach, even if always rooted in a "constructive dialogue", can be noticed. In any case, with the following events, Rule of Law Crisis escalate to a real and evident systemic threat for EU legal order that seriously undermines the tenets of democracy.

First of all, a Polish Government's official response of 20 February 2017 rejected once again the notion that there existed a systemic threat to the rule of law in Poland[266]. Moreover Polish Authorities, in line with their clear purposes of dismantling the Rule

[260] Commission Recommendation 2016/1374 of 27 July 2016 regarding "The rule of law in Poland."

[261] A leaked document in Polish, where this political will is expressed is available at https://www.tvn24.pl/zdjecia/stanowisko-polski,53418,lista.html As

[262] Prime Minister Beata Szydło was reported to claim by Polish Media that "Law and Justice government would not Introduce into the Polish legal system any recommendations that are incompatible with the interests of the Polish state, which are not compatible with the interests of Polish citizenship". See for more https://www.politico.eu/article/beate-szydlo-eu-law-and-justice-poland-rejects-commissions-rule-of-law-request/

[263] We cannot but mention the resignation in the words of Franz Timmermans, who during an interview with a Belgian Newspaper concluded that "The Member States have already declared their opposition to the trigger of procedure under Article 7. I note this with sadness and disappointment, as a priori refusal invalidates the instrument". See more about the alliance anti-Article 7 at http://www.miniszterelnok.hu/the-alliance-between-poland-and-hungary-is-a-historic-one.

[264] Commission Recommendation of 21 December 2016 "*Rule of Law: Commission discusses the latest developments and issues complementary Recommendation to Poland."*

[265] Commission Recommendation of 21 December 2016 "*Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland."*

[266] European Parliament, Resolution of 15 November 2017 on "The Situation of the Rule of Law and Democracy in Poland" 2017/2931(RSP)

of Law at National level and to secure the control of judiciary system, commenced to *"demolish an Independent Judiciary with the Help of a Constitutional Court"*[267]. *The "judicial coup d'état"*[268] in place in Poland, expanded radically to affect the Independence of National Council for Judiciary and Ordinary Courts Administration.[269]. Again, the bland instrument of Rule of Law Recommendation [270], was the response of the Commission. Despite the light-touch nature of the instrument, the issue is introduced in a revolutionary way. The declaration in the first line[271], indeed, leaves no room for doubts: "*Despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has today concluded that there is a clear risk of a serious breach of the rule of law in Poland. [..] The Commission is, therefore, proposing to the Council to adopt a decision under Article 7(1) of the Treaty on European Union".*

The importance of this fourth Recommendation lies in two essential facts:

I. for the first time, by means of it, Commission announces its intention to launch complementary infringement procedures as regards specific violations of EU Law. The mechanism that we have thoroughly described in the previous chapter, in the specific case aimed at sanctioning Poland for breaches of EU law by the Law on the Ordinary Courts Organisation, referring Poland to the Court of Justice of the European Union.[272]

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[267] Matczak, M. *"How to Demolish an Independent Judiciary with the Help of a Constitutional Court*" VerfBlog, 2017/6/23, https://verfassungsblog.de/how-to-demolish-an-independent-judiciary-with-the-help-of-a-constitutional-court/, DOI: https://dx.doi.org/10.17176/20170623-103309.

[268] Anna- Sledinska-Simon "*The Polish Revolution 2015-2017"* published on www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017. See also Koncewicz, T.T "*The Court is dead, long live the courts? On judicial review in Poland in 2017 and judicial space beyond*" VerfBlog, 2018/3/08, https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond/, DOI: https://dx.doi.org/10.17176/20180308-094828.

[269] On the topic: Koncewicz T.T, 2016, "*Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond*" 53 Common Market Law Review, Issue 6, pp. 1753–1792

[270] European Commission Recommendation on "Rule of Law: European Commission acts to defend judicial independence in Poland" of 20 December 2017 available at http://europa.eu/rapid/press-release_IP-17-5367_en.htm

[271] European Commission Recommendation on "Rule of Law: European Commission acts to defend judicial independence in Poland" of 20 December 2017 available at http://europa.eu/rapid/press-release_IP-17-5367_en.htm

[272]European Commission Recommendation on "Rule of Law: European Commission acts to defend judicial independence in Poland" of 20 December 2017 available at http://europa.eu/rapid/press-release_IP-17-5367_en.htm

The law in question violated the anti-gender discrimination rules under Article 157 of the TFEU and Directive 2006/54 on gender equality in employment. At para 3 we also read that "In its referral to the European Court of Justice, the Commission will also raise the linked concern that the independence of Polish courts will be undermined by the fact that the Minister of Justice has been given a discretionary

II. It invites the Council to determine, on the basis of the same provision "that there is a clear risk of a serious breach" by the Republic of Poland of the rule of law which is one of the values referred to in Article 2 TEU. [273].

To further strengthen the points put forward, the Commission referred to multiple condemnations, coming both from European actors and International ones[274], of the dramatic unfolding events in Poland. A crucial reference, in particular, was made to European Parliament's stance [275], as this body had at the time of the Reasoned Proposal, already stated that the Polish Rule of Law crisis represented a clear risk of serious breach of the values referred to in Article 2 TEU.

Now it is the Council that has to decide whether to act or not, in view of the fact that Treaties bestow upon it discretionary powers on the matter. [276]. Yet, the issue remains a vexed one, as at the time of writing of this dissertation minimal progress has been achieved.

Besides, it is not the first instance of the inaction of the Council.[277].

Council's wait-and-see attitude is the results of two combined factors:

1. Procedural limitations of Article 7 due to unrealistic thresholds [278]

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power to prolong the mandate of judges which have reached retirement age (see Article 19(1) TEU in combination with Article 47 of the EU Charter of Fundamental Rights)"

[273] European Commission COM(2017) 835 final Proposal for a Council Decision "on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law " of 20 December 2017

[274] See Para. 148 of European Commission COM(2017) 835 final Proposal for a Council Decision "on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law " of 20 December 2017

As reported in the Reasoned Proposals, a plethora of institutions expressed their concerns on the Polish situation. Among the many Venice Commission, the Commissioner for Human Rights of the Council of Europe, the Consultative Council of European Judges, the United Nations Human Rights Committee, the United Nations Special Rapporteur on the independence of judges and lawyers, the Network of Presidents of the Supreme Judicial Courts of the European Union, the European Network of Councils for the Judiciary, the Council of Bars and Law Societies of Europe as well as numerous civil society organisations such as Amnesty International and the Human Rights and Democracy Network.

[275] Reference has to be made to European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)) At para 16 we read : " (i.e The Parliament)B*elieves that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU; instructs its Committee on Civil Liberties, Justice and Home Affairs to draw up a specific report in accordance with Rule 83(1)(a) of its Rules of Procedure, with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU"*

[276] The wording of Article 7 confers upon the Council discretion concerning the progress of the procedure. According to Article 7 the Council "may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2."

[277] For proofs of inaction that will follow, credit goes to Oliver, P. and Stefanelli, J., 2016 "*Strengthening the Rule of Law in the EU: The Council's Inaction*" *JCMS: Journal of Common Market Studies*, *54*(5), pp.1075-1084.

[278] Considering the procedural requirement of Article 7, the "clear risk of a serious breach can be" ascertained with the positive vote of 4/5 majority. Regrettably, Article 7(3) procedural requirements that are virtually impossible to meet as things stand at the moment. After the first Recommendation was addressed to Polish authorities, a dejected Timmermans declared that Article 7 procedure would have

2. The propensity to adopt "inclusive approach" instead of sanctioning mechanisms such as Article 7 TEU[279].

In 2018, despite the invocation of Article 7 by the Commission[280], European Institutions embarked on further constructive dialogues accompanied by infringement proceedings, in case specific violations of EU law were detected.[281].

As regards, instead, the further steps within the framework of procedure under Article 7, the General Affairs Council hearing on the rule of law in Poland on 26 June 2018[282], no indication was given[283] by the Polish authorities of forthcoming measures to address the Commission's outstanding concerns.[284]The divergence of views between Polish Government and European Union seems irreconcilable at the moment and is

led to nothing, as European Countries were against the measure." He was almost certainly referring to Hungary, empowered so as the other European members to veto sanctions set out in Article 7(3).
See Halmai, G., 2018 "*How the EU Can and Should Cope with Illiberal Member States*" Quaderni costituzionali, 38(2), pp.323.
For the "historic alliance "see http://www.miniszterelnok.hu/the-alliance-between-poland-and-hungary-is-a-historic-one/

[279] We think that we may say without fear of contradiction that this view is also shared by Commission. In this sense, the setting up of a pre-Article 7 procedure moves in this direction. By the way, the Council's approach proved to favour excessively soft measures. To the point that the Council's Rule of Law Dialogue, as we have seen in the previous chapter, does not address issues properly. In the words of Kochenov even if it was constituted to confront "emerging the rule of law crisis" it "*did not even amount to a peer review."*
To comprehend the preference for a dialogic approach of Commission see the latest Communication of Commission published at the present day. See European Commission Communication on "Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court" of 24 September 2018. Available at http://europa.eu/rapid/press-release_IP-18-5830_en.htm

[280] European Commission Recommendation on "Rule of Law: European Commission acts to defend judicial independence in Poland" of 20 December 2017 available at http://europa.eu/rapid/press-release_IP-17-5367_en.htm

[281] In this context, see European Commission Letter of Formal Notice concerning "Rule of Law: Commission launches infringement procedure to protect the independence of the Polish Supreme Court" 2 July 2018 and European Commission Reasoned Opinion concerning "Rule of Law: European Commission takes next step in infringement procedure to protect the independence of the Polish Supreme Court" of 14 August 2018.
Letter of Formal Notice is available at http://europa.eu/rapid/press-release_IP-18-4341_en.htm.
Reasoned Opinion is available at http://europa.eu/rapid/press-release_IP-18-4987_en.htm.
It must be noted that both final conclusions of Commission remark that "The Commission stands ready to continue the ongoing rule of law dialogue with Poland, which remains the Commission's preferred channel for resolving the systemic threat to the rule of law in Poland."

[282] Council of the European Union, General Affairs, Meeting 10519/1 no. 3629 of 26 June 2018 available at https://www.consilium.europa.eu/media/35910/st10519-en18.pdf.
Minute of the hearing at http://www.statewatch.org/news/2018/aug/eu-council-rule-ofLaw-poland-10906-18.pdf

[283] Despite indications to the contrary as this declaration of Jarosław Kaczyński in an interview with Gazeta Polska."We are currently planning to implement changes that we had earlier agreed on with the European Commission," See https://www.politico.eu/article/80-percent-chance-eu-spat-will-end-soon-poland-jaroslaw-kaczynski-pis-judicial-reform/

[284] The official wording of European Commission Recommendation on "Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court" of 20 December 2017 available at http://europa.eu/rapid/press-release_IP-17-5367_en.htm

duly expressed with the tenor of declarations. While commenting on the General Affairs Council hearing of 26 June, Konrad Szymański, Poland's EU affairs minister in office, said "*In our view, there is no such serious risk, such serious threat. So there is no ground to conclude this procedure in a way that would be confrontational vis-à-vis Poland*. " A diametrically opposed view was expressed by Timmermans[285], as he maintained that the systemic threat for the rule-of-law persisted with reference to Polish case. He also added that in order to address the issue more steps from the Polish side were needed and confirmed firm willingness of EU institutions to maintain a dialogue. More than likely, at the least in the short term, confidence will be misplaced again.

3.2 Inconsistencies with EU Law

In our first chapter, we have described the process of "*juridification*" of EU law, whose undisputed protagonist was ECJ, from *Stauder* onwards.[286] As evidence thereof, a reference to principles emerged from the case law of ECJ is mentioned in Article 6 of TEU, as belonging to common constitutional traditions of the Member States[287]. Principle of legality[288], which implies a transparent, accountable, democratic and pluralistic process for enacting laws; the principle of legal certainty[289]; separation of powers[290]; prohibition of the arbitrariness of the executive powers[291]; independent and impartial courts;[292] effective judicial review including respect for fundamental rights[293] and equality before the law were all mentioned in the case law of ECJ.

[285] de La Baume M., Plucinska J., "*Warsaw defiant as Brussels opens new front in battle over the rule of law*" Article published on Politico.eu available at https://www.politico.eu/article/eu-unpersuaded-by-polands-defense-at-rule-of-law-hearing/

[286] ECJ, Judgement C-29/69 *Stauder v Stadt Ulm* [1969], ECLI:EU:C:1969:57. It is the seminal Judgement in which ECJ referred to "fundamental rights as being part of the general principles of Community Law and underlined their protection by the Court".

[287] See also Commission Communication A new EU Framework to strengthen the Rule of Law"COM(2014)158/F1 Annex 1 available at http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-158-EN-F1-1-ANNEX-1.Pdf

[288] ECJ Judgement C-294/83 *Les Verts v Parliament* [1986] ECLI:EU:C:1986:166 para.

[289] ECJ Judgement C-212/80 - *Meridionale Industria Salumi and Others* [1981] ECLI:EU:C:1981:270 para.10

[290] ECJ Judgement C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission*, [2000] ECLI:EU:C:2000:1 para.17

[291] ECJ ECJ Judgement C-46/87 - *Hoechst v Commission* [1989] ECLI:EU:C:1989:337 para.10

[292] ECJ Judgement Case C-50/00 P - *Unión de Pequeños Agricultores v Council* [2002] ECLI:EU:C:2002:462 paras. 38-39.

[293] ECJ Judgement Case C-583/11 P Inuit Tapiriit Kanatami and Others Parliament and Council [2013] ECLI:EU:C:2013:625

Polis authorities have defied the compliance to these cornerstones of EU Legal Order and with sweeping reforms of judiciary system have, in every respect, captured Constitutional Tribunal National Council for Judiciary and Ordinary Courts. It is indicative that, *in tempore non suspecto,* Venice Commission had already warned EU institutions about the unprecedented threat in the field of democracy, human rights and the rule of law.[294]

Major inconsistencies with EU Legal Framework are evidenced in Commission's Reasoned Proposal. Concerns of Commission are grounded on five distinct reasons, accurately reported in the document. The importance of the concerns underpinning the Reasoned Proposal issued to the Council by the Commission is crucial for our purposes. Thus, we found appropriate to quote verbatim the wording used by the Commission in the document[295]:

a. the lack of an independent and legitimate constitutional review.
b. the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases the systemic threat to the rule of law in Poland significantly.
c. the law on the Supreme Court; approved by the Senate on 15 December 2017.
d. the law amending the law on the Ordinary Courts Organisation ('law on Ordinary Courts Organisation'); published in the Polish Official Journal on 28 July 2017 and in force since 12 August 2017.
e. the law amending the law on the National Council for the Judiciary and certain other laws ('law on the National Council for the Judiciary'); approved by the Senate on 15 December 2017;
f. the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws ('law on the National

[294] Venice Commission, opinion no. 833/2015 on "Amendments on the Act of 25 June 2015 on the Constitutional Tribunal of Poland " at para 138. Venice Commission underscores that "Crippling the Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: *democracy* – because of an absence of a central part of checks and balances; *human rights* – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the *rule of law* – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective.

[295] See Para. 5 of European Commission COM(2017) 835 final Proposal for a Council Decision "on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law " of 20 December 2017

School of Judiciary'); published in the Polish Official Journal on 13 June 2017 and in force since 20 June 2017.

With reference to the principles highlighted above, we will emphasise incompatibilities emerged once the Polish judiciary system undertook radical reforms.

3.2.1 Supreme Court

As regards the law on Supreme Court approved on 15 December 2017[296]:

i. compulsory retirement of a considerable number of sitting judges combined with the discretionary powers of the President to renew their mandate or not seriously undermine the *independence and impartiality of national courts*, a key component of the rule of law. Forced retirement provokes no less than a change in the composition of the Supreme Court. This would not be a problem if simultaneous reforms of the National Council of Judiciary and Ordinary Courts enabled PiS party to control the appointment of judges indirectly. A politically-oriented Supreme Courts do not guarantee the *separation of powers*. Furthermore, new extraordinary appeal procedures cast doubts on the respect of the *principle of legality.*[297]

3.2.2 National Council for the Judiciary

As regards the law on National Council of Judiciary approved on 15 December 2017[298]:

i. The Venice Commission objected that the law on National Council of Judiciary facilitates the executive powers to interfere in a severe and extensive manner in the

[296] European Commission COM(2017) 835 final Proposal for a Council Decision "on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law " of 20 December 2017 para. 175 (a)

[297] Venice Commission, Opinion no. 904/2017 on "the Draft Act amending the Act on the Supreme Court" 11 December 2017. Adopted by the Venice Commission in its 113th Plenary Session. Paras. 58,63,130
On the point, the Venice Commission maintained that the extraordinary appeal procedure is harmful to the stability of the Polish legal order. In an abstract sense, the extraordinary appeal procedures can possibly reopen any case decided in the country in the past 20 years on virtually any ground, and the system could lead to a situation in which no judgement will ever be final anymore.

[298] European Commission COM(2017) 835 final Proposal for a Council Decision "on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law " of 20 December 2017 para. 175 (c)

administration of justice and poses. With a law of that kind in force, *judicial independence* is exposed to serious threats. In addition, Commission has doubts that the law does not sufficiently protect court presidents against arbitrary dismissals. Again, extensive *damages to the separation of power.*

3.2.3 Ordinary Courts

Ultimately, as regards reform of ordinary courts approved on 15 December 2017[299]:

i. Commission underscores that the combination of decreased retirement age for judges and discretional powers conferred upon ruling Minister of Justice whether to prolong the mandate of retiring judges undermines in a persistent way both the *principle of irremovability* of justice
and the principle of *independence of judges.* Another major shortcoming detected by Commission regards the discretionary power held by the Minister of Justice to appoint and dismiss presidents of courts without being bound by concrete criteria. Added to this, no available judicial review may prejudice the personal independence of court presidents and of other judges.

3.3 Final assessment of measures adopted to address systemic breaches in Poland

With reference to the Polish case, EU institutions demonstrated their capacity to offer a timely response to emerging the rule of law crisis. Acknowledged the inconsistency of mechanisms of social pressure while facing threats to *acquis* in Hungary[300], Commission has activated its *New Framework to Strengthen the Rule of Law* without delay. From a competence point of view, Commission‘s creation of a new instrument perfectly fits into the legal vacuum between the soft "political pressures" and the

[299] European Commission COM(2017) 835 final Proposal for a Council Decision ”on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law ” of 20 December 2017 para. 175 (c)

[300] See Sedelmeier, U., 2014. *"Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession".* JCMS: Journal of Common Market Studies, 52(1), pp.105-121 and Sedelmeier, U., 2017 ” *Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure ”* Journal of European Public Policy, 24(3), pp.337-351.

"nuclear option" of Article 7 Procedure. [301]. Furthermore, the *New Framework* can be deployed alongside additional procedures such as infringement proceedings under articles 258 and seq. This told, in its enactment against Poland, New Framework exhibited two clear weaknesses.

1) First one is structural and depends on its nature of "light-touch mechanism"[302]. The New Framework set up by the Commission was designed to be a monitoring mechanism intended to detect any risk of serious breach. An early warning tool, based on a presumption of a mutual adherence to the "duty of sincere cooperation" enshrined in Article 4 of TEU.
The proposal of the Commission disregards the possibility that a discursive dialogue is not always bound to produce satisfactory results. Especially in cases in which "constitutional capture of the State" is part of a conscious illiberal drift almost any discoursive attempt is doomed to failure [303]. Commission's flawed approach shed light on the fundamental misperception of the nature of the threat. We can infer that the Commission believed that even if recalcitrant, Member States were well-intentioned to put an end to legal anomalies. In this spirit, the dominant feature of Rule of Law Opinion and Recommendations issued by Commission is the underlying faith in future compliance.

2) *New Rule of Law Framework*, the same applying to Article 7 of TEU, suffers from the absence of a precise and pre-defined benchmark above which a systemic threat becomes a systemic violation. As we saw in Chapter II, a valuable way to fill the existent legal vacuum would be to provide a clear and undisputed definition of what is considered a serious systemic breach.[304] Nonetheless, we must conclude that is the distinctly political nature of the New Framework, and in general of the "last resort measures to address systemic breaches" to prevent European Institutions from giving a clearcut definition. In the words of Timmermans "*I am even less convinced by proposals aiming to make the application of the rule of law framework more*

[301] State of Union 2012 Barroso, Address, Plenary Session of the European Parliament in Strasbourg. See at http://europa.eu/rapid/press-release_SPEECH-12-596_en.htmS.
[302] Kochenov, D. and Pech, L., 2015 "*Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality".* European Constitutional Law Review, 11(3), cit.
[303] Mueller, J.W., 2014 "*The EU as a militant democracy, or: are there limits to Constitutional mutations within EU member States"* Revista de Estudios Políticos, (165), pp.141-162.
[304] See Footnotes from [199] to [203]

'automatic'. I do not believe it is possible to define sufficiently the precise criteria that would trigger automatic reactions. It is a political process. What may work in the field of economic policy cannot necessarily be transposed to an entirely different area such as the rule of law, in which a measure of discretion will always remain unavoidable"[305].

3) By mentioning the words of Timmermans, we sought to introduce a decisive feature of New Framework activated by the Commission: its political character.

Commission as "Guardian of Treaties" is the institution pursuing the monitoring procedure, serving itself with the expertise of Venice Commission, the Council of Europe' advisory body on constitutional matters. Criticized by some as "*further proof of the appetite for jurisdictional and competence expansion of the Union in general and Commission in particular*"[306], the New Framework actually sends a mixed message, given its flexible political nature instead of a legally binding one[307]. Beyond the formal exclusion of Member States from the procedure[308], what really raises concerns is the discretionary power the Commission has reserved to itself to any particular member state ought to be assessed

As to Article 7 TEU procedure, there is a few to add, if we confirm that, somewhat predictably, the procedure is currently stalled. Reasons against linear progress have been already highlighted in the second Chapter. In any case, we can provide some further remarks.

Council is facing the insurmountable threat of political feasibility. Hungarian authorities had, in a plethora of occasions, "showed their solidarity" to PiS ruling party and are more than likely keen to veto any eventual sanctions against Poland. Added to

[305] Keynote Speech at Conference on the Rule of Law "*The European Union and the Rule of Law*" Tilburg University, 31 August 2015'. Available at https://ec.europa. eu/commission/2014-2019/timmermans/announcements/european-union-and-rule-law-key- note-speech-conference-rule-law-tilburg-university-31-august-2015_en.

[306] Weiler, J.H., 2016."*Epilogue: living in a glass house: Europe, democracy and the rule of law"* Cambridge University Press, 2016, pp. 313-326

[307] An interesting proposal in this field is the one of von Bogdandy. In his view, EU should combine judicial mechanism with a complementary political approach. See von Bogdandy. A. *"How to protect European Values in the Polish Constitutional Crisis"*, VerfBlog, 2016/3/31, https://verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis/, DOI: https://dx.doi.org/10.17176/20160331-132159.

[308] An event that brought criticism from the UK government.

this, even if Hungary would vote, in a somewhat surprising way, aligned with the majority of countries, this could eventually backfire.[309]

CONCLUSIONS

Rule of law and fundamental rights are backbones of European democracies: neglect their respect signifies disavowing the core of our identity. In latest years, we have constantly seen the temptation of using democracy as a justification to not have the rule of law respected. It does appeal to people's feelings. It does appeal to some politicians.

Legal instruments we have presented to address emerging issues are structurally flawed, dialogue conducted by institutions has been ineffective hitherto. Nonetheless, we firmly believe we have a moral and legal obligation to challenge this notion that "*you can brush aside the rule of law simply on the basis of the majority*".

Can European Union address existing rule of law crises? As long as we identify EU fundamental values as our common heritage, we think it is the case. However, we firmly believe time has come to take a deeper and respectful look at the past, at our past. Tocqueville once said that : "*When the past no longer enlightens the future, the spirit walks in darkness*."

If we neglect rule of law, cornerstone of our Legal Order, future for Europe looks bleak.

Even though the recent activation of Article 7 against Hungary seems to be a bed portent for a democratic Union, we maintain it is a step towards a solution. In the particular case, we really di admire the determination showed by European Parliament. It is, indeed, very meaningful that the body with popular mandate has firmly expressed its concerns.

Today, we are pinning our hopes in the courageous stance of Parliament. It is a sound point of departure.

[309] On 4 July 2018, the European Parliament issued a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

European Union has proved, several times, to act as an *autopoietic creature*. Through living experience, it has learnt from its mistakes and sharpened its tools for the prevention thereof.

EU 14's measures against Austria underlined a lack of legal instruments to tackle systemic violations. And years later, European Institutions delayed activation of New Framework against Hungary. But with Poland, showing new awareness, the Commission responded to threats in a timely manner. As a matter of fact both New Framework and Article 7 have failed to address systemic violations.

EU institutions will now, once again, confront threats stemming from Hungary. We cannot but hope that maturation process undertook by European Union will finally bear fruits.

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RIASSUNTO

Il 18 Dicembre 2014, La Corte di Giustizia dell'Unione Europea si pronuncia in merito al "progetto di accordo sull'adesione dell'Unione europea alla Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali". L'opinione della Corte, oltre ad evidenziare le insorgenti incompatibilità con il diritto dell'Unione qualora tale adesione si verifichi, lascia in eredità un importantissimo saggio sulla peculiarità della struttura legale comunitaria. Al paragrafo 168 è riconosciuto che la costruzione giuridica europea poggia "sulla premessa fondamentale secondo cui ciascuno Stato membro condivide con tutti gli altri Stati membri, e riconosce che questi condividono con esso, una serie di valori comuni sui quali l'Unione si fonda, così come precisato all'articolo 2 TUE. Questa premessa implica e giustifica l'esistenza della fiducia reciproca tra gli Stati membri quanto al riconoscimento di tali valori e, dunque, al rispetto del diritto dell'Unione che li attua".

È quindi su questa premessa che si fonda la validità del sistema giuridico europeo: il rispetto dei valori fondamentali dell'Unione, come sanciti dall'Articolo 2 del TUE in uno spirito di leale collaborazione, disposto dall'articolo 4 del TUE. La stessa adesione di nuovi Stati Membri, ex art. 49 TUE, è condizionata al rispetto di tali valori. Tuttavia, al di là della formale assunzione di impegni giuridici, si è assistito negli ultimi anni a sconvolgimenti notevoli nella struttura legale dell'Unione Europea. Un gruppo, seppur ristretto, di Stati ha in concreto messo in discussione i capisaldi della struttura giuridica comunitaria, contravvenendo agli obblighi che discendono dallo status di Membri dell'Unione. È evidente che, come dimostrato dalle recenti crisi dello Stato di Diritto

in Polonia, sui valori sanciti dall'art. 2 TUE non viga più quel tacito assenso che potrebbe giustificare l'assenza di una decisa mobilitazione da parte delle Istituzioni Europee. Condizione di sopravvivenza di democrazia, diritti fondamentali e stato di diritto è pertanto una risposta proattiva dell'Unione: è necessario che essa agisca in difesa dei capisaldi del suo ordinamento giuridico, ponendo un freno alle ripetute violazioni sistemiche (così definite nell'art. 7) che rischiano di compromettere e delegittimare *l'acquis communautaire.*

La constatazione secondo cui l'ottemperanza ai valori fondamentali dell'Unione non sia più unanime e che sorga in ragione di ciò un dovere d'azione in capo alle Istituzioni competenti è il punto di partenza del nostro lavoro, che verterà sul caso della Polonia. Prima di osservare nel dettaglio la portata delle violazioni sistemiche recanti pregiudizio all'acquis, e le conseguenti risposte comunitarie, riteniamo sia di capitale importanza ricostruire il percorso giurisprudenziale dei valori formalizzati nell'art. 2 TUE: il primo capitolo ricoprirà, essenzialmente, questa funzione.

Una preliminare riflessione sarà rivolta alla nozione di "Comunità di Diritto" coniata da Walter Hallstein e fatta propria dalla Corte di Giustizia dell'Unione Europea in occasione della cruciale sentenza Les Verts v Parlamento. Sulla scia di questa e successive pronunce, la Corte ricostruisce la nozione di "Comunità di Diritto" e poi "Stato di Diritto" quale principio generale cui si ispira l'ordinamento giuridico comunitario. Sullo sfondo di una prassi ormai nota, secondo cui "ai Trattati non spetta un compito di creazione, bensì di rivelazione", la nozione di Stato di diritto, in principio esclusivamente deducibile dalla giurisprudenza della Corte, riceve menzione nei Trattati a partire da Maastricht.

In un secondo momento, l'encomiabile lavoro di ricostruzione della Corte viene avvalorato dall'aggiunta di un ulteriore tassello: la giurisprudenza sui diritti fondamentali.

Menzioneremo la sentenza Costa v. Enel, il cui lascito cruciale sarà il principio di supremazia dell'ordinamento comunitario su quello nazionale e seguiremo il conseguente conflitto di competenza sorto tra la Corte Costituzionale tedesca "protettrice dei diritti fondamentali" e la Corte di Giustizia dell'Unione Europea. Con Frontini, Kremzov e Nold sonderemo, pertanto, i due sentieri tracciati per la risoluzione del rovente dibattito sui diritti fondamentali. Il primo sarà l'introduzione della "Carta dei Diritti Fondamentali dell'Unione Europea" e ne verranno messe in luce struttura, ripartizione di competenze tra Corti Nazionali e Corte di Giustizia e

sfera d'applicazione; il secondo sentiero riguarderà, invece, la relazione esistente tra Corte di Giustizia e Corte Europea dei Diritti dell'Uomo in materia di tutela dei diritti fondamentali: verranno considerate due Opinioni espresse dalla Corte di Giustizia, la 2/94 del 1996 e la 2/13 del 2013 (dal cui è testo è tratta la frase introduttiva).

Il secondo capitolo si aprirà con la descrizione delle grandi speranze riposte nel Summit tenutosi a Copenaghen nel 1993.

Ivi per la prima volta si fa strada il criterio secondo il quale eventuali ampliamenti del numero di Stati Membri dovranno essere ancorati al soddisfacimento di alcuni criteri prestabiliti (d'ordine economico, politico e d'applicazione dell'*acquis*). Seguirà una rassegna delle innovazioni apportate nel summit di Copenaghen, dagli Accordi di Associazione ai nuovi obblighi derivanti dallo status giuridico di Membro dell'Unione.

Ci dedicheremo, in seguito, ad un'analisi delle incongruenze relative all'inefficacia del criterio politico, argomentando che il superficiale monitoraggio di Copenaghen assurga a motivo principale dell'esistenza di violazioni sistemiche dell'*acquis communautaire*. Cercheremo così di chiarire la nozione di breccia sistemica, per poi passare in rassegna il novero di strumenti legali appannaggio delle istituzioni al verificarsi di violazioni sistemiche.

In primis introdurremo la descrizione delle procedure di infrazione ex art. 258 e seguenti; ad una concisa, ma puntuale analisi del loro funzionamento, seguirà una valutazione dei poteri discrezionali in capo alla Commissione circa l'espletamento della procedura. In un secondo momento, ne evidenzieremo potenzialità, in riferimento alla teoria degli "*umbrella proceedings*", e limiti, citando una famosissima opinione espressa dall' avvocato Gallhoed nel giudizio Commissione v Irlanda del 2005.

Valutate, poi, in accordo ai nostri scopi le procedure di infrazione, ci soffermeremo sull'art. 7 TUE, passato ad onor di cronaca come "opzione nucleare" o "manovra d'ultima istanza". Un iniziale resoconto storico mirato ad individuare le origini della disposizione segnerà il passo della ratio della procedura. La sua logica preventiva verrà infatti rapportata a quella "promozionale" dei Criteri di Copenaghen." Successivamente, speculeremo sull'effettiva portata delle sanzioni previste ex Art. 7, difettando i Trattati di una formulazione chiara. Sarà quindi preso in esame l'ambito applicativo delle disposizioni ex art. 7 alla luce di quello meno ampio previsto dalle disposizioni della "Carta dei Diritti Fondamentali dell'Unione Europea".

Prima di sottoporre a minuto esame gli aspetti procedurali dell'Art.7 torneremo sulla nozione di "Stato di Diritto" e "Violazione Sistemica" la cui operatività si rivela essenziale ai nostri fini.

La valutazione dei singoli commi dell'Art. 7 sarà accompagnata da giudizi circa le sue criticità tratti da disamine esistenti in letteratura e si farà cenno all' "appropriazione di competenza" ravvisata dal Servizio legale del Consiglio nell'ambito dei poteri di monitoraggio spettanti alla Commissione. Ampio spazio, infine, verrà riservato alla segnalazione delle evidenti lacune del meccanismo previsto ex art.7.

In prossimità della fine del capitolo, discuteremo del nuovo "Quadro per rafforzare lo Stato di Diritto" ideato dalla Commissione e definito nell'ambito della procedura ex art.7. Ne verrà evidenziata l'aspetto di "strumento sussidiario e di natura prettamente dialogica" (di pre-procedura ex art.7) oltre che di strumento atto ad individuare tempestivamente eventuali rischi di violazioni sistemiche. La conclusione sarà dedicata ad una descrizione delle fasi di cui si compone il dialogo tra Commissione e Stato Membro in cui tale rischi siano apprezzabili.

Il capitolo 3 riprenderà le criticità dei criteri ideati a Copenaghen collegandole operativamente alla regressione degli standard democratici in diversi Paesi dell'Europa Orientale.

La descrizione del procedimento tuttora in atto nei confronti della Polonia sarà il filo conduttore dell'intero capitolo. Essa avrà inizio utilizzando come espediente formale le accuse mosse all'Ungheria. L'obiettivo sarà duplice: da un lato alimentare le perplessità suscitate dalla risposta tardiva delle istituzioni europee a fronte delle ripetute violazioni poste in essere dal governo ungherese; dall'altro evidenziare come, nel caso polacco, l'attivazione dei meccanismi predisposti a impedire il protrarsi di violazioni sistemiche sia stata puntuale.

Seguirà una ricostruzione della crisi dello stato di diritto in Polonia ed una contemporanea valutazione delle reazioni delle istituzioni europee in difesa dell'*acquis communautaire*.

Una prima fase della descrizione degli eventi sarà dedicata all'attivazione del "Quadro per Rafforzare lo Stato di Diritto", in cui emerge il proverbiale scetticismo del Governo polacco, poco propenso a seguire le indicazioni della Commissione Europea e dunque a porre fine a conclamate aberrazioni sistemiche del sistema giudiziario nazionale. Nel presentare il resoconto dei passaggi fondamentali, emergerà l'opinione dell'autore - sostanzialmente in linea con quella della corrente maggioritaria di studiosi

- circa l'inefficacia strutturale del dialogo avviato dalla Commissione. Si suppone che il caso sia ascrivibile a circostanze in cui la sclerotizzazione del sistema giudiziario faccia parte di un piano prodromico all'instaurazione di un autoritarismo; proprio in considerazione di tali condizioni, il dialogo sarebbe pertanto destinato a rivelarsi infruttuoso. La descrizione degli eventi sarà arricchita da valutazioni in *medias res* delle riforme aventi ad oggetto modifiche strutturali del sistema giudiziario polacco; ivi troveranno posto le considerazioni contenute in documenti della Commissione, i report circostanziati della Commissione di Venezia e le opinioni personali dell'autore sulla materia dibattuta. L'analisi, tuttavia, si soffermerà principalmente sulle Comunicazioni della Commissione, poiché già in esse viene in rilievo la gran mole di obiezioni mosse alle improvvide riforme giudiziarie polacche. Prima di passare alle dinamiche d' attivazione del meccanismo ex art. 7 sarà fatta menzione dell'approccio complementare seguito dalla Commissione nel tentativo di porre un argine alle violazioni sistemiche perpetrate dalle autorità polacche: simultaneo impiego dello strumento del dialogo ed utilizzo delle procedure d'infrazione, nei casi in cui siano rilevate violazioni di disposizioni specifiche dei Trattati.

Esauritesi le scadenze temporali del Quadro, sarà valutata l'attivazione della procedura ex Articolo 7 ad opera della Commissione, un unicum (recentemente pareggiato dall'attivazione del meccanismo nei confronti dell'Ungheria) nella storia dell'Unione. In assenza di ulteriori sviluppi, l'analisi si fonderà sulle incompatibilità tra *acquis* e recenti riforme del sistema giudiziario polacco. Ancora una volta, il metro di paragone sarà costituito dai documenti della Commissione.

In ultima analisi, prima di giungere alla conclusione, si farà nuovamente strada l'opinione dell'autore. Verranno addotte argomentazioni in grado di rivelare l'inconsistenza del meccanismo ex art. 7, i limiti delle procedure d'infrazione e la prevedibile inefficacia del Quadro qualora l'interlocutore sia poco propenso a correggere le violazioni riscontrate.