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The Bite, the Bark, and the Howl

Article 7 TEU and the Rule of Law Initiatives

Leonard Besselink

In this chapter I analyse Article 7 TEU 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 chapter 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. The very identity of the foundational values of the Union and of the Member States makes it impossible to delimit the scope of EU law from that of Member State orders when it comes to guaranteeing these values. This also explains the politically highly sensitive nature of doing so. Defining the contours of the ensuing problems—mainly the question what is the scope of the powers under the various procedures and when are they triggered—requires a precise legal reconstruction of Article 7 TEU and its development.

Historically, this development takes the form of a backward shift from the issue of sanctions to their preconditions and of powers under prior procedures. 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 of which institutions should have a say, and the desirability of a ‘preventive mechanism’). The ‘monitoring powers’ preceding the ‘preventive mechanism’ have become the focus of the most recent controversies over the Commission’s ‘Rule of Law Initiative’ and the Council’s counter-initiative, the ‘Rule of Law Dialogue’, which steps even further back from ‘monitoring’ to a mere conversation within the Council. The structure of the analysis follows this retrograde development. It starts with a discussion of the sanctions and procedures. It ends with a discussion of the Commission’s and the Council’s respective initiatives, asserting that these should more correctly be viewed as integral parts of the procedure under Article 7, rather than be situated outside it.

1. Article 7 TEU

Article 7 TEU concerns compliance with the values enumerated in Article 2 TEU, which are common to the Member States and on which the Union is based, namely ‘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 which is the aim of the Union (Articles 3(1) and 13(1) TEU).¹

¹ See also Arts 21(2), 32(1), 42(5), and 49(1) TEU; the Preamble to Protocol No 24 (Lisbon), and the Preamble to the Charter.

These values constitute, one may say, the constitutional identity of the Union insofar as it coincides with the identity common to the Member States. This provision is therefore sometimes referred to as the ‘homogeneity’ clause.² As the *commonality* of values is the very essence of what is to be protected, the duty for the EU to respect the national identity inherent in a Member State’s political and constitutional structure (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 was the first paragraph of the present Article 7 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 to permit monitoring of Member States and prevent the actual occurrence of a ‘serious and persistent breach’.⁴ Therefore, 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 having 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. But true to the retrograde form of the analysis announced, we will first discuss the sanctions and the procedure leading to their imposition.

2. What sanctions?

Article 7(3) TEU is unclear as to the substance of the sanctions which 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 for voting rights in the Council as mentioned in Article 7(3). So this issue must be a matter of speculation.

3. What rights can and cannot be suspended?

The use of the expression ‘certain rights’ implies both that the 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

² F Schorkopf, *Homogenität in der Europäischen Union, Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art 7 EU* (Duncker & Humblot 2000); R Miccù and V Altripaldi (eds), *L’omogeneità costituzionale nell’Unione Europea* (CEDAM 2003).

³ Convincingly, Cesare Pinelli, ‘Protecting the Fundamentals: Article 7 of the Treaty on the European Union and Beyond’ (2012) Foundation for European Progressive Studies, 7, <http://www.feps-europe.eu/assets/9a4619cf-1a01-4f96-8e27-f33b65337a9b/protecting%20the%20fundamentals.pdf>, accessed 12 October 2016. I do not agree, however, that the view expressed in the text entails that Art 4(2) TEU excludes elements of national identity common to the Member States.

⁴ An overview of the history of Art 7 TEU is Wojciech Sadurski, ‘Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider’ (2010) 16 *Columbia Journal of European Law* 382.

or the cessation of membership. It is up to the Member State who is the target of sanctions to decide whether to leave the Union—it cannot be compelled to leave. Accordingly, even in the case in which a Member State persistently refuses to mend its ways and restore its compliance with 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 sibling, the Statute of the Council of Europe's (Article 8). This provision was triggered after the colonels' coup in Greece by Max van der Stoep's reports on Greece to the Consultative Assembly,⁵ 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.⁶

This experience suggests that a similar scenario could unfold in the event of large scale sanctions under Article 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 fourteen Member State governments in February 2000, subsequent to Haider's FPÖ becoming a coalition partner in Austria in 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 for positions in international organizations.⁷

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. Moreover, the sanctions against Austria were not EC/EU sanctions, but bilateral sanctions of fourteen Member States against Austria that were not supposed to interfere with obligations under European law. They might, however, have been allowed as EU sanctions under the present Article 7(3) TEU to the extent that if more severe steps are allowed—the suspension of rights—then less severe ones are 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 types of sanctions taken under Article 7 against a Member State would justify the infringement of the principle of loyal cooperation and other possible infringements of EU law resulting from the enforcement of and compliance with sanctions.

In principle, sanctions could concern any 'right deriving from the application of the Treaties' for 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 that, being based on a high level of confidence between Member States, its implementation may be suspended only in the event of a serious and persistent

⁵ It is wrong to say that Art 8 Statute CoE has never been activated; EU Commission in A New EU Framework for the Rule of Law (n 15), 6.

⁶ 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 Stoep found awaiting the slow evidence gathering and procedure of the Commission to be counterproductive and called successfully for political intervention; see T van Boven, *Human Rights From Exclusion to Inclusion: Principles and Practice* (F Coomans et al. eds, Kluwer Deventer 2000) 52–3.

⁷ Statement by the Portuguese Presidency of the EU, 31 January 2000, http://www.cvce.eu/content/publication/2009/12/16/8a5857af-cf29-4f2d-93c9-8bfd90e40c1/publishable_en.pdf, accessed 12 October 2016.

breach by one of the Member States of the principles of Article 2 TEU pursuant to Article 7 TEU.⁸

Another sanction which has been discussed concerns the suspension of EU funding to the Member State under any of the relevant instruments of secondary law.⁹

There is only one express limitation to sanctions governing the actions of the Council, contained in the wording of 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 the disapplication of rights which 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 proportionate.

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 rights can be affected—also of those who have nothing whatsoever to do either with 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.¹⁰

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 which we cannot imagine easily to occur within the Union. Article 7 TEU is written to address less severe violations than the outrages against human rights which occurred in the conflict in the former Yugoslavia, although very serious infringements can and do occur, if we consider for instance Member State complicity in the extraordinary renditions with a view to ‘enhanced interrogation’ of suspected terrorists.¹¹

4. 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 imposed (Article 7(3) TEU);

⁸ Council (EU), Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, Recital 10.

⁹ Thus the German, Dutch, Danish, and Finnish foreign ministers in their letter to the Commission President on the protection of the Rule of Law in the EU of 6 March 2013, see n 22. B Bugarič, ‘Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge’ LEQS Paper 79/2014, 16, <http://ssrn.com/abstract=2257935>, accessed 12 October 2016, 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’.

¹⁰ Case C-84/95 *Bosphorus Hava Yollari Turizm v Ticaret AS v Minister for Transport, Energy and Communications and others* [1995] ECLI:EU:C:1996:312, paras 22–3 and 26.

¹¹ c.f. *Al Nashiri v Poland* (ECtHR, App No 28761/11); *Husayn (Abu Zubaydah) v Poland* (ECtHR, App No 7511/13); EP resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners [2006] OJ C287E/309.

- the *European Council*, which 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 (Article 7(2) TEU);
- either at least *one third of the Member States* or the *Commission* can trigger the European Council’s determination—these two actors also have the right of initiative; and finally there is
- the *EP* 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 does not participate in the vote, and does not count either for determining the votes required 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 EP. So the European Council acts together with the EP, and 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 interplay between both the states and the Union inasmuch as the EP must consent (and also the Commission can take the initiative).

The role of the EP 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, but the Rules of Procedure of the Parliament explicitly provide for the possibility of a 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 3.¹² 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 qualified majority.¹³ 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, this is not the intergovernmentalism of the old ‘second’ and ‘third pillar’ from the days of the Maastricht Union: the decision is taken by qualified majority.

The procedure is of a highly political nature. The political actors dominate; a Commission initiative is not strictly necessary. The Court of Justice has not been given an explicit role in the procedure under Article 7: *de lege ferenda*, it could be imagined that the Council would be competent to impose sanctions following a suitable finding by a court. In practice, if for instance members of government of an EU Member State were prosecuted or convicted before the International Criminal Court, this might trigger determinations and sanctions under Article 7 TEU. But this is not the law as it stands. Since the Treaty of Nice,

¹² Rule 83, Rules of Procedure, EP, July 2014.

¹³ Art 354 TFEU refers to the qualified majority of Art 238(3)(b), i.e. at least 72 per cent, instead of the normal number of participating Council members, comprising 65 per cent of the population.

Article 7 is no longer completely excluded from its jurisdiction,¹⁴ but its jurisdiction is explicitly restricted to procedural issues only.

5. 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 Article 7 mechanism in its original form was no more than a bark in practice; or more accurately, a bite without a previous bark, which 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 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 3.¹⁵ 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 | Since Lisbon |
|---|---|
| <i>... 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</i> | <i>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.</i> |

¹⁴ The Amsterdam Treaty omitted Art 7 from the justiciable provisions enumerated in Art 46 TEU; 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’. See Case T-337/03 *Luis Bertelli Gálvez v Commission* [2004] ECLI:EU:T:2004:106. Interestingly, in Case T-280/09 *Morte Navarro v Parliament* [2010] ECLI:EU:T:2010:28 inadmissibility was not based on this provision, but on the proper motivation of the EP to reject a petition to start investigations into the alleged infringement of Art 6(1) TEU (pre-Lisbon).

¹⁵ Commission Communication to the Council and the EP on Art 7 of the TEU ‘Respect for and promotion of the values on which the Union is based’ COM(2003) 606 final, at 4 et seq.

A major but little noticed difference resides in the moment at which the 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 Union competence 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 whether monitoring of Member States is also allowed *prior* to the determination of a 'serious risk' has become controversial.

Given the fact that decision making in the Council will need a solid factual basis for the determination process, the logical assumption is that the monitoring powers 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.¹⁶

The Commission explicitly adopted this view in its Communication on Article 7 TEU of 15 October 2003.¹⁷ 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',

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.¹⁸

6. The Rule of Law Initiative: origin and reception

Even though the preventive procedure was devised as a more feasible mechanism, Rule of Law policy and politics moved in an opposite direction. The main use of Article 7 was that actually using it is unthinkable. Barroso described Article 7 as 'the nuclear option'.¹⁹ This has received continuous criticism by NGOs and others who felt it resulted in misplaced complacency, and moreover by applying this metaphor the Commission essentially deprives the Union from its practical use. The Commission exhibited this complacency in its conclusion of the 2003 Communication, stating 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

¹⁶ A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 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.

¹⁷ COM(2003) 606 final (n 15) at 3: '[T]he 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'.

¹⁸ COM(2003) 606 final (n 15), at 7 and 8 respectively. ¹⁹ State of the Union 2012 Address, 10.

Article 309 of the EC Treaty'.²⁰ By merely saying we cherish certain constitutional values, however, we do not automatically observe them in practice. Hence, 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'.²¹

Commission President Barroso announced this initiative in his State of the Union speech in 2012, expressing the wish to develop a broader set of instruments to occupy the ground between mere political persuasion and the use of Article 7. This was also followed up in the Council with a debate in the General Affairs Council, taking note of a German/Dutch/Danish/Finnish initiative calling for Rule of Law instruments with a key role for the Commission,²² and the Home Affairs Council in 2013, which seemed not unsympathetic to the idea of developing such tools.²³ The EP joined with a number of reports, urging the development of further instruments.²⁴

The Commission introduced a Justice Scoreboard in 2013, which monitors the quality of the judiciary in the Member States on a range of indicators, such as caseload in relation to duration of case handling, perceived independence, etc.²⁵ This was justified on the strength of the argument that the quality of judicial systems contribute to the investment climate and hence influences trade and economic growth and development, and the Commission proposed its inclusion in the European Semester.²⁶ 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 organizations, albeit with an unexplained and unspecified and hence non-transparent methodology.²⁷

²⁰ COM(2003) 606 final (n 15), at 12; for criticism, e.g. Amnesty International, 'Response to the European Commission Communication on Article 7 of the Treaty on European Union' (December 2003), http://www.amnesty.eu/static/documents/AI_response_to_EC_Comm_on_Article_7_of_Treaty_on_EU.doc, accessed 12 October 2016.

²¹ Communication from the Commission to the European Parliament and the Council, 'A new EU Framework to strengthen the Rule of Law' COM(2014) 158 final.

²² Letter from Guido Westerwelle, Guido Westerwelle, Villy Søvndal, and Erkki Tuomioja to José Manuel Barroso (6 March 2013), <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>, accessed 12 October 2016, 2.

²³ Council (EU), Press Release (22 April 2013), http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/136915.pdf, accessed 12 October 2016; and Council Conclusions of June 2013, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf, accessed 12 October 2016.

²⁴ R Tavares, 'Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the EP resolution of 16 February 2012)' 2012/2130(INI) <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>, accessed 12 October 2016; Louis Michel, 'Report on the situation of fundamental rights in the European Union (2012)' 2013/2078(INI), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0051+0+DOC+XML+V0//EN>, accessed 12 October 2016; and K Göncz, 'Report on evaluation of justice in relation to criminal justice and the rule of law' 2014/2006(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0122+0+DOC+XML+V0//EN>, accessed 12 October 2016.

²⁵ Commission, 'The EU Justice Scoreboard' COM (2013) 160 final, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf, accessed 12 October 2016; scoreboards for 2014 and 2015 have also been published: Commission, Commission, 'The 2014 EU Justice Scoreboard' COM(2014) 155 final, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2014_en.pdf, accessed 12 October 2016; and Commission 'The 2015 EU Justice Scoreboard' COM(2015) 116 final, http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf, accessed 12 October 2016.

²⁶ This has happened in the meantime, and recommendations on judicial systems have been made in some country-specific recommendations in this framework, 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 Commission, 'Country Report Slovakia 2015' (Staff Working Document) COM(2015) 85 final, http://ec.europa.eu/europe2020/pdf/csr2015/cr2015_slovakia_en.pdf, accessed 12 October 2016, 35–6.

²⁷ 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, accessed 12 October 2016.

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 level to secure the rule of law.²⁸

To distinguish the situations in which the Framework is triggered, the emphasis is on the 'systemic' effects of a situation or of certain measures; it is not triggered in the case of individual infringements of fundamental rights or miscarriages of justice.²⁹

The three steps envisaged are:³⁰

- Commission assessment and confidential dialogue with a view to resolving the issues:
 - Where there is a 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 opportunity to respond.
- Commission recommendation:
 - Unless the matter has already been resolved satisfactorily 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.
- A follow-up stage to the recommendation:
 - In this third stage, the Commission monitors the follow-up provided by 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.

7. 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: the Rule of Law Dialogue.

No doubt, an important role was played by the Council Legal Service's opinion of 27 May 2014, which presented an analysis of the Commission's Rule of Law Framework, concluding that the Framework is incompatible with the Treaties.³¹ The opinion takes the view that:

²⁸ Framework (n 21) 6.

²⁹ Compare A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done' (2014) 51 *Common Market Law Review* 59.

³⁰ Framework (n 21) 6–8.

³¹ Council Legal Service, 'Opinion on the Commission's Communication on a new EU Framework to strengthen the Rule of Law' (Document 10296/14, 27 May 2014) <http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>, accessed 12 October 2016.

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.³²

This view is based on the principle of conferred 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].³³

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

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 arrangements 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.³⁴

After what must be understood as the negative opinion of its Legal Service concerning the Commission’s Rule of Law Initiative, the Council launched its own ‘initiative [which] focuses more specifically on the respect for Rule of Law that is an essential element of the EU’s identity’.³⁵ Instead of a separate intergovernmental agreement supplementing the EU Treaty, as the legal service had suggested, it decided that it would hold a ‘constructive dialogue’ between all Member States in thematic sessions once a year. This dialogue is conducted on the basis of equality and aims:

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).³⁶

³² Framework (n 21) 7. ³³ *ibid.*, 5. ³⁴ *ibid.*, 7.

³⁵ Council Document 16862/14, 12 December 2014, <http://data.consilium.europa.eu/doc/document/ST-16862-2014-INIT/en/pdf>, accessed 12 October 2016, 1, para 3.

³⁶ Framework (n 21) 6.

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

8. Monitoring powers: within 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 might suggest that the Council implicitly went along with its Legal Service, although it is by no means clear that the Council has endorsed the opinion.

With the exception of one point, the Council Legal Service opinion is unclear as to *what* exactly the ‘new supervision mechanism’ is which 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 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.³⁷

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 aided this 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, on the contrary, we 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 case law of the Court of Justice cited, could not apply: Article 269 TFEU would prohibit the Court from giving preliminary rulings and receiving actions for damages.

Another indicator that the Legal Service assumed that the Framework is outside the remit of Article 7 is that the opinion passes over the explicit power of the *Council* under the ‘preventive mechanism’ of Article 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

³⁷ Council Legal Service, ‘Opinion on the Commission’s Communication on a new EU Framework’, 5, para 19.

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 have just seen.)

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 systematic Rule of Law monitoring is outside the scope and framework of Article 7 correct?

There are good reasons to think that it is not. The starting point must be the explicit wording of Article 7 concerning the stage prior to applying the 'sanctions mechanism', which is to say the 'preventive mechanism' of paragraph 1. It is indeed often overlooked, both in the Council's documents and in the literature,³⁸ 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 a talking shop in which views are exchanged which 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 severe powers for 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 2.³⁹

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.

It is not only the Council which must have implied monitoring powers. The same must necessarily be true 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.

A further question is what the scope of monitoring powers implicit in 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 Article 7 procedures 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

³⁸ e.g. H von Heinegg, 'Artikel 7' in C Vedder and WH von Heinegg (eds), *Europäisches Unionsrecht, Handkommentar* (Nomos 2012) 90; alternatively, H-J Blanke, 'Article 7' in H-J Blanke and S Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer 2012) 363.

³⁹ Especially the Council Conclusions on fundamental rights and the Rule of Law (n 23) 4, paras 9–11.

Member States' sensitivities at not being treated equally. 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 conducting this 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 are 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 reason chosen as the basis of the Commission's Rule of Law Initiative,⁴⁰ although the criticism can rightly be made that too many aspects of diplomatic 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 which can provide relevant information, usually from the Member States. These include sources already available to the Union institutions, including the FRA, and available from other organizations, such as Council of Europe monitoring exercises (including the Venice Commission, the Human Rights Commissioner, the Parliamentary Assembly, the Committee of Ministers, and the ECtHR), OCSE, the ILO, and the UN (including the supervisory committees of the various UN conventions). The amount of information relevant to monitoring under Article 7 is indeed so great that it might be useful to systematically organize it within a platform established specifically for this purpose.⁴¹

A subsequent step must be the processing of information in the form of some kind of engagement with the relevant 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 solely grants 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 were no other role for them than mere information gathering.

To avoid a multiplicity of opinions expressed at an early stage prior to the formal engagement of the two mechanisms, some orderly way of proceeding would be desirable. An inter-institutional agreement might be necessary to achieve this, which could be based on the experience with existing monitoring procedures in which more than one institution has a role to play.⁴² The current lack of coordination and actual inter-institutional rivalry displayed in the context of the Commission's and Council's respective Rule of Law

⁴⁰ Framework (n 21) 7.

⁴¹ See the Netherlands Advisory Council on International Affairs, 'The rule of law: Safeguard for European Citizens and Foundation for European Cooperation', (Report No 87, January 2014), <http://aiv-advies.nl/download/57da03fa-3410-4aba-af05-663cb780df72.pdf>, accessed 12 October 2016, 32.

⁴² Compare the cooperation and verification monitoring of Bulgaria and Romania, and the monitoring introduced in the context of the Schengen Acquis, in Council Regulation (EU) 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis [2013] OJ L295, 27–37.

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.

9. 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—determining which activity remains within the framework of Article 7 and which lacks a legal basis—are not the only issues. There is a more profound explanation for 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 Article 7 mechanisms aim to protect. Article 2 sums up the values on which the Union is founded and which are common to the Member States. From the Union perspective, these values are not restricted to the Union's specific competences or the operation of Union law; from the Member State perspective, these values do not target the specific operation or realization of the Union and its laws in the Member States. They are foundational values which 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, necessarily not solely to the activity of the Union within the Member State, nor to Member State activity concerning the implementation of Union law or the Union's specific competence. That is why Article 7 is generally considered the only provision conferring a power to the Union over matters which relate to Member State activity which can be *outside* the scope of EU law. As this activity concerns values which 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 which can be completely outside the scope of Union law in the strict sense.

This sensitivity explains the Council's slamming on the brakes as soon as it approaches Rule of Law monitoring of Member State action. A good illustration is the manner in which the Council understood its Legal Service's opinion on a crucial point.

The opinion is at first sight somewhat opaque and contradictory, focusing on Articles 2 and 7 respectively when it comes to Member State action within and outside the scope of EU law. I will quote two paragraphs here. The first might seem to suggest that Rule of Law monitoring can only concern Member State actions within the scope of Union law, whereas the second paragraph states the contrary, i.e. the Union can—exceptionally—act with respect to Member State acts which 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.⁴³ (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 paragraph quoted can then be read as saying that such a competence is granted in Article 7.

The Council, however, summarized the two paragraphs 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’.⁴⁴ The two paragraphs are understood to mean that Rule of Law monitoring is possible *only* 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 paragraphs quoted. 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 literature and in the case law.⁴⁵ These views need to be developed further 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 which 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 Article 258 and following 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.⁴⁶ 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 in the strict sense.

I have been using the expression ‘the scope of EU law in the strict sense’. The paradox is that if the Union is competent to act on Member State behaviour *outside* the scope of EU law—ie 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 (ie including Articles 2 and 7). The reason is the very nature of what Article 2 claims: the values it lists are common to the Member States and form the very foundation of the Union, so the common constitutional values of the *Member States* constitute the foundation of the *Union*. Member State constitutional values and the founding constitutional values of the Union cannot be strictly separated: they are commensurate, the Union and the Member States have a common constitutional identity. The Union and the Member State orders are inextricably linked, bound up with each other, intertwined, and enmeshed. This in turn is caused by the

⁴³ Council Legal Service (n 37), paras 16 and 17.

⁴⁴ Council Document (n 35) para 12.

⁴⁵ Famously, Advocate General Maduro in Case C-380/05 *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni* [2008] ECLI:EU:C:2008:59, paras 17–23; A Duxbury, ‘Austria and the European Union: The Report Of The ‘Three Wise Men’ (2000) 1 *Melbourne Journal of International Law* 169, 170; Mangiameli (n 38) 351, with further references; von Bogdandy and Ioannidis (n 29) 65 and 67. In Case C-505/13 *Ymer*, Order of the Court of 17 July 2014, paras 22–4, the Court distinguished claims of compatibility of Member State action with Art 2 TEU from that with the Charter; in Case C-28/14 *Ryszard Pańczyk*, Order of the Court, 12 June 2014, para 16, the Court was asked on the compatibility with Art 2 TEU and several other provisions of the Charter, but ignored the question about Art 2 and found that it was outside the scope of the Charter; in Case T 512/12 *Front Polisario*, 15 December 2015, paras 159 ff. at 164–5, the General Court seemed to accept that Art 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’.

⁴⁶ COM(2003) 606 final (n 15) 5, para 1.1; Mangiameli (n 38) 355.

nature of the values concerned: they are not specific from one Member State to another, but foundational to the individual Member State constitutional orders as well. They are foundational, but from the Union's perspective they also *ought to be* foundational: they are prerequisites for Union membership. A failure to heed those foundational values is for that very reason sanctionable by 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 in the strict sense is therefore a misconstruction. Otherwise, a Member State could respect human dignity, freedom, equality, the Rule of Law, human rights—including the rights of persons belonging to minorities—and be a democracy *only* when acting within the narrower confines of EU law, but then still persistently and seriously breach those values and denigrate human dignity, stifle freedom, crush equality, deny the Rule of Law, trample human rights, and act as a dictatorship in gross denial of minority rights outside the scope of EU law narrowly construed. That would seem to be as untenable as it is improbable, given the entwining of the national and Union legal orders in the practical exercise of public authority.

The conclusion on the contrary must be that the values of Article 2 affect both national and the Union identities, with the consequence that, when threatened at the national level, they are also threatened at the EU level.⁴⁷

10. Final remarks

The analysis of Article 7 and the Commission's Rule of Law initiative and the Council's Rule of Law Dialogue 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 debate recoiling from sanctions, towards prevention and prior monitoring powers in the Commission's and the Council's Rule of Law 'initiatives', the latter even hesitating to monitor. Deficiencies in the legal analysis facilitate this, some ignoring the nature of the 'preventive mechanism' of Article 7 altogether by holding that Article 7 concerns *a posteriori* procedures.⁴⁸ Both the literature and the institutions seem to overlook the power to issue recommendations under Article 7 *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 by both the power to issue Council recommendations at that stage and the right to initiative are swept under the carpet or flatly denied. Thus the bite and the bark may end up being a howl, or even less.

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 the EP, Commission, and Member States can play in such overly politicized decision making. On the other hand, the involvement of institutions which are not accountable before directly elected bodies

⁴⁷ Pinelli (n 3) 7.

⁴⁸ A Faure-Atger and S Carrera, 'L'affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice' (September 2010) CEPS, Liberty and Security in Europe, <http://www.ceps.eu/system/files/book/2010/09/Carrera%20%26%20Faure%20Atger%20on%20Roma%20Affair.pdf>, accessed 12 October 2016.

would seriously undermine the democratic quality and legitimacy of the relevant procedures. This brings us to a different level of insight, namely that these procedures concern the very foundations of political order in Europe, which precede the legal institutions established 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 reasons for doing so, of which citizens are the beneficiaries. The objective of 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 which require 'containment'. The identity of their foundational values necessarily also implies that it is mistaken to think of guaranteeing their constitutive foundations only by reference to behaviour which is within the scope of Union law, and not to behaviour outside that scope narrowly understood. When it comes to its foundational values the Union is about *any* political behaviour touching on those values. The only way forwards is the insight expressed in Article 2 TEU: that the EU 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.