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Besselink, L.

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The Bite, the Bark and the Howl

Article 7 TEU and the Rule of Law Initiatives

Leonard Besselink

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Address for correspondence

Prof. Leonard Besselink
University of Amsterdam
Amsterdam Centre for European Law and Governance
P.O. Box 1030
NL - 1000 BA Amsterdam
The Netherlands
Tel.: +31-20-525-3958
Email: l.fm.besselink@uva.nl

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**The Bite, the Bark and the Howl:
Article 7 TEU and the Rule of Law Initiatives**

In this essay I analyze Article 7 of the Treaty on European Union on sanctions against Member States for certain potential and actual breaches of the values enshrined in Article 2 TEU, and the related 'Rule of Law initiatives'.

The debates over Article 7 TEU and the Rule of Law initiatives, so this paper argues, reveal a twofold boundary issue: that of the legal delimitation of the procedures and powers under Article 7, and that of the fuzzy boundaries of the Member State political orders as distinct from the EU political order. It is the very identity of the foundational values of the Union and the Member States that causes the impossibility of delimiting the scope of EU law from that of Member States when it comes to guaranteeing them. This in turn explains the politically highly sensitive nature of doing so. The developments sketched in the analytical part of this essay, reflect the dynamics in the relations between the member states and the Union as regards the control and authority over their constitutional foundations. Defining the contours of the problem requires a precise legal reconstruction of Article 7 TEU and its development. This in turn requires a historical framing of this analysis.

Historically, this development takes the form of a backward shift from the issue of sanctions to their preconditions and prior powers. The initial point was the introduction of the sanctions; then - in the aftermath of the *Haider* affair - the issue shifted from sanctions to preventative measures at an earlier stage (the type of breach and the issue which institutions should have a say, and the desirability of a 'preventive mechanism'). The 'monitoring powers' which both logically and temporally precede the

'preventive mechanism' have become the focus of the most recent controversies over the 'Rule of Law Initiative' of the Commission, and over the Council's counter-initiative which steps even further back from 'monitoring' to a mere conversation within the Council. The structure of the analysis follows this retrograde development. This paper starts with a discussion of the sanctions and the procedures. It ends with a discussion of the Rule of Law initiatives of the Commission and Council respectively, asserting that these should more correctly be viewed as an integral part of the procedure under Article 7, rather than be situated outside it.

Article 7 TEU

Article 7 TEU concerns compliance with the values summed up in Article 2 of the Treaty on European Union, which are common to the Member States and on which the Union is based. These are 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities', and the promotion of which is the aim of the Union (Article 3(1) and 13(1) TEU¹).

These values constitute, one may say, the constitutional identity of the Union in as far it coincides with the identity common to the Member States. Hence, this provision is sometimes referred to as the 'homogeneity' clause, particularly in the German and Italian doctrine.² As the *commonality* of values is the very essence of what is to be protected, the duty on the part of the EU to respect the national identity inherent in the political and

¹ See also Artt. 21(2), 32 (1), 42(5), 49(1) TEU; Preamble to Protocol no 24 (Lisbon), Preamble Charter.

² F. Schorkopf, 'Homogenität in der Europäischen Union, Ausgestaltung und Gewährleistung durch Art. 6 Abs. I und Art 7 EU' Duncker & Humblot 2000; R. Miccù and V. Altripaldi (eds), 'L'omogeneità costituzionale nell'Unione Europea' CEDAM 2003.

constitutional structure of a Member State (Article 4(2) TEU) cannot logically be affected by Article 7 TEU, nor can an infringement of the values of Article 2 be justified by reference to the national identity clause.³

The sanctions for a 'serious and persistent breach' of the fundamental values provided for in Article 7 (3) consist in the suspension of

'certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council'.

Historically, this is the core of the provision. Only with the Nice Treaty, the first paragraph of the present Article 7 was inserted, concerning a determination that there is 'a clear risk of a serious breach' by a Member State of the values referred to in Article 2. It was introduced in order to be able to monitor Member States and prevent the actual occurrence of a 'serious and persistent breach'.⁴ So Article 7 has a three part structure:

1. the determination of 'a *clear risk of a serious breach*',
2. the determination of 'a *serious and persistent breach*' (which is not dependent on have a prior 'clear risk' determination) and
3. the decision to impose sanctions (which is dependent on a determination of a 'serious and persistent breach').

We discuss this procedure below, both as to its meaning and its procedural characteristics below. But true to the retrograde form of the analysis announced, we first discuss the sanctions and the procedure leading up to their imposition.

³ On this issue convincingly Cesare Pinelli, 'Protecting the Fundamentals: Article 7 of the Treaty on the European Union and Beyond', Foundation for European Progressive Studies, 2012, 7. I do not think, however, that the view expressed in the text can entail that Article 4(2) TEU excludes elements of national identity common to the Member States.

⁴ The best overview of the history of Article 7 TEU based on public documents is Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', 16 Columbia Journal of European Law (2010) 382.

What sanctions?

Article 7(3) TEU is unclear as to the substance of the sanctions that can be imposed. These concern the suspension of 'certain rights deriving from the application of the Treaties to the Member State in question'. There is a surprising paucity in the literature as to what those 'certain rights' might be, except voting rights in the Council, as mentioned in Article 7(3). What other rights might be suspended other than voting rights must unavoidably be a matter of speculation.

What rights can and cannot be suspended?

The use of the expression 'certain' rights implies both that rights suspended are specified in the decision on the imposition of sanctions, and that not all rights can be suspended. Hence, Article 7(3) TEU excludes the possibility of suspension of membership or the ceasing of membership. It is up to a member who is target of sanctions whether to leave the Union or not – it cannot be compelled to leave. So even in the case in which a MS persistently refuses to better its life or restore its observance of the fundamental values of the EU, the EU cannot force it to leave.

This is different under the counterpart of Article 7 TEU in the TEU's human rights sister, the Council of Europe's Statute, Article 8. This provides:

'Any Member of the Council of Europe which has seriously violated [the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and the aim to

realize these of] Article 3⁵ may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine.’⁶

This provision was triggered after the colonels’ coup in Greece by Max van der Stoel’s reports on Greece to the Consultative Assembly, which led to the withdrawal of Greece from the Council of Europe on 12 December 1969, before actual decisions under Article 8 of the Statute were taken.^{7,8}

This experience suggests that a similar scenario might unroll in case of large scale sanctions under 7(3) TEU: should a Member State targeted by EU sanctions be unwilling to comply, it may well withdraw.

Could sanctions include such measures as were taken by the 14 Member State governments in February 2000, subsequent to Haider’s FPÖ becoming a coalition partner in Austria at the end of 1999? These sanctions aimed at creating a *cordon sanitaire* around the Austrian coalition government, and took the form of bilateral diplomatic measures: the suspension of bilateral diplomatic contacts except on a ‘technical level’, freezing of bilateral contacts with other high officials, and no support for Austrian candidates

⁵ Article 3: ‘Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.’

⁶ Statute of the Council of Europe, London 5 May 1949, ETS No. 1.

⁷ It is misleading if not wrong to say that Article 8 Statute CoE has never been activated, as is done in ; EU Commission in A New EU Framework for the Rule of Law, footnote 20 below, p. 6, footnote 17.

⁸ The ‘Greek case’ was brought by Denmark, Norway and Sweden, joined by the Netherlands to the European Commission of Human Rights; the Assembly found this procedure too burdensome and slow, given clear evidence that the Greek regime did not intend to restore democracy and the full enjoyment of human rights. Max Sørensen considered this a missed opportunity for building a human rights practice of the European Commission, but Max Van der Stoel found that awaiting the slow evidence gathering and procedure of the Commission to be counterproductive and called successfully for political intervention; see Theo van Boven, ‘Human Rights: From Exclusion to Inclusion’, Fons Coomans and others (eds.), Kluwer Deventer, 2000, 52-53.

for positions in international organizations.⁹

It would seem that these measures fall short of being a suspension of ‘rights deriving from the application of the Treaties’. Rather they concern the benefits of diplomatic intercourse. Of course, the sanctions against Austria were not EC/EU sanctions, but bilateral sanctions of 14 Member States against Austria, and they were not supposed to interfere with obligations under European law. They might, however, be allowed as EU sanctions under the present Article 7(3) TEU to the extent that if the more is allowed – the suspension of rights – the less is also allowed – ‘suspension’ of (non-rights related) factual benefits.

There is little other historical precedent on which one might rely in speculating on the nature of the sanctions under Article 7(3) TEU.

It is plausible that these type of sanctions taken under Article 7 against a Member State would justify the infringement of the principle of loyal cooperation and possible other infringements of EU law entailed on the part of the other Member States in the compliance and enforcement of the sanctions.

In principle sanctions could concern any ‘right deriving from the application of the Treaties’ to the Member State concerned. This implies that rights under *secondary* law can be suspended with regard to that Member State, secondary law being ‘the application of the Treaties’. This is made explicit in the preamble to the European Arrest Warrant Framework Decision, which states:

‘(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be

⁹Statement from the Portuguese Presidency of the EU, 1/31/00, 31 January 2000; not officially published by available at <http://www.cvce.eu/content/publication/2009/12/16/8a5857af-cf29-4f2d-93c9-8bfd90e40c1/publishable_en.pdf>.

suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article [2] of the Treaty on European Union, determined by the Council pursuant to Article 7[2] of the said Treaty with the consequences set out in Article 7[3] thereof.’¹⁰

Another sanction that has been mentioned concerns the suspension of EU funding to the Member State under any of the relevant instruments of secondary law.¹¹

There is only one express limitation to sanctions, which is contained in the wording that the Council, acting under Article 7(3) TEU; sanctions must

‘take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons’.

This does not exclude the suspension of rights or disapplication of rights that do not primarily target the government of the state in question, so sanctions might concern deviations from *any* of the Treaty rights. ‘Taking into account the consequences for the rights and obligations of natural and legal persons’ does not imply that sanctions must exclusively target the Member State executive, and it suggests that sanctions must be proportional.

The judgment of the Court of Justice on sanctions imposed by the EU in *Bosphorus*, confirms this as regards *fundamental* rights (right to property). When assessing the proportionality of an EU sanction the fact that a natural or legal person’s fundamental right can be affected – also of those who

¹⁰ 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190 , 18/07/2002, 1, Recital 10.

¹¹ This is suggested in the German/Dutch/Danish/ Finnish foreign ministers initiative in their letter on the protection of the rule of law in the EU to the Commission President of 6 March 2013, see below footnote 25. Bojan Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’, <http://ssrn.com/abstract=2257935>, p. 16 mistakenly claims: ‘If other, primarily financial sanctions, are added, it is more likely that the Article 7 system will become more effective. Needless to say, an amendment of the treaty to that purpose is required in all cases.’

have nothing whatsoever to do with either the causes or objectives of the sanctions – was found not to be decisive. The Court held that if the aim of EU sanctions is ‘putting an end to [...] massive violations of human rights’, this objective is sufficient justification for a substantial interference with fundamental rights of persons who are in no way responsible for such violations.¹²

So if a ‘serious and persistent breach’ of the fundamental EU values under Article 7 TEU is similar to ‘massive violations of human rights’, this can justify the far-reaching curtailment of the fundamental rights of arbitrary natural and legal persons as was the case in *Bosphorus*. If this is a correct inference, the somewhat paradoxical situation arises that fundamental rights infringements justify fundamental rights infringements: the sanctions acquire the nature of *talio*. Clearly, the *Bosphorus* case concerned an extreme situation that we cannot imagine easily to occur within the Union. Article 7 TEU is written for less than those massive violations of human rights that occurred in the conflict in the former Yugoslavia, although very serious infringements can occur, if we think for instance of Member State complicity in the extra-ordinary renditions with a view to ‘enhanced interrogation’ of suspected terrorists, that could become systemic.¹³

Five actors and their roles

There are five actors on the stage when it comes to deciding on sanctions:

- the Council, who, after hearing the Member State concerned, determines by qualified majority whether and what sanctions are

¹² ECJ Case C-84/95, 30 July 1996, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, ECR I – 3978, nrs 22-23 and 26.

¹³ Compare ECtHR, *Al Nashiri v. Poland* (application no. 28761/11) and *Husayn (Abu Zubaydah) v. Poland* (no. 7511/13), 26 July 2014; see also European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), P6_TA(2007)0032, Wednesday 14 February 2007, OJ C 287E/309.

imposed (Art. 7(3) TEU);

- the European Council, who unanimously determines the prerequisite existence of a 'serious and persistent breach' of the values of Article 2 after inviting the Member State involved to submit its observations (Art. 7(2) TEU);
- two actors that can trigger the latter determination by the European Council, which are either
 - at least one third of the Member States, or
 - the Commission,

who have the right of initiative, and

- the European Parliament which has to consent to the determination of the 'serious and persistent breach' by the European Council.

The voting arrangement of Article 354 TFEU determines that the Member State targeted by the procedure does not participate in the vote, and does not count either for determining the votes in Council and European Council or for the calculation of the number of Member States.

It is clear that, within the procedure, the determination of the existence of a 'serious and persistent breach' is the most convoluted element. It involves a proposal from either the Commission or one third of the Member States, following which the European Council needs to decide by unanimity after obtaining the consent of the European Parliament. So the European Council acts together with the European Parliament, but an initiating role for the Commission is not mandatory.

The fact that this determination is made not by the Council but by the European Council indicates that it is considered the most important step in the whole procedure. Although this step in the procedure could be dominated by the Member States both in the European Council and

potentially as initiators, the determination requires an interplay between both the states and the Union in as much as the European Parliament must consent (while also the Commission can take the initiative).

The role of the European Parliament can in fact be somewhat greater than Article 7 suggests. The Parliament does not have a formal right of initiative under paragraphs 2 and 3, the Rules of Procedure of the Parliament explicitly provide for the possibility to vote on a proposal to call on the Commission or Member States to submit a proposal under paragraph 2, or on the Council to act under paragraph 3.¹⁴ The Parliament clearly wants to be involved more actively than Article 7 suggests. In practice we see frequent – but unsuccessful – appeals by MEPs to activate the procedure in concrete cases.

After the determination of a serious and persistent breach, the actual sanctions are determined by the Council, acting on its own by a reinforced

¹⁴ Rules of Procedure European Parliament, July 2014. Rule 83: Breach by a Member State of fundamental principles

1. Parliament may, on the basis of a specific report of the committee responsible drawn up in accordance with Rules 45 and 52:

- (a) vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the Treaty on European Union;
- (b) vote on a proposal calling on the Commission or the Member States to submit a proposal pursuant to Article 7(2) of the Treaty on European Union;
- (c) vote on a proposal calling on the Council to act pursuant to Article 7(3) or, subsequently, Article 7(4) of the Treaty on European Union.

2. Any request from the Council for consent in relation to a proposal submitted pursuant to Article 7(1) and (2) of the Treaty on European Union along with the observations submitted by the Member State in question shall be announced to Parliament and referred to the committee responsible in accordance with Rule 99. Except in urgent and justified circumstances, Parliament shall take its decision on a proposal from the committee responsible.

3. Decisions under paragraphs 1 and 2 shall require a two-thirds majority of the votes cast, constituting a majority of Parliament's component Members.

4. Subject to the authorisation of the Conference of Presidents, the committee responsible may submit an accompanying motion for a resolution. That motion for a resolution shall set out Parliament's views on a serious breach by a Member State, on the appropriate sanctions and on varying or revoking those sanctions.

5. The committee responsible shall ensure that Parliament is fully informed and, where necessary, asked for its views on all follow-up measures to its consent as given pursuant to paragraph 3. The Council shall be invited to outline developments as appropriate. On a proposal from the committee responsible, drawn up with the authorisation of the Conference of Presidents, Parliament may adopt recommendations to the Council.

qualified majority.¹⁵ No initiative is needed, nor the consent of the Parliament. So, after a determination of a 'serious and persistent breach' the actual determination of sanctions is the most 'intergovernmental' of decisions – no other EU institution than the Council is involved. However, it is important to emphasize that this is not the inter-governmentalism of the old 'second' and 'third pillar' from the days of the Maastricht Union, because the decision is taken by qualified majority.

The procedure is of a highly political nature. There is a dominance of political actors; a Commission initiative is not strictly necessary. The Court of Justice has not been given an explicit role in the procedure under Article 7, in the sense that in theory it could have been imaginable that the Council would only be competent to impose sanctions after there had been a conviction by a Court. And in fact, if for instance members of government of an EU Member State were prosecuted or convicted before the International Criminal Court, this might of course trigger determinations and sanctions under Article 7 TEU. But such measures cannot be triggered by the Court of Justice. Since the Treaty of Nice, Article 7 is no longer fully excluded from its jurisdiction¹⁶, but its jurisdiction is restricted to procedural issues only.¹⁷

¹⁵ Art. 354 TFE refers to the qualified majority of Art. 238 (3) b, i.e. at least 72 % instead of the normal number of the participating Council members, comprising 65 % of the population.

¹⁶ The Amsterdam version of Art. 46 TEU omitted Art. 7 from the enumerated justiciable provisions; Nice amended it to include: '(e) the purely procedural stipulations in Article 7, with the Court acting at the request of the Member State concerned within one month from the date of the determination by the Council provided for in that Article'. This limitation has been applied in the case law, cf. CFI, Case T-337/03, *Luis Bertelli Gálvez v Commission* Order of 2 April 2004, ECR II – 1042. Interestingly, the General Court in Order of 30 May 2013, Case T-280/09, *Morte Navarro v Parliament*, based inadmissibility not on this provision, but on the basis of the proper motivation of the EP to reject a petition to start investigations into the alleged infringement of Art. 6(1) TEU (pre-Lisbon).

¹⁷ Article 269 TFEU: 'The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.'

The preventive function of the first paragraph of Article 7

As we have already seen, the EU Treaty originally only provided for the determination of a serious and persistent breach and the imposition of sanctions by the Council. Imposing sanctions after the determination of a serious and persistent breach as only means to enforce compliance with the common constitutional values might be too great a step ever to be taken, and therefore impracticable. As Sadurski put it: the mechanism of Article 7 in its original form, was no more than a bark in practice. Or, one could say, a bite without a previous bark is not how it should be – except for really mean dogs. What was considered desirable was the creation of earlier and lesser intervention, since the existent power to impose sanctions could only be a last resort.

That was precisely why the Nice Treaty introduced the ‘preventive mechanism’ that we now find in Article 7(1):

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.

The Council shall regularly verify that the grounds on which such a

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.’

determination was made continue to apply.

This provision intended to create powers for the EU to *prevent* the occurrence of an actual serious and persistent breach. So there is a certain relation between the preventive mechanism of paragraph 1 and the sanctions mechanism of paragraphs 2 and 3. Nevertheless, the preventative procedure under paragraph 1 is – for the very reason of being preventive in nature – considered to constitute a *separate* and *different* mechanism from the sanctions procedures under paragraphs 2 and 3.¹⁸ Biting and barking are two different ways of responding to a rule of law crisis.

Part of the ‘preventive mechanism’ is the possibility of issuing recommendations to the relevant Member State. The formulation since Lisbon is different from the previous formulation:

Prior to Lisbon

...the Council [...] may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State.

Before making such a determination, the Council shall hear the Member State in question.

Since Lisbon

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.

A major, but little noticed, difference resides in the moment at which the

¹⁸ COM (2003) 606 final, at p. 4 et seq..

Council can address recommendations to a Member State. The textual change suggests that prior to Lisbon, recommendations could only be issued together with or after the determination of the existence of a 'clear risk of serious breach'. The text since Lisbon clearly suggests that recommendations can be made *before* the existence of such a risk has been determined, albeit under the same procedure as for that determination. This suggests the competence of the Union prior to the risk determination.

A point of controversy has become the question whether paragraph 1 confers the power to monitor the situation in a Member State. The letter of the law suggests that such monitoring powers are explicitly granted to the Council *after* the determination of a 'serious risk'. But it has become controversial whether monitoring of Member States is allowed also *prior* to the determination of a 'serious risk'.

Given the fact that the decision-making in the Council will need a solid factual basis for the determination process, the logical assumption is that powers of monitoring are inherent in the powers of the Council and the right of initiative of the Parliament, Commission and Member States. This was also evident in the literature at the time.¹⁹

The Commission explicitly adopted this view in its Communication on Article 7 TEU of 15 October 2003.²⁰ As we will see below, this common sense has recently become disputed by the Council. In 2003 the Commission expressed the view that by introducing the concept of 'clear risk',

¹⁹ A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 CMLRev 1318, and G. De Burca, 'Beyond the Charter: How Enlargement has Enlarged the Human Rights Policy of the European Union' (2004) 27 Fordham International Law Journal, 713.

²⁰ 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. At p. 3: '... the amended Article 7 confers new powers on the Commission in its monitoring of fundamental rights in the Union and in the identification of potential risks. The Commission intends to exercise its new right in full and with a clear awareness of its responsibility.'

'Article 7 of the Union Treaty provides a means of sending a warning signal to an offending Member State before the risk materialises. It also places the institutions under an obligation to maintain constant surveillance, since the "clear risk" evolves in a known political, economic and social environment and following a period of whatever duration during which the first signs of, for instance, racist or xenophobic policies will have become manifest. [...]

Apart from the fact that the Union policies themselves help to secure respect for and promotion of common values, the legal and political framework for the application of Article 7 as described above, based on prevention, requires practical operational measures to ensure thorough and effective monitoring of respect for and promotion of common values.'²¹

The Rule of Law Initiative: origin and reception

Even though the preventive procedure was devised as a more feasible mechanism, in practice it was still felt that the main use of Article 7 was its impossibility to use it – hence Barroso called it 'the nuclear option'.²² This state of affairs has received continuous criticism by NGOs and others who felt this resulted in misplaced complacency, notably exhibited by the Commission concluding in its 2003 Communication that it 'is convinced that in this Union of values it will not be necessary to apply penalties to Article 7 of the Union Treaty and Article 309 of the EC Treaty'.²³ By merely

²¹ COM (2003) 606 final, at p. 7 and 8 respectively.

²² State of the Union 2012 Address, p. 10.

²³ COM (2003) 606 final, at p. 12; for criticism, e.g. Amnesty International, 'Response to the European Commission Communication on Article 7 of the Treaty on European Union', December 2004. < <http://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCoQFjAB&url=http>

saying we cherish certain constitutional values, we do not automatically observe them in practice. It is in this line of thought that the Commission launched its 'Rule of Law Initiative' in a communication of March 2014, setting out 'A new EU Framework to strengthen the Rule of Law'.²⁴

This initiative had been announced in the State of the Union speech by Barroso in 2012, expressing the wish to develop a broader set of instruments between mere political persuasion and the use of Article 7. This was followed up also in the Council with a debate in the General Affairs Council, taking note of a German/Dutch/Danish/Finnish initiative pleading for rule of law instruments with a key role for the Commission²⁵, and the Home Affairs Council in 2013, which seemed not unsympathetic to the idea of developing such tools.²⁶ The European Parliament joined with a number of reports, urging the development of further instruments.²⁷

The Commission had introduced a Justice Scoreboard in 2013, which monitors the quality of the judiciary in the Member States on a range of aspects, such as the case load in relation to duration of case handling,

www.amnesty.eu/static/documents/FAI_response_to_EC_Comm_on_Article_7_of_Treaty_on_EU.doc&ei=zoBKVfflLqqs7Aa2yIH4AQ&usg=AFQjCNF5dWDqurTvRbWEXh5Mz0VD0rIEw&bvm=bv.92291466,d.ZGU.

²⁴ COM(2014) 158 final. Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, Brussels 11.3.2014, henceforth referred to as the 'Framework'.

²⁵ <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf>, second page: 'Neither the procedures enshrined in the Treaties nor the EU fundamental rights charter provide for sufficiently targeted instruments. We therefore believe that a new and more effective mechanism to safeguard fundamental values in Member States is needed.'

Such a mechanism should be swift and independent of political expediency. We propose that the Commission as the guardian of the Treaties should have a stronger role here. It should be allowed to address deficits in a given country at an early stage and – if sufficiently supported by Member States – require the country in question to remedy the situation.

A variety of options could then be explored to foster compliance, including introducing a structured political dialogue, bringing the issue to the Council at an early stage, or concluding binding agreements between the Commission and the relevant Member State. As a last resort, the suspension of EU funding should be possible.'

²⁶ See http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf and the Council Conclusions of June 2013, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf.

²⁷ Rui Tavares Report of 2013, the Louis Michel and the Kinga Göncz Reports of 2014, <http://www.europarl.europa.eu/committees/en/libe/reports.html>.

perceived independence, etc..²⁸ This was justified with the argument that the quality of the judicial systems contributes to the investment climate and hence influences trade and economic growth and development, and the Commission proposed its inclusion in the European Semester.²⁹ The Justice Scoreboard uses data provided by the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ), with the addition of sources from the World Bank and other international organisations, albeit with an unexplained and unspecified and hence non-transparent methodology.³⁰

The Rule of Law Framework developed in the Commission Communication, aims to fill the gap between triggering Article 7 TEU and the normal instruments for infringement proceedings under the TFEU, which had to be resorted to during the Roma crisis in France and the constitutional reform crisis in Hungary.

The framework provides a three step approach and is triggered

‘in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to *systematically* and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national

²⁸ http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf; also a 2014 and 2015 have been published: http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2014_en.pdf and http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf.

²⁹ This has in the meantime happened, and in some country specific recommendations in this framework, recommendations on the judicial systems have been made, e.g. the recommendations to Slovakia, which has many problems with the quality of the judiciary and has the lowest perceived judicial independence in Europe, see the report at http://ec.europa.eu/europe2020/pdf/csr2015/cr2015_slovakia_en.pdf, p. 35-36.

³⁰ The Commission has also begun publishing anti-corruption reports in 2013 and 2014, see http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm.

level to secure the rule of law.’³¹

In order to distinguish the situations in which the Framework is triggered, the emphasis is on the ‘systematic’ effects of a situation or of certain measures; it is not triggered in the case of individual infringements of fundamental rights of miscarriages of justice.³²

The three steps envisaged are:³³

- Commission assessment and confidential dialogue with a view to resolving the issues:
 - In a situation of systemic threat to the rule of law, the Commission initiates a dialogue with the Member State concerned, by sending a public "rule of law opinion" and substantiating its concerns, giving the Member State concerned the possibility to respond.
- Commission recommendation
 - Unless the matter has already been satisfactorily resolved in the meantime, the Commission issues a "rule of law recommendation" addressed to the Member State concerned, if it finds that there is objective evidence of a systemic threat and that the authorities of that Member State are not taking appropriate action to redress it. The recommendation may include specific indications on ways and measures to resolve the situation. The ‘main content’ of the recommendation will be made public by the Commission.
- and a follow-up stage to the recommendation
 - In this third stage, the Commission monitors the follow-up given by

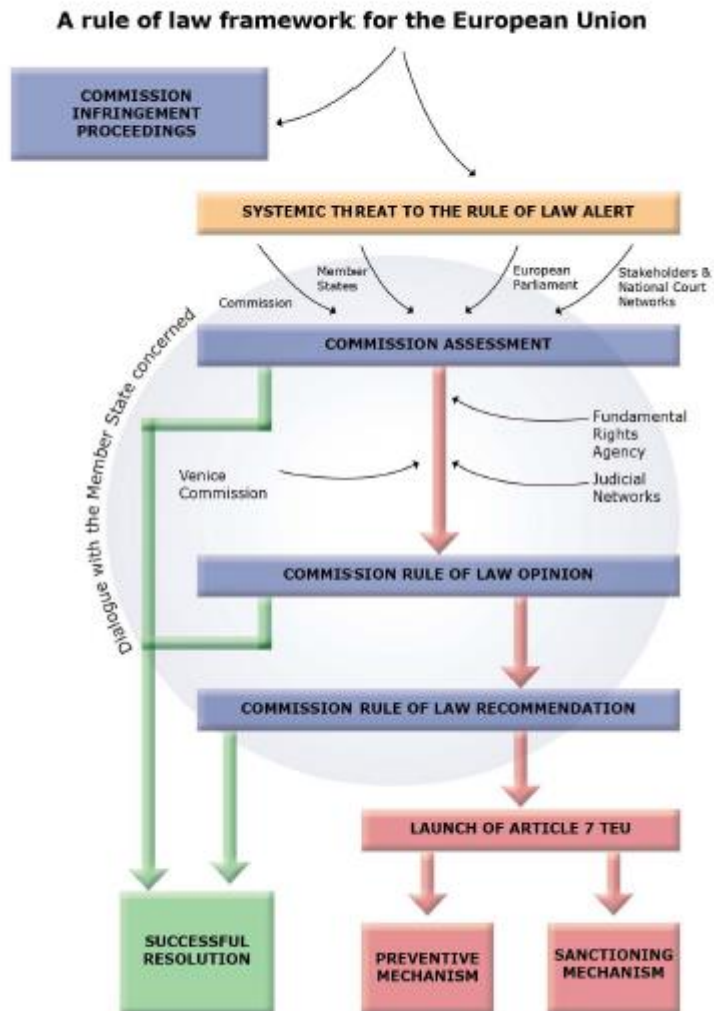
³¹ Framework, p. 6.

³² Compare Armin Von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done’, (2014) 51 CMLRev 59.

³³ Framework, pp. 6-8.

the Member State concerned to the recommendation addressed to it. If there is no satisfactory follow-up to the recommendation by the Member State concerned 'within the time limit set', the Commission will assess the possibility of activating one of the mechanisms set out in Article 7 TEU.

Graphically the Commission viewed the Framework as in the following picture:



The Council on the Rule of Law Initiative

The Commission’s communication presenting the Framework has been received critically by the Council, leading to the latter’s own Rule of Law Initiative.

No doubt, an important role was played by the Legal Service of the

Council's opinion of 27 May 2014, which presented an analysis of the Commission's Rule of Law Framework. The conclusion is that the Framework is incompatible with the Treaties.³⁴ The opinion takes the view

'that there is no legal basis in the Treaties empowering the institutions to create a new supervision mechanism of the respect of the rule of law by the Member States, additional to what is laid down in Article 7 TEU, neither to amend, modify or supplement the procedure laid down in this Article. Were the Council to act along such lines, it would run the risk of being found to have abused its powers by deciding without a legal basis.'³⁵

This view is based on the principle of enumerated powers of Article 5 TEU, under which 'competences not conferred upon the Union in the Treaties remain [with] the Member States'. The lack of a legal basis for the Framework is the core of the analysis, basically because

'[r]espect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, with the sole exception of the procedure described at Article 7 TEU. Only this legal basis provides for a Union 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. [...] [T]hat Article does not set a basis to further develop or amend [the] procedure [set out in Article 7 itself].'³⁶

The opinion then continues to discuss the absence of a power to address recommendations beyond what is stipulated in Article 7.

³⁴ Council Document 10296/14, 27 May 2014.

³⁵ Ibid, p. 7.

³⁶ Ibid., p. 5.

In the view of the Council Legal Service the lack of a legal basis vitiates the whole Framework. The Opinion does point out that the *Member States* are allowed to agree on an arrangement additional to Article 7 TEU:

‘This solution is that Member States – and not the Council – agree on a review system of the functioning of the rule of law in the Member States, which may allow for the participation of the Commission and of other institutions if necessary, and on the consequences that Member States might engage to draw from such review. The possibility for the Union to use the powers provided for in Article 7 TEU and Articles 258, 259 and 260 TFEU must be unaffected by such agreement among the Member States. [...]

Such a peer review approach, with a possible involvement of the institutions if so decided, could find its legal basis in an intergovernmental agreement designed to supplement the law of the Union and to ensure effective respect of the values on which the Member States have founded the Union, without by doing so conferring on the Union competences whose transfer the Treaties have not foreseen.’³⁷

After what must be understood as a negative opinion of its legal service concerning the Commission’s Rule of Law Initiative, the Council has launched its own ‘initiative [that] focuses more specifically on the respect for rule of law that is an essential element of the European Union’s identity’. ³⁸ Instead of a separate inter-governmental agreement supplementing the EU Treaty, as the legal service had suggested, it decided that it will hold once a year a ‘constructive dialogue’ between all Member States in thematic sessions. This dialogue is conducted on the basis of equality and aims

³⁷ Ibid., p. 7.

³⁸ Council Document 16862/14, 12 December 2014, p. 1, paragraph 3.

‘to encourage the culture of "respect for rule of law" [...] *within the framework of the Treaties*, [...], in respect of the principles of objectivity, non-discrimination, equal treatment, on a non-partisan and evidence-based approach [...] without prejudice to the principles of conferred competences as well as the respect of national identities of Member States’ (emphasis added).³⁹

The Council considers the annual dialogue to be ‘complementary’ to other EU institutions and international organisations. The dialogue will be prepared ‘by the COREPER (Presidency)’. The Council will evaluate the experience acquired in the dialogue by the end of 2016.

Monitoring powers: inside or outside the framework of Article 7?

The precise extent of the differences between Commission and Council concerning the legal basis of the Rule of Law Initiative is unclear. The Council Legal Service opinion is explicit in its conclusion that Article 7 ‘does not set a basis to further develop or amend’ the procedure contained therein, and in particular that Commission recommendations on the rule of law require a legal basis that is absent. The fact that the Council has reverted to a mere ‘dialogue’ prepared by COREPER suggests that the Council implicitly went along with its Legal Service, although the Council does not in so many words endorse the opinion.

Except on one point, the Council Legal Service opinion is unclear as to *what* is exactly the ‘new supervision mechanism’ that is ‘additional’ to Article 7 TEU, ‘amends, modifies or supplements’ the procedure under this provision and lacks a legal basis. In other words, what kind of monitoring falls outside the scope of Article 7?

The one point on which the opinion seems clear is the power of the

³⁹ Council Document 16862/14, 12 December 2014, p. 6.

Commission to issue a 'rule of law recommendation': the required legal basis for such recommendations is missing. The opinion bases this on two considerations:

'The first one is that the non-binding nature of a recommendation does not allow the institutions to act by issuing such type of acts in matters or subjects on which the Treaties have not vested powers [in] them. (See Case C-233/02, *France v. Commission*, ECR 2004 p. I-2781, paragraph 40.)

The second is that even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not without any legal effect. (See Case C-207/01, *Altair*, ECR 2003 p. I-8894, paragraph 41.) As a consequence the legality and interpretation of recommendations may be the object of proceedings before the Court of Justice, via preliminary rulings or actions for damages.'⁴⁰

This part of the opinion is premised on the idea that rule of law recommendations are outside the scope of Article 7. The Commission has facilitated such an approach by taking as its point of departure that its rule of law initiative is 'complementary' to Article 7, which can be understood as 'being located outside the scope' of Article 7. This is the implicit assumption in the Legal Service's opinion. For if, to the contrary, one were hypothetically to assume that the Commission's rule of law initiative is *within* the remit of Article 7, the Legal Service's considerations, in particular the cited case law of the Court of Justice, could not apply: Article 269 TFEU would prohibit the Court giving preliminary rulings and receiving actions for damages.

Another pointer to the Legal Service's assumption that the Framework is outside the remit of Article 7, is that the opinion passes over the explicit

⁴⁰ Council Document 10296/14, p. 5 nr 19.

power of the *Council* under the ‘preventive mechanism’ of 7(1) TEU to address recommendations to the Member State involved. From the attribution of this power of recommendation to the Council one can infer that the *Commission* has no power to issue such recommendations under Article 7. The Legal Service’s first argument on the legal importance of recommendations could be an argument in line with this inference. (The second argument does not apply within the scope of Article 7, as we just saw.)

The opinion does not actually argue that all elements of the Commission’s Framework are outside the remit of Article 7; this is assumed only implicitly. But is the assumption that a systematic rule of law monitoring is outside the scope and framework of Article 7 correct?

There are good reasons to think that this is not so. The starting point must be the explicit wording of Article 7 concerning the stage prior to applying the ‘sanctions mechanism’, that is to say the ‘preventive mechanism’ of paragraph 1. It is indeed often overlooked, both in the Council documents and in the literature,⁴¹ that the Council’s powers to issue recommendations exists already *prior* to the determination of a ‘clear risk’ of a serious breach, which, as we saw above, was a clarification (or perhaps ‘novelty’) in the Lisbon Treaty’s formulation of Article 7(1). It is no wild assumption that the preliminary power to address recommendations to Member States on the rule of law within the framework of Article 7(1) necessarily implies the power to monitor Member State behaviour. If such an implied power did not exist, the Council would risk issuing recommendations that are not based in established fact. This would be totally contrary to established principles of EU law. It is absurd to assume that the Council can only act as

⁴¹ E.g. Heintschel von Heinegg, in Christoph Vedder, Wolff Heintschel von Heinegg [Hrsg.], *Europäisches Unionsrecht, Handkommentar* (Nomos 2012) Artikel 7, Rn 14, p. 90; differently Mangiameli/ Saputelli in Hermann-Josef Blanke, Stelio Mangiameli, Editors, *The Treaty on European Union (TEU): A Commentary*, (Springer 2012) Artikel 7, Nr 28, p. 363.

a talk shop in which views are exchanged that lead to recommendations addressed to a Member State, given that these recommendations are supposed to prevent – and in the case of non-compliance lead to – the actual use of such important powers of sanctioning a systemic breach as are granted in Article 7. Council recommendations and subsequent determinations of a ‘clear risk’ of a serious breach would be based on hearsay only, instead of on objective verification. It would run counter to the institutional architecture if the Council could not involve the Commission in an assessment aimed at verification, and be at odds with the consistent calls of the Council to the Commission to develop tools for assessing compliance with the rule of law and the other values of Article 2.⁴²

The conclusion must be that for the Council to be able to use its powers under the ‘preventive mechanism’, there must be implied monitoring powers, which either the Council itself can use, or for which it can invoke the assistance of the Commission.

Not only the Council must have implied monitoring powers. The same must necessarily be the case for those who can initiate (Parliament, Commission and a Council minority of a third of the Member States) the determination of a ‘clear risk’ of a serious breach and must come with a ‘*reasoned*’ proposal’. Without possessing monitoring powers, a proposal could hardly be reasoned. The adjective ‘reasoned’ is used only in the context of the initiative for triggering the preventive mechanism, and is a decisive argument to conclude that there must be powers of monitoring included in the right to initiative.⁴³

A further question is what the scope of monitoring powers implicit in

⁴² Especially the Council Conclusions on fundamental rights and the rule of law of June 2013, footnote 26 above, p. 4, nrs 9-11.

⁴³ That also the Commission has a role to play in monitoring the rule of law, is consistent with the position the Council has consistently taken on the matter in recent years, especially the Council Conclusions on fundamental rights and the rule of law of June 2013, footnote 26 above, p. 4, nrs 9-11.

Article 7 must be in order to remain within its boundaries.

Here, the Council Legal Service opinion perpetrates a rhetorical trick by changing 'monitoring' into 'supervision', thus suggesting the submission of the Member States to the Commission. It does so both with regard to the existing procedures of Article 7 and with regard to the Commission initiative. This language suggests an inherent inequality between the supervisory Commission and the subjected Member State involved, and plays on the sensitivity on the part of Member States of not being treated equally among themselves. It again invokes the mantra, repeated in many Council documents on the rule of law and Article 7, that any mechanism should be non-discriminatory and treat all Member States in the same way. Hence, the Council initiative's stress on the peer review character of its own 'rule of law dialogue'. Indeed, the idea that it is other Member States that are conducting the dialogue instead of the Commission is to reinforce the 'peer' aspect of the review.

It would be incorrect, however, to conclude that monitoring and dialogue conducted by other institutions than the Council and its members is excluded. As we noted above, the framework of Article 7 is *not* merely intergovernmental and gives significant powers to the Commission and Parliament, notably the right of initiative and the right of consent. But this does not turn their monitoring activity into 'supervision' as a hierarchical device to which Member States are subjected. The principles of non-discrimination between Member States and their equality in monitoring can be achieved by basing monitoring on the principle of general monitoring of all Member States and the application of transparent and uniform criteria and methodologies. These are for good reasons chosen as the basis of the Commission's Rule of Law Initiative,⁴⁴ although the criticism can rightly be made that too many aspects of diplomatic

⁴⁴ Framework, p. 7.

confidentiality are written into it.

Monitoring must in essence be gathering information, which might be provided by Member States directly to Commission and Parliament, but may also be collected from many other sources that can provide relevant information, usually in turn provided by Member States. These include sources already at the disposition of the Union institutions, including the Fundamental Rights Agency, and available from other organisations, such as the Council of Europe monitoring exercises (including the Venice Commission, the Human Rights Commissioner, the Parliamentary Assembly and the Committee of Ministers, and the European Court of Human Rights), OCSE, the ILO and UN (including the various UN conventions' supervisory committees). The amount of relevant information is indeed such that with a view to monitoring within the framework of Article 7, it might be useful to systematically organise this in a platform established for this purpose.⁴⁵

A next step must be the processing of information in the form of some kind of engagement with the respective Member States. The Council suggests that it is the privileged forum to do so, but this is questionable in light of the Commission's and Parliament's role in both the preventive and sanctioning mechanism. It is true that the preventive mechanism of Article 7(1) explicitly gives only the Council the power to issue formal recommendations prior to the determination of a 'clear risk'. The power of initiative on the basis of a reasoned proposal for the other institutions would be pretty meaningless if there would be no other role for them than mere information gathering.

In order to avoid a multiplicity of opinions expressed at an early stage prior to the formal engagements of the two mechanisms some orderly way of

⁴⁵ Thus the Netherlands Advisory Council on International Affairs, AIV, in its report *The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation*, No. 87, January 2014, p. 32.

proceeding would be desirable. An inter-institutional agreement might be necessary for this, which could be based on the experience with existent monitoring procedures in which more than one institution has a role to play.⁴⁶ The present lack of coordination and actual inter-institutional rivalry displayed in the context of the Commission's and Council's respective Rule of Law Initiatives clearly exhibit the risk that institutions can be played off against each other, thus frustrating the operability of the preventive and sanctioning mechanisms of Article 7.

The fuzzy boundaries between the Union and Member State political orders

The boundary issues of Article 7 regarding the possibility of rule of law monitoring – what activity remains within the framework of Article 7 and what lacks a legal basis – are not the only ones. There is a more profound explanation of the sensitivity of matters surrounding Article 7. This is the permeability of the boundaries of the Union's order itself in relation to those of the constitutional orders of the Member States. This permeability is ingrained in the nature of Article 2 which the mechanisms of Article 7 aim to protect. Article 2 sums up the values on which the Union is founded and that are common to the Member States. From the perspective of the Union, these values are not restricted to the Union's specific competences or the operation of Union law; from the perspective of the Member States, these values are not aimed at the specific operation or realisation of the Union and its law in the Member States. They are foundational values that are at the basis of the exercise of *all* public authority both by the Union and by the Member States. The compliance mechanisms of Article 7 refer therefore

⁴⁶ Compare the Cooperation and Verification Monitoring of Bulgaria and Romania, and the monitoring recently introduced in the context of the Schengen Acquis, in Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis, OJ L 295, 6.11.2013, p. 27–37.

necessarily not only to the activity of the Union within the Member State, nor only to Member State activity that concerns the exercise of the Union law or the Union's specific competence. That is why Article 7 is generally considered the only provision conferring a power of the Union over a matter that relates to Member State activity that can be *outside* the scope of EU law. As this activity concerns values that are also the values of the Member State concerned, we are in a situation that is doubly sensitive: on the one hand this is due to the constitutional nature of the Member State activity and, on the other hand, due to the Union acting with regard to Member State activity that can be totally outside the scope of Union law properly speaking.

This sensitivity explains the Council slamming on the brakes as soon as it comes to rule of law monitoring of Member State action. A good illustration is the manner in which, on a crucial point, the Council constructed the opinion of its own Legal Service.

The opinion is at first sight somewhat opaque and contradictory concerning Articles 2 and 7 respectively when it comes to Member State action within and outside the scope of EU law. I quote two paragraphs here. The first might seem to suggest that rule of law monitoring can only concern Member State acts within the scope of Union law, whereas the second paragraph states the contrary, i.e. the Union can – exceptionally – act with regard to Member State acts that are otherwise outside the scope of Union law:

'[16] Article 2 TEU does not confer any material competence upon the Union but, similarly to the Charter provisions, lists certain values that ought to be respected by the institutions of the Union and by its Member States *when they act within the limits of the powers conferred on the Union in the treaties*, and without affecting their limits. Therefore, a violation of the values of the Union, including the rule of law, may be *invoked against a*

Member State only when it acts in a subject matter for which the Union has competence based on specific competence-setting Treaty provisions.

[17] Respect of the rule of law by the Member States cannot be, under the Treaties, the subject matter of an action by the institutions of the Union irrespective of the existence of a specific material competence to frame this action, *with the sole exception of the procedure described at Article 7 TEU. Only this legal basis provides for a Union 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.*⁴⁷ (emphasis added)

The first quoted paragraph may, however, also be construed as saying that the Union cannot invoke a violation of the values of Article 2 unless it has been granted the competence to do so. The second quoted paragraph may then be read as saying that such a competence has been granted in Article 7.

The Council, however, summarised the two paragraphs so as to read:

‘In essence, under this opinion, the rule of law applies as a value of the EU in the areas in which the EU has competence and EU monitoring mechanisms are possible to this extent.’⁴⁸

So the two paragraphs are constructed so as to mean that monitoring is possible *only* with regard to the rule of law when a Member State is acting *within* the scope of EU law. That is not what the Legal Service actually said in the second of its quoted paragraphs. It held that Article 7 ‘provides for a Union 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 [Union] competence*’.

The Council’s interpretation goes against standard views expressed in the

⁴⁷ Council Document 10296/14, 27 May 2014, p. 5, paragraphs 16 and 17.

⁴⁸ Council Document 16862/14, 12 December 2014, p. , paragraph 12.

literature and in the case law.⁴⁹ These views we need to develop slightly further in order to understand what the Council is doing when it attempts to set it aside in its new interpretation of Article 7.

In the standard account, the Union can act under Article 7 with regard to Member State acts that are not necessarily undertaken within the scope of EU law. This is precisely why an alleged infringement of the values of Article 2 is regarded as not being or not merely being the object of the ordinary infringement proceedings under Art. 258 and following of the TFEU: these are restricted to acts and omissions of Member States within the scope of EU law, whereas serious breaches of the values of Article 2 are not necessarily so.⁵⁰ In short, Article 7 can be considered a special procedure for situations in which there is a risk of a serious breach or an actual persistent and serious breach of the foundational values of the Union by a Member State *outside* the scope of EU law properly speaking.

The scope of Article 2 TEU and the scope of EU law

I have been using the expression ‘the scope of EU law properly speaking’. The paradox is that if the Union is competent to act on Member State behaviour *outside* the scope of EU law – *i.e.* in the narrower sense of all EU law other than Articles 2 and 7 TEU – this brings that behaviour *within* the scope of Union law in a broader sense (*i.e.* including Articles 2 and 7). The reason is the very nature of what Article 2 claims: the values it enumerates are common to the Member States and form the very foundation of the Union. So the common constitutional values of the *Member States* constitute

⁴⁹ Famously Advocate General Maduro in Case C 380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni*, nr. 17-23; Alison Duxbury, ‘Austria and The European Union: The Report Of The ‘Three Wise Men’, 1 (2000) Melbourne JIntlL, 169, 170;

Mangiameli and Saputelli, *the Treaty*, (n. 41) 351, with further references; Von Bogdandy and Ioannidis, ‘Systemic Deficiencies’ (n 32) 65 and 67;

⁵⁰ Commission Communication COM (2003) 606 final, 5, paragraph 1.1. Mangiameli/ Saputelli, p. 355.

the foundation of the *Union*. A strict separation of Member State constitutional values and of the founding constitutional values of the Union cannot be made: they are commensurate, there is a common constitutional identity of Union and Member States. The Union and the Member State orders are inextricably linked, tied up with each other, intertwined and enmeshed. This in turn is caused by the nature of the values concerned: they are not specific from one Member State to another, but foundational for the respective Member State constitutional orders as well. They are foundational, but from the Union's perspective they *ought to be* foundational as well: they are prerequisites for Union membership. A failure to heed those foundational values is for that very reason sanctionable with suspension of the rights deriving from membership.

The Council's stance that Article 2 and 7 are *only* applicable to Member State action within the scope of EU law properly speaking, is therefore a misconstruction. Otherwise, the situation could arise that a Member State respects human dignity, freedom, equality, the rule of law and human rights, including the rights of persons belonging to minorities, and is a democracy *only* when it acts within the narrower confines of EU law, but can persistently and seriously breach those values and revile human dignity, stifle freedom, crush equality, deny the rule of law, trample human rights and act on the basis of dictatorship and gross denial of minority rights outside the scope of EU law narrowly understood. That would seem to be as untenable as improbable, given the entwining of the national and Union law in the practical exercise of public authority.

The conclusion must be that the values of Article 2, to the contrary, affect both the national and the Union's identity, with the consequence that, when threatened at the national level, these are threatened at the EU's level

as well.⁵¹

Excursus: The Court of Justice on Article 2 TEU

The case law of the Court of Justice in which reference is made to Article 2 TEU is not abundant, and very little, if anything, has crystalized beyond doubt. On the basis of the little that is available, it is difficult to say with certainty that the court holds the same erroneous view as outlined above regarding the scope of EU law in connection with Article 2. In *Ryszard Pańczyk*, the Court was asked on the compatibility with Article 2 TEU and Article 1 of the Charter read in connection with Article 6 TEU, and several other provisions of the Charter, with regard to an act of the Polish legislature and executive that (to put it briefly) treated also members of the secret services prior to 1994 who had been cleared from any form of misbehaviour as collaborationists of the repressive communist regime, and whose pensions are therefore cut to the same extent as the latter's in retaliation for unpatriotic behaviour.⁵² The Court took its cue from Article 51, first paragraph of the Charter, on the applicability of the Charter only to Member State action within the scope of EU law, and from there concluded 'que la compétence de la Cour pour interpréter les articles 1er, 17, 20, 21 et 47 de la Charte, lus en combinaison avec les articles 2 TUE, 4, paragraphe 3, TUE et 6 TUE, n'est pas établie.' It therefore considered itself manifestly incompetent to answer the referring court's questions. Here the Court failed to consider the issue of compatibility of Article 2 TEU from that of compatibility with the Charter rights, and hence assumed the former to be part of the latter – which is not obviously correct in a case like this.

In *Yumer*, the Court distinguished the claims of compatibility of Member State action with Article 2 TEU from that with the Charter. It found, however, that the referring court had given no information as to the relevance of an interpretation of Article 2 to the solution of the dispute in the main

⁵¹ Pinelli, op. cit., p. 7.

⁵² Order of the Court, 12 June 2014, case C-28/14, para. 16.

proceedings, and concluded to the inadmissibility of the relevant questions.⁵³ In *Front Polisario*, the General Court seemed to accept that Article 2 TEU is justiciable as standard for EU acts, but found that in the context of external economic relations the institutions enjoy a wide discretion that prevented the matter of the conclusion of an international agreement with application to an illegally occupied territory to regard the 'founding values of the Union'.⁵⁴

Concluding remarks

The analysis of Article 7 and the rule of law initiative of the Commission and the Council's own initiative show that the legal possibilities offered under Article 7 are insufficiently explored, both by the institutions and in the literature. As a consequence, we see the discussion shifting backwards from the sanctions, to prevention and to prior monitoring powers in the 'rule of law initiatives' of the Commission and Council respectively, the latter even stepping away from monitoring. Deficiencies in the legal analysis facilitates this, some ignoring the nature of 'preventive mechanism' altogether by holding that Article 7 concerns *a posteriori* procedures.⁵⁵ Both the literature and the institutions seem to overlook the power to issue recommendations *prior* to the establishment of a 'clear risk' of serious breach of Article 2, and the powers of initiative and the monitoring powers necessarily entailed in both the power to issue Council recommendations at that stage and the right to initiative have been wiped under the carpet or flatly denied. Thus the bite and the bark may end up with a howl, or even less.

⁵³ Order of the Court of 17 July 2014, Case C-505/13 para. 22-24.

⁵⁴ Case T 512/12, 15 December 2015, para. 159ff at 164-165.

⁵⁵ Anaïs Faure Atger and Sergio Carrera, 'L'affaire des Roms : A Challenge to the EU's Area of Freedom, Security and Justice'. CEPS September 2010, Liberty and Security in Europe <<http://www.ceps.eu>> last accessed 29 September 2014.

No doubt, the developments sketched in the preceding analysis reflect the dynamics in the relations between the Member States and the Union as regards the control and authority over their constitutional foundations. But this calls for further reflection.

Authors suggest that the whole kerfuffle over Article 7 is caused by the political nature of the procedure, the decisive role of the Council and the high threshold posed by the voting requirements for formal determinations to be made. At one level we can say, as we have done above, that this on the one hand again overlooks the significant powers preceding such determinations and the moderating influence that the roles of European Parliament, Commission and Member States can play in overly politicized decision-making. On the other hand, the involvement of institutions that have no accountability before directly elected bodies would seriously undermine the democratic quality and legitimacy of the relevant procedures. And this brings us to a different level of insight, namely that these procedures concern the very foundations of political order in Europe that precede the legal institutions set up on their basis. The political nature of Article 7 is inherently and indissolubly connected to the political and constitutional nature of Article 2.

The quality of the polity is determined by its constitutive values. These are common and identical between the Union and the Member States. Upholding the quality of the values in practice means upholding the quality of the exercise of public authority both in the Union and in the Member States. This identical communality creates an unbreakable bond of mutuality in upholding those values and in the interest of doing so, of which citizens are the beneficiaries. The objective and the whole process underlying Article 7 is therefore not a matter of politics holding the Union hostage, nor of muzzling the Member State democracies that require 'containment'. The identity of their foundational values necessarily implies

also that it is mistaken to think of guaranteeing the foundations in terms of something referring to behaviour that can only be to some extent within and for the rest outside the scope of what the Union is about. The only way forwards is the insight expressed in Article 2 TEU: that the European Union and the Member States are each and both together based on identical values, the guarantee of which is as necessary for the Union as for the Member States.