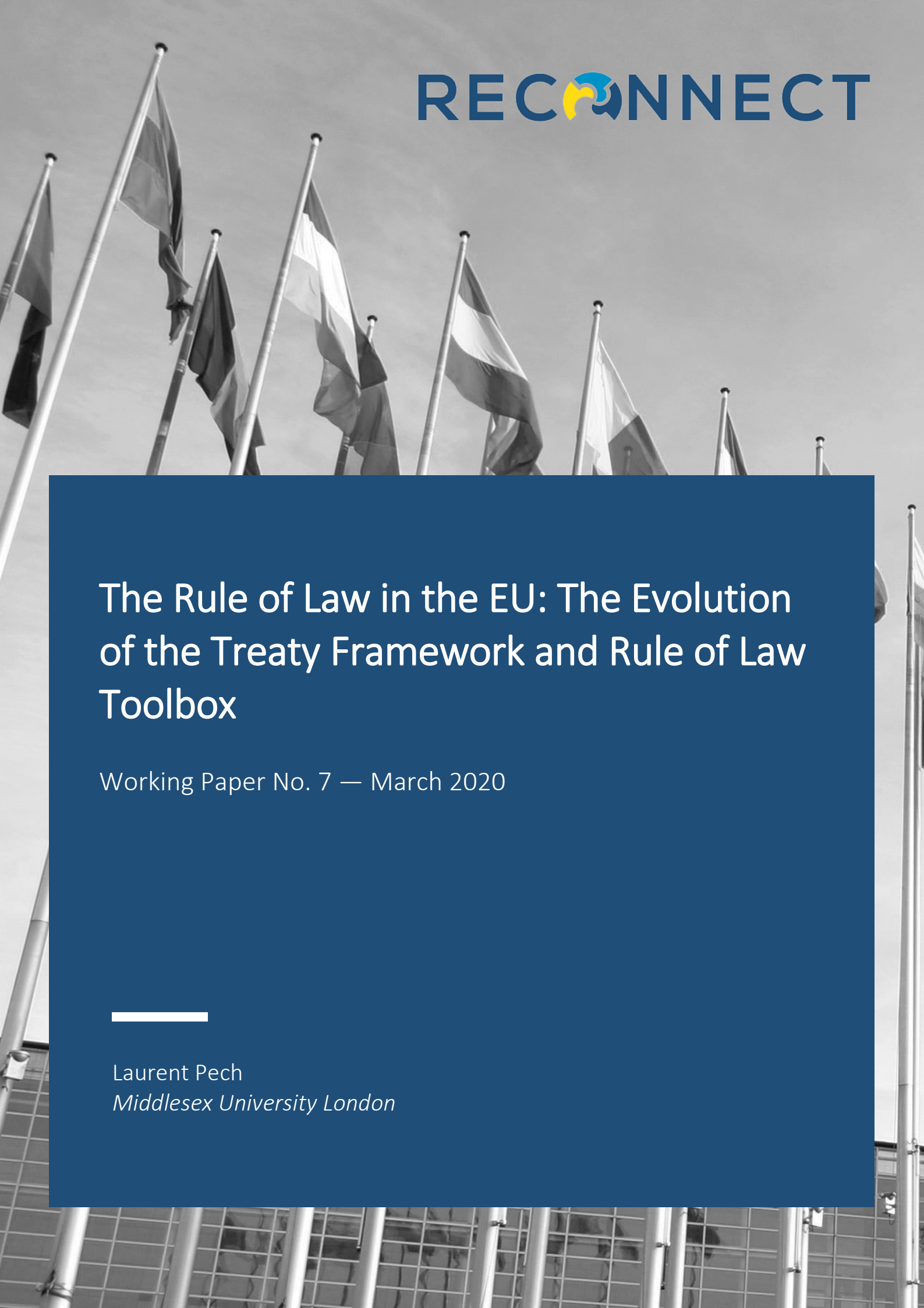

RECONNECT

The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox

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The Rule of Law

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Abstract

The history of the rule of law in the EU Treaty framework has been one of gradual but extensive process of entrenchment and formal enshrinement. While it may be argued that the founding Treaties did protect the rule of law to the extent that they provided for a supranational and independent court with a wide jurisdiction to guarantee that the "law is observed", it was not until a 1986 judgment of the Court of Justice that the rule of law was explicitly and prominently referred to in a ruling in which the then European Community (EC) was described as "a Community based on the rule of law". This first judicial reference was followed, starting in 1992, by multiple and important references in the EU's founding Treaties

When comparing the evolution of the Treaty framework to the evolution of the EU's rule of law toolbox, it is difficult not to be struck by the contrast between the gradual evolution of the Treaty framework with the rapid development of the EU's rule of law toolbox. This swift development and densification of the EU's rule of law toolbox may be understood both in a positive and negative way: It may be positively understood as the sign of a broad consensus regarding the critical importance of the rule of law and an increasing awareness of the existential nature of the threat that rule of law backsliding poses to the EU. Conversely, this evolution may be understood as a failure to fully confront those who have deliberately undermined the rule of law in their countries by instead focusing in a quasi-permanent new instrument creation cycle at the EU level.

Keywords

Rule of Law, European Union, Treaty Framework, Rule of Law Toolbox, Rule of Law Backsliding

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1. Introduction

To follow the President of the European Court of Justice, the rule of law may be concisely understood as "the only reliable bulwark against the arbitrary exercise of power and means, in essence, that any legal dispute must be resolved in accordance with – and only in accordance with – the applicable norms provided for by law".[1] As far as the EU is concerned, the rule of law essentially "means that neither the EU institutions nor the Member States are above EU law."[2]

Article 2 TEU is the most important Treaty provision when it comes to the rule of law. This provision describes the rule of law both as one of the foundational values on which the EU is based and one which is common to the Member States "in a society in which, inter alia, justice prevails".[3] In more practical terms, the fact that the EU is a union based on the rule of law means first and foremost that "individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act" as "the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law".[4]

While the founding Treaties did not initially contain a direct reference to "the rule of law" as such, the concept was arguably very much encapsulated in the first Treaty provision describing the role of the European Court of Justice. Indeed, in some early English translations of Article 31 of the 1951 European Coal and Steel Community Treaty (hereinafter: ECSC Treaty), a provision originally written in French, the English label "rule of law" was used to translate "*respect du droit*":

> The function of the Court is to ensure the rule of law in the interpretation and application of the present Treaty and of its implementing regulations.[5]

Following the ratification of the 1992 Maastricht Treaty and subsequent multiple Treaty amendments, it is beyond doubt that the rule of law has become one of several core elements which underlie the whole EU legal structure and without which the "structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other"[6] will cease to effectively function.

In answer to some recurrent criticism regarding the allegedly vague nature of the principle and more recent challenges originating from officials of national governments criticised for their rule of law records, the Commission has helpfully further clarified the core meaning and essential components of the EU rule of law:

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[1] K. Lenaerts, "Upholding the Rule of Law within the EU", in 2nd RECONNECT conference (5 July 2019) report, p. 20: https://reconnect-europe.eu/wp-content/uploads/2019/08/RECONNECT-GA-report-web.pdf.
[2] Ibid.
[3] ECJ, Case 64/16 *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 30.
[4] Ibid., paras. 31 and 36.
[5] M. Lagrange, "The Role of the Court of Justice of the European Communities as seen through its case law" (1961) 26 *Law and Contemporary Problems* 400, p. 401. This article was translated from the French language by an officer of the ECJ's Translation Service.
[6] ECJ, Opinion 2/13 *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454, para. 167.

> Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.[7]

This definition was included in a communication adopted by the Commission in April 2019 which outlined possible steps on how to further strengthen the EU's "rule of law toolbox". In the follow-up communication adopted in July 2019,[8] the Commission identified a number of avenues to better encourage and enforce respect for the rule of law, the most important of which will be the launch of a new "Rule of Law Review Cycle" in the second semester of 2020.[9] This latest potentially significant addition to the EU's rule of law toolbox may be understood as the culmination of multiple initiatives and new instruments which have been adopted since 2012, which is when, for the very first time, the then President of the European Commission spoke of a new type of "threats to the legal and democratic fabric in some of our European states".[10]

When comparing the evolution of the Treaty framework (section 2) to the evolution of the EU's rule of law toolbox (section 3), it is difficult not to be struck by the contrast between the gradual evolution of the Treaty framework with the rapid development of the EU's rule of law toolbox. This is not to say, however, that a swift evolution was not required. To follow a distressing but sadly accurate diagnosis recently put forward by three major European judicial networks, the EU's common legal order is now "at risk" due to the independence of the judiciary "being severely threatened, and the separation of powers between the executive branch and the judicial branch […] being dismantled"[11] in several EU Member States. The EU has therefore no choice but to decisively act and innovate failing what the present threat of the "progressive destruction of law by arbitrariness […] will eventually undermine the entire European project"[12] if it is not counteracted promptly and effectively.

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[7] European Commission Communication, *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, COM(2019) 163 final, 3 April 2019, p. 1. This definition builds on the working definition first offered in a Commission Communication issued in 2014: *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, 19 March 2014. For further analysis, see D. Kochenov and L. Pech 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11(3) *European Constitutional Law Review* 512.

[8] European Commission Communication, *Strengthening the Rule of Law within the Union. A blueprint for action*, COM(2019) 343 final, 17 July 2019.

[9] See infra section 3.5.

[10] J. Barroso, President of the European Commission, *State of the Union 2012 Address*, Plenary session of the European Parliament, Strasbourg, Speech/12/596, 12 September 2012.

[11] Letter to the President-Elect of the European Commission from the president of the Network of Presidents of the Supreme Courts of the EU; The president of the European Association of Judges; and the president of the European Network of Councils for the Judiciary, Brussels, 20 September 2019: https://www.encj.eu/node/535.

[12] L. Pech, D. Kochenov et al., *Strengthening the Rule of Law within the European Union: Diagnoses, Recommendations, and What to Avoid*, RECONNECT Policy Brief, 14 June 2019, p. 1: https://reconnect-europe.eu/publications/policy-briefs/.

2. The Gradual Evolution of the Treaty Framework

The history of the rule of law in the EU Treaty framework has been one of gradual but extensive process of entrenchment and formal enshrinement. While it may be argued that the founding Treaties did protect the rule of law to the extent that they provided for a supranational and independent court with a wide jurisdiction to guarantee that the "law is observed" (literal translation of the original French expression "*respect du droit*"), it was not until a 1986 judgment of the Court of Justice that the rule of law was explicitly and prominently referred to in a ruling in which the then European Community (EC) was described as "a Community based on the rule of law".[13] This first judicial reference was followed, starting in 1992, by multiple and important references in the EU's founding Treaties.

2.1 The concept without the label

To follow Sir Francis Jacobs, "the key to the notion of the rule of law is … the reviewability of decisions of public authorities by independent courts; the European Union goes far in recognizing this" to the extent that the Treaties on which the EU is based have conferred a "wide jurisdiction […] on an active and independent court."[14] This has been true from the very beginning of European integration and has remained a constant feature in the history of the EU with the jurisdiction of what is now the Court of Justice of the EU regularly expanded with each new treaty.

While the EU's judicial branch currently consists of two courts (the Court of Justice and the General Court), the ECSC Treaty only foresaw the establishment of a single court known as the Court of Justice. Originally set up to ensure that the ECSC and subsequently the European Communities "would be subject to the rule of law,"[15] its primary function, as noted by the Court of Justice itself, has remained the same ever since: "to ensure that "the law is observed" "in the interpretation and application" of the Treaties".[16] This phrasing was first used in Article 31 of the ECSC Treaty. In the French version – the ECSC Treaty was drawn up in a single original in French – this provision read as follows:

> *La Cour assure le respect du droit dans l'interprétation et l'application du présent Traité et des règlements d'exécution.*

While it is possible to find an English translation of this provision using the concept of the rule of law ("The function of the Court is to ensure the rule of law in the interpretation and application of the present Treaty and of its implementing regulations"[17]), a more accurate translation would be as follows: "The Court shall ensure that in the interpretation and

[13] Case 294/83 *Les Verts v. Parliament*, ECLI:EU:C:1986:166, para. 23.
[14] F. Jacobs, *The sovereignty of law: The European way* (The Hamlyn Lectures 2006, Cambridge University Press, 2007), p. 35 and p. 37.
[15] F. Jacobs, Foreword in A. Arnull, *The European Union and its Court of Justice* (2nd ed., OUP, 2006), p. vii.
[16] CJEU, "The Institution: General Presentation": http://curia.europa.eu/jcms/jcms/Jo2_6999/.
[17] See translation of the ECSC Treaty published by the Publishing Services of the European Communities and made available by CVCE.eu: https://www.cvce.eu/obj/treaty_establishing_the_european_coal_and_steel_community_paris_18_april_1951-en-11a21305-941e-49d7-a171-ed5be548cd58.html. This is also the translation of Article 31 of the ECSC Treaty used in M. Lagrange, op. cit., p. 401.

application of this Treaty, and of the rules laid down for the implementation thereof, the law is observed". This phrasing was maintained by the drafters of the EEC Treaty with Article 164 of this Treaty originally providing that "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed" (in French: "*La Cour de justice assure le respect du droit dans l'interprétation and l'application du présent Traité"*).

In practical terms, this meant inter alia that the Court was provided with the jurisdiction to (i) decide whether a Member State has failed to fulfil its obligations under the Treaty; (ii) to review the legality of acts adopted by EEC institutions; (iii) to review any eventual failure of the Council or Commission to act in violation of the Treaty and (iv) to interpret EU law as well as review the validity of acts adopted by EEC institutions on the basis of preliminary ruling requests made by national courts or tribunals.

The initial absence of any explicit reference to the term "rule of law" did not, therefore, mean the absence of judicial control over public authorities when they adopted EEC law or (mis)implemented EEC law. In other words, the original absence of a provision similar to Article 3 of the 1949 Council of Europe Statute ("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…") or of a reference similar to the one to be found in the Preamble to the 1950 European Convention on Human Rights (Europe's "common heritage of political traditions, ideals, freedom and the rule of law") should not be understood as implying that the drafters of the ECSC or the EEC Treaties were oblivious to the importance of preventing or sanctioning any eventual arbitrary exercise of power or the need to guarantee compliance with one's legal obligations.

In light of the explicit references to the principle of the rule of law in the ECHR framework, one may, however, wonder about the absence of similar references in the original texts of the ECSC and the EEC treaties which, as previously noted, were first written in French?[18]

Several explanations may be advanced. Firstly, considering that the reference to the rule of law in the Preamble of the European Convention on Human Rights (ECHR) is seemingly due to a representative of the British government,[19] one may speculate that the absence of British lawyers at the time when the ECSC and EEC Treaties were drafted may explain the lack of reference to "the rule of law" as such.

Secondly, linguistic factors have to be taken into account. In short, the protean nature of the English term "rule of law", by comparison to other languages, is unusual. For instance, "the rule of law" may be translated in French – without being exhaustive – by the following terms:

[18] The 1953 draft Treaty on a European Political Community (EPC) similarly reiterated that the Court of Justice shall ensure that the "law is observed" but acceptance of the rule of law was indirectly made a membership requirement of the EPC as the EPC draft Treaty provided that membership of the EPC "shall be open to the Member States of the Council of Europe and to any other European State which guarantees the protection of human rights and fundamental freedoms".

[19] See J.-Y. Morin, "La 'prééminence du droit' dans l'ordre juridique européen" in *Essays in Honour of Krystof Skubiszewski* (Kluwer Law International, 1996), pp. 668-669.

prééminence du droit,[20] *Etat de droit*,[21] *primauté du droit*,[22] or *principe de légalité*.[23] One could therefore reasonably argue that the French version of Article 31 of the ECSC Treaty and its subsequent reiteration in Article 164 EEC encapsulated the core meaning of what is known in English as the "rule of law". To put it differently, while the Treaty provision providing that "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed" does not expressly refer to the rule of law, this principle may be said to be inherent in this Treaty provision.[24] In those days, however, today's dominant concept (*Etat de droit* which was furthermore derived from the German concept *Rechtsstaat* rather than the English concept of rule of law) was not widely used in French legal discourse.[25] It was furthermore understood in a narrow manner and primarily equated with the principle of legality and judicial review.[26]

Thirdly, the definition of the Court of Justice's mission first laid down in the ECSC Treaty is the outcome of a compromise between representatives of the French and German governments who were in disagreement about whether the Court should be a permanent body with extensive jurisdiction akin to a federal constitutional court or more akin to an ad hoc arbitral tribunal.[27] In the end, "the final result of the deliberations […] was a court based on the French model [of the Conseil d'Etat], but with some openness to the German wishes, such as for the right, though limited, for natural and legal persons to have recourse to the Court,"[28] with the right to bring an action against the High Authority "seen as an important legal guarantee against arbitrary decision-making and as such it eventually became a decisive part of the Treaty".[29] A broadly similar debate arose again at the time of the drafting of the EEC Treaty and resulted in a broadly similar compromise between the proponents of a permanent court and those in favour of an arbitrary body.

In light of the above, one may then better understand why the ECSC and EEC Treaties did not contain any solemn reference to the rule of law similar to what can be found in the Council of Europe Statute or the ECHR. It was not until the Maastricht Treaty that the principle of the rule of law/*Etat de droit/ Rechtsstaatlichkeit* was formally enshrined in EU primary law. This formal enshrinement was preceded by the Court of Justice's first significant reference to the rule of

[20] A translation historically favoured by the Council of Europe: In the French version of the Statute and of the Convention's Preamble, the rule of law is equated with the notion of "*prééminence du droit*".
[21] This is term which today appears to have the favour of most legal scholars when they analyse the rule of law as a constitutional principle governing a state.
[22] See e.g. Preamble of the Canadian Charter of Rights and Freedoms: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law [*la primauté du droit*]."
[23] Case 101/78 *Granaria* [1979] ECR 623, para. 5.
[24] See e.g. M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (Kluwer Law International, 1999), pp. 103-104.
[25] For a comprehensive account, see L. Heuschling, *État de droit. Rechtsstaat. Rule of Law* (Dalloz, 2002).
[26] For further analysis, see recently E. Carpano, "La definition du standard européen de l'Etat de droit" (2019) 2 *RTDEur.* 255.
[27] M. Rasmussen, 'The Origins of a Legal Revolution – The Early History of the European Court of Justice' (2008) 14 *Journal of European Integration History* 77, p. 83.
[28] D. Tamm, "The History of the Court of Justice of the European Union Since its Origin", in A. Rosas, E. Levits, Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC ASSER Press and Springer Verlag, 2013) 9, p. 17.
[29] Ibid.

law in the seminal case of *Les Verts* which will be outlined below. Before doing so, however, one may note that the fundamental significance of the rule of law was politically made clear in 1973 in a Declaration on European Identity adopted by the Heads of State or Government of then nine EEC member states. This Declaration referred to their determination to defend "fundamental elements of the European Identity" such as the principle "of the rule of law" ("*règne de la loi*" and *Rechtsstaatlichkeit* in the French and German versions).[30] This created the fertile ground that would lead to the Court of Justice's ruling in *Les Verts*.

2.2. Laying down the ground for formal Treaty enshrinement: The Court's ruling in Les Verts[31]

In *Les Verts*,[32] the Court of Justice, for the first time,[33] described what was then the EEC as a "Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles [now 263 TFEU] and [now 277 TFEU], on the one hand, and in Article [now 267 TFEU], on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions."[34]

At the time of this litigation initiated by a French association (*Parti écologiste "Les Verts"*) against the European Parliament, the Court's jurisdiction to hear and determine an action for annulment was expressly limited to actions brought against measures adopted by the Council and the Commission. In the words of the applicant, this limitation amounted to a denial of justice. In the name of the rule of law and by reference to the "general scheme" of the Treaty as well as its "spirit" as expressed in what is now Article 19 TEU (The Court of Justice of the EU "shall ensure that in the interpretation and application of the Treaties the law is observed"), the Court interpreted ex Article 173 EEC as not excluding annulment actions brought against measures adopted by the Parliament intended to have legal effects vis-à-vis third parties.[35] It is therefore in a context where the Court decided to exercise a constitutional gap-filling role that the phrase "Community based on the rule of law" first emerged.

This original formula appears to have been coined from the German term *Rechtsgemeinschaft* coined by Walter Hallstein, a renowned Professor of Law who later became the first President of the European Commission from 1958 to 1967, with the French expression "Communauté de droit" also popularised by Robert Lecourt, President of the ECJ from 1967 to 1976, in a book

[30] Declaration on European Identity (Copenhagen, 14 December 1973), EC Bulletin, December 1973, No 12, p. 118.
[31] This section borrows from L. Pech, "The Rule of Law as a Constitutional Principle of the European Union", *Jean Monnet Working Paper* 04/09, pp. 10 et seq.
[32] Case 294/83, op. cit., para. 23.
[33] The Court of Justice made however an earlier reference to "the principle of the rule of law within the Community context" in Case 101/78 *Granaria*, ECLI:EU:C:1979:38, para. 5. In the German version of this judgment, the expression *Rechtsstaatlichkeit* is used, which explains why German scholars tend to view *Granaria* as the first judgment referring to the concept of *Rechtsstaat*. It may be worth pointing out that the terms *Rechtsstaat*, *Rechtsstaatlichkeit* and *Rechtstaatprinzip* are often used interchangeably.
[34] Case 294/83, op. cit., para. 23.
[35] The Court's case law was later codified via an amendment to ex Article 230 EC which enabled challenges against acts of the Parliament intended to produce legal effects vis-à-vis third parties.

published in 1976 entitled *L'Europe des juges*.[36] In the French version of the judgment, the expression *communauté de droit* is used. The most likely explanation for the Court of Justice's reluctance to rely on the then more widely used notions of *Rechtsstaat* or *Etat de droit* – a reluctance which is difficult for English speakers to note as the English phrase "rule of law" does not refer to a state or government – is that ECJ judges may have been concerned by the use of any phrasing which could wrongly suggest that they viewed the then EEC as a quasi-state or state in the making. This may explain why the term *Gemeinschaft/communauté de droit* ("community based on law" if literally translated), which leaves open the statehood question, was preferred. Another potential explanation is that the Court wished to acknowledge the existence of a genealogical link between all the national and European concepts,[37] but also sought to preserve its power to construct an "autonomous" understanding of the rule of law.

Be that as it may, the Court's judgment made it clear that the rule of law must be understood as one of the fundamental principles underlying the EEC's constitutional framework as a whole which, in the case of *Les Verts*, the Court relied upon to justify the adoption of "a generous and dynamic interpretation of the Treaty" so "to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance."[38] Whether or not this may be connected to the Court's first reference to a "Community based on the rule of law" in 1986, the principle of the rule of law was endowed with formal Treaty blessing just a few years after *Les Verts*.

2.3 Formal enshrinement of the rule of law in EU primary law

The formal enshrinement of the rule of law in the EU's founding Treaties should be understood in the political context of the time, that is, "the post-Cold War explosion in interest in the rule of law, and its appendage … to national and international economic, social, and political desirables."[39] Following the fall of the Berlin Wall, the rule of law was quickly embraced as one of the key principles which should guide countries as well as international organisations in the post-Cold war era. One may refer for instance to the so-called 1990 Copenhagen document adopted by the OSCE in which the participating states affirmed their determination "to support and advance those principles of justice which form the basis of the rule of law".[40] This emphasis on the rule of law was unsurprising considering that even before the fall of the Berlin Wall, "central among the slogans of opponents of [Communism] were 'the rule of law', 'legality', the subordinator of politics to law'."[41] A few months later, the Heads of State or Government of the participating States of the Conference on Security and Co-operation in Europe, which included most current EU Member States but also Canada, the US and the Union of Soviet

[36] S. Platon, "Les fonctions du standard de l'Etat de droit en droit de l'Union européenne" (2019) 2 *RTDEur.* 305, p. 307.
[37] D. Simon, *Le système juridique communautaire* (Presses Universitaires de France, 3nd ed., 2001), p. 96, para. 61.
[38] AG Jacobs, Opinion in Case C-50/00 P *UPA v. Council*, ECLI:EU:C:2002:462, para. 71.
[39] For an analysis of the combined factors which explain how the rule of law "became a key dimension of the model of society organization towards which all were expected to now converge", see A. Magen, "The Rule of Law and its Promotion Abroad: Three Problems of Scope" (2009) *45 Stan. J. Int'l L* 51, p. 82.
[40] Conference on Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, para. 2.
[41] M. Krygier and A. Czarnota, "Introduction" in M. Krygier and A. Czarnota (eds.), *The Rule of Law After Communism: Problem and Prospects in East-Central Europe* (Routledge, 1999), p. 2.

Socialist Republics, further agreed to commit themselves to promoting human rights, democracy and the rule of law as the three fundamental principles on which the "new Europe" must be founded,[42] the same principles which nine EU Member States described in 1973 as "fundamental elements of the European Identity".

Following the fall of the Berlin Wall, the rule of law became an increasingly popular concept in political and legal discourses.[43] In these circumstances, the Court of Justice's relatively original reference to the principle notwithstanding, it is not surprising that the EU Member States decided to insert not one but multiple references to the rule of law at the time of the 1992 Maastricht Treaty.[44] These references were largely symbolic at first. For instance, the Preamble of the 1992 TEU merely stipulated that the Member States confirm "their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law." In addition, the EU's foreign and security policy and the EC's policy of development cooperation were given the same objective of developing and consolidating democracy and the rule of law and respect for fundamental rights.[45]

A more significant development occurred in 1997 when the rule of law was described as one of the EU's foundational principles which were also said to be principles which are common to the Member States.[46] Rather than describing the EU as a "community based on the rule of law" (*Rechtsgemeinschaft/communauté de droit*), the drafters of the TEU decided to refer to the EU as being founded on the principle of the rule of law (*Rechtsstaatlichkeit/Etat de droit*). Should one attach any significance to this departure from the Court's phrasing? A negative answer seems warranted as the principles of *Rechtsgemeinschaft/communauté de droit* and of *Rechtsstaat/Etat de droit* give the wrong impression of an important dichotomy when in fact they illustrate the same basic idea: the exercise of public power ought to be subject to the law. The Amsterdam Treaty, therefore, can be understood as merely confirming that the EU is a polity that complies with the rule of law rather than being itself a State founded on the rule of law.

Two additional and significant references were made to the rule of law in 1997: The first one concerned the current Member States while the second was applicable to the countries wishing to accede to the EU. According to what became informally and misleadingly known as the EU's "nuclear option",[47] the European Council was empowered for the first time to "determine the existence of a serious and persistent breach by a Member State" of the Union's foundational principles, following which the Council could "decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question".[48] With

[42] See Charter of Paris for a new Europe adopted by on the 21st of November 1990.
[43] See e.g. J. Chevallier, "La mondialisation de l'Etat de droit" in *Mélanges Philippe Ardant* (LGDJ, 1999), p. 333.
[44] The rest of this section borrows from L. Pech, "The Rule of Law as a Constitutional Principle of the European Union", *Jean Monnet Working Paper* 04/09, p. 17 et seq.
[45] See ex Article 11 TEU and ex Article 177(2) EC respectively.
[46] Ex Article 6(1) TEU as modified by the Amsterdam Treaty: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."
[47] See infra Section 3.1.
[48] See ex Article 7 TEU. This provision was further revised via the Nice Treaty and a "preventive clause" was added to the initial "sanctioning clause". According to the provision added by the Nice Treaty, the Council may determine the existence of a clear risk of a serious breach of Article 2 values.

respect to candidate countries, the Amsterdam Treaty was used to codify what had been made previously clear at the 1993 European Council in Copenhagen.[49] In other words, any European State wishing to become a Member of the EU must respect the principles on which the Union is founded.[50] With respect to the enlargement process, one may in addition note the existence of two specific chapters which demand compliance with key components of the rule of law:[51]

Chapter 23: Judiciary and fundamental rights

[…] The establishment of an independent and efficient judiciary is of paramount importance. Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place. Equally, Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law. […] Member States must ensure respect for fundamental rights and EU citizens' rights, as guaranteed by the acquis and by the Fundamental Rights Charter.

Chapter 24: Justice, freedom and security

EU policies aim to maintain and further develop the Union as an area of freedom, security and justice. On issues such as border control, visas, external migration, asylum, police cooperation, the fight against organised crime and against terrorism, cooperation in the field of drugs, customs cooperation and judicial cooperation in criminal and civil matters, Member States need to be properly equipped to adequately implement the growing framework of common rules. Above all, this requires a strong and well-integrated administrative capacity within the law enforcement agencies and other relevant bodies […] A professional, reliable and efficient police organisation is of paramount importance […][52]

The 2007 Lisbon Treaty resulted in further changes made to the Treaty provisions mentioned above. To begin with, the Union is no longer described as being founded on a number of key principles but rather as being founded on a number of key values, with new values being added to the previous list:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[53]

The vocabulary shift to values from principles was unexpected and it remains unclear whether those responsible for this terminological variation understood this change as legally meaningful. The Treaties themselves are also not perfectly consistent. For instance, the rule of law is still described as a principle in the Preamble of the EU Charter of Fundamental Rights.[54] It may have been more appropriate to make "a distinction between the EU's fundamental *moral* values (human dignity, freedom, etc.) on which the EU is founded, and the *structural*

[49] See e.g. the political criterion codified at that time and which demands "the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities", European Council Conclusions of 21-22 June 1993, SN 180/1/93 REV 1, Copenhagen, 21-22 June 1993.
[50] See ex Article 49 TEU.
[51] For further analysis, see L. Pech, "The EU as a global rule of law promoter: the consistency and effectiveness challenges" (2016) 14 *Asia Europe Journal* 7.
[52] European Commission, Chapters of the acquis: https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en.
[53] Article 2 TEU.
[54] "[T]he Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law."

constitutional principles (democracy, the rule of law, etc.) on the basis of which the Union must function".[55] Be that as it may, Article 2 TEU has created one "single 'homogeneity' clause", which may be understood as expressing both the "untouchable core" of the EU legal order and the core constitutional identity of the EU as a legal-political system.[56]

With respect to the external dimension of the rule of law, two additional changes introduced by the Lisbon Treaty are worth noting: With respect to candidate countries, by increasing the number of values on which the EU is founded, the Lisbon Treaty formally reinforced the conditions of eligibility for accession to the EU. Candidate countries also became subject to a new obligation to demonstrate their commitment to promoting them.[57] Another important change was made in the Title of the TEU detailing the general provisions governing the Union's external action and the specific provisions on the Union's common foreign and security policy. According to Article 21 TEU introduced by the Lisbon Treaty, all of the EU's external policies must be guided by and seek to promote the principles

> which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

This new, transversal provision, which also commits the Union to define and pursue common policies and actions in order to inter alia "consolidate and support democracy, the rule of law, human rights and the principles of international law", reflects one of the EU Member States' key priorities at the time of the Lisbon Treaty and which was to improve the coherence of the EU's external action.[58]

Last but not least, in order to remedy the EU's "rule of law deficit",[59] the Treaty of Lisbon also introduced a number of changes which primarily aimed to deal with a number of jurisdictional "black holes"[60] in respect of measures relating to the Common foreign and security policy (CFSP) and the Area of freedom, security and justice (AFSJ). The first important change concerned the abolition of the so-called "three-pillar structure", which resulted in, inter alia, the ECJ seeing its jurisdiction extended over all AFSJ measures.[61] Secondly, the CJEU gained for

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[55] L. Pech, "'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law" (2010) 6 *European Constitutional Law Review* 359, pp. 366-367.

[56] M. Klamert and D. Kochenov, "Article 2 TEU", in M. Kellerbauer, M. Klamert and J. Tomkin (eds.), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press, 2019), pp. 23-24.

[57] "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. [...]"

[58] For a recent overview of the legal framework with respect to the external promotion of Article 2 values, see J. Grogan and L. Pech, "EU External Human Rights Policy", in R. Wessel and J. Larik (eds.), *EU External Relations Law. Text, Cases and Materials* (Hart, 2nd edition, 2020).

[59] For further analysis of the "Pre-Lisbon rule of law gaps" and the Lisbon Treaty answers to the EU's "rule of law deficit", see L. Pech, "'A Union Founded on the Rule of Law', op. cit.

[60] To borrow from S. Carruthers, 'The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affaires' (2009) 6 *European Human Rights Law Review* 784, at p. 799.

[61] For further analysis, see A. Hinarejos, *Judicial control in the European Union. Reforming jurisdiction in the Intergovernmental Pillars* (Oxford University Press 2009).

the first time the jurisdiction to review the legality of acts of the European Council "intended to produce legal effects *vis-à-vis* third parties".[62] Fourthly, the Lisbon Treaty explicitly extended the jurisdiction of the CJEU in respect of the acts and failures to act of EU bodies, offices and agencies with the CJEU also given jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of bodies, offices or agencies of the Union. Fifthly, the CJEU gained the jurisdiction to review the legality of measures adopted by the European Council or the Council in the situation where a Member State is found to be in serious breach of the EU's foundational principles such as the rule of law.[63] Finally, one may mention the marginal easing of the conditions for the admissibility of annulment actions brought by natural or legal persons as regards "regulatory acts"[64] as well setting up of an advisory panel responsible for giving 'an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments.[65]

A number of features may still appear rule of law deficient. To give a single example, most national governments have agreed to maintain a provision (now known as Article 275 TFEU) that expressly excludes CFSP provisions as well as acts adopted on the basis of those provisions from the jurisdiction of the CJEU. This may appear to the reasonable observer as constituting "a substantial breach in the rule of law"[66] as the CFSP area continues to remain for the most part a "judicial review-free islet"[67] notwithstanding two modest reforms laid down in Article 275(2) TFEU which have been however interpreted in broad terms by the ECJ:[68] The CJUE may now monitor compliance with the EU Treaties' allocation of powers between the EU and the Member States and, more importantly, rule on proceedings reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council under the CFSP.

To conclude this review of the evolution of the Treaty framework, the multiple amendments made to the TEU and what is now the TFEU have repeatedly confirmed the fundamental as well as foundational nature of the rule of law as a principle/value of the EU's constitutional framework. Being a union based on the rule of law means, in a nutshell, that the EU is a legal entity "in which all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights. This also includes the European Union's external action."[69] The credibility and functioning of the EU have however come under increasing strain following the emergence and propagation of what has been

[62] Art. 263(1) TFEU.
[63] According to Art. 269 TFEU, the ECJ shall have jurisdiction to decide on the legality of an act adopted by the European Council (new addition) or by the Council pursuant to Article 7 TEU at the request of the concerned Member State "in respect solely of the procedural stipulations contained in that Article".
[64] Article 263(4) TFEU.
[65] Article 255 TFEU.
[66] P. Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations* (Walter van Gerven Lectures, Europa Law Publishing 2005) p. 27.
[67] J. Rideau, "Nature, fondements et caractères généraux", *Juris-Classeur Europe Traité*, Fasc. 110, Nov. 2006, para. 231.
[68] P. Koutrakos, "Judicial Review in the EU's Common Foreign and Security Policy" (2018) 67 *International & Comparative Law Quarterly* 1.
[69] Opinion 1/17, Opinion of AG Bot, para. 195.

labelled "rule of law backsliding".[70] To address this unprecedented and critical challenge, the EU's rule of law toolbox has experienced a period of swift if not radical evolution.

3. The Swift and Radical Evolution of the EU's Rule of Law Toolbox

Not unlike what has been observed in relation to respect for human rights in the EU,[71] the national governments of the Member States have shown an extreme reluctance to accept that the EU and in particular the Commission should play any new, permanent and meaningful role when it comes to monitoring rule of law developments within the EU, let alone adopt new and specific tools to do so. The emergence of a new type of threats to the rule of law in the past decade, sometimes diplomatically referred to as "challenges to the rule of law in some Member States",[72] has however been progressively acknowledged as a most pressing issue to address.[73]

Why should rule of law backsliding be considered a particularly pressing if not an existential issue from the point of view of the EU? Because, as the ECJ itself emphasised, the EU legal ecosystem is a deeply interconnected one, with its legal structure based on "the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected."[74] Should this assumption no longer hold, the entire legal EU order can no longer properly work and may well collapse.

Increasing awareness of this threat has resulted in the rapid evolution of the EU's rule of law toolbox since 2012, which is when rule of law backsliding was acknowledged and identified as a new major challenge by the President of the European Commission. Since then, we have witnessed the multiplication of new instruments but in an uncoordinated manner: The Commission launched a new Justice Scoreboard in 2013 and adopted the Rule of Law Framework in 2014, which is also when the Council decided to launch its own new Annual Rule of Law dialogue. Most recently, the Commission has proposed a new Rule of Law Review

[70] See L. Pech and K. L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

[71] See G. de Búrca, "The Road Not Taken: The EU as a Global Human Rights Actors", *Straus Working Paper 09/10*, p. 61: "There is a clear tension between such organic and energetic development of the EU's human rights policies and activities on the one hand, and the reluctance of Member States to contemplate endorsing a serious and comprehensive EU human rights policy and mechanism on the other. Each move in the direction of a new human rights commitment has been met with a counter-move on the part of Member States to rein it in, with a view to limiting the impact of the change […] The result is an EU human rights system which […] continues to lack coherence and credibility."

[72] European Commission, *Strengthening the rule of law within the Union. A blueprint for action*, op. cit., p. 1.

[73] As noted by the European Commission, ibid., p. 2: concerns for rule of law backsliding has "been an important theme of the 2019 European elections campaign" with the main European political parties having "started to consider whether parties which challenge the rule of law and common EU values should be excluded". On whether EU law requires actions from European political parties, see A. Alemanno and L. Pech, "Holding European Political Parties Accountable: Testing the Horizontal EU Values Compliance Mechanism", *VerfBlog*, 15 May 2019: https://verfassungsblog.de/holding-european-political-parties-accountable-testing-the-horizontal-eu-values-compliance-mechanism/.

[74] Opinion 2/13, op. cit., para. 168.

Cycle[75] and the adoption of a new mechanism to enable suspension of EU funding in a situation where a generalised deficiency as regards the rule of law may be identified.[76] In addition, tools designed in the pre-rule of law backsliding era have been used for the first time (Article 7 TEU) or reinvented (e.g. the European Semester) with the Court of Justice also playing a key role since it interpreted a provision introduced by the Lisbon Treaty according to which "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Article 19(1) TEU) as imposing an obligation on Member States to maintain their courts' independence.

Before providing a *tour d'horizon* of the rapid development of the EU's rule of law toolbox since 2012, the Commission's diagnosis of the situation will be briefly presented and discussed.

3.1 The Commission's diagnosis underlying the evolution of the EU's rule of law toolbox

President Barroso's State of the Union Address in 2012 may be considered a particularly important juncture when it comes to the development of the EU's internal "rule of law policy".[77] Indeed, in this address, the then President of the Commission explicitly referred for the first time to the emergence of new internal threats within the EU:

> A political union also means that we must strengthen the foundations on which our Union is built: the respect for our fundamental values, for the rule of law and democracy. In recent months we have seen threats to the legal and democratic fabric in some of our European states. The European Parliament and the Commission were the first to raise the alarm and played the decisive role in seeing these worrying developments brought into check.[78]

Leaving aside Barroso's rose-tinted glasses assessment of the Commission's "decisive role" in allegedly bringing these "worrying developments" into check,[79] the same speech was also important for Barroso's description of Article 7 TEU as a "nuclear option" and more broadly the claim that the EU's toolbox was not designed to address the new type of threats he had identified:

> But these situations also revealed limits of our institutional arrangements. We need a better developed set of instruments– not just the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty.[80]

The following year, Barroso reiterated the need for the EU to safeguard its values "at a moment of challenges to the rule of law in our own member states" and the need "to make a bridge" between political persuasion, including infringement procedures, and "the nuclear

[75] European Commission, *Strengthening the rule of law within the Union. A blueprint for action*, op. cit., p. 9.
[76] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM/2018/324 final.
[77] State of the Union 2012, op. cit.
[78] Ibid.
[79] For the (compelling) argument that the Commission has had a tendency to look the other way during Barroso's term when member states such as Hungary engaged in symbolic and/or creative compliance, designed to create the appearance of norm-conform behaviour without giving up their original objectives, see A. Batory, "Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU" (2016) 94(3) *Public Administration* 685.
[80] State of the Union 2012, op. cit.

option of Article 7".[81] The new mechanism he proposed was supposed to be "activated only in situations where there is a serious, systemic risk to the rule of law".[82] A week before, Viviane Reding, then the EU Justice Commissioner, spoke of the need to act to address what she referred to as "a true "rule of law" crisis" as well as an unprecedented one as the EU was not faced with "small, isolated incidents or illegalities, as happen from time to time […] but matters that quickly took a systemic dimension and revealed systemic rule of law problems."[83] Three concrete cases were explicitly mentioned: "the Roma crisis in France in summer 2010, when the rights of the people belonging to an important minority were at stake; the Hungarian crisis from the end of 2011, where we were mostly concerned about the independence of the judiciary; and the Romanian rule of law crisis in the summer of 2012, where non-respect of constitutional court judgements threatened to undermine the rule of law."[84]

The Commission was not the only EU institution to be concerned with these developments. The European Parliament in particular repeatedly raised the alarm in relation to Hungary starting in 2011 with the Parliament's monitoring of Hungary culminating in the adoption of the "Tavares report" in June 2013 and concomitant resolution in which the European Parliament concluded

> that the systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames, and the content of such modifications, are incompatible with the values referred to in Article 2 TEU, Article 3, paragraph 1, and Article 6 TEU, and deviate from the principles referred to in Article 4, paragraph 3, TEU; considers that – unless corrected in a timely and adequate manner – this trend will result in a clear risk of a serious breach of the values referred to in Article 2 TEU.[85]

Nothing was however done either by the European Council or the Council to stop Hungary's descent into authoritarianism.[86] Instead, the Justice and Home Affairs Council merely stressed in June 2013 the importance of "respecting the rule of law" before calling on the Commission "to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues".[87]

The following year, as will be shown below, two new rule of law instruments of general scope were adopted by the Commission and the Council respectively. While this may be construed as evidence of some degree of minimal consensus on the need to tackle the rule of law crisis first identified by the Commission President in 2012, the situation has however continued to deteriorate in a number of EU Member States. This, in turn, pushed the Commission to adopt

[81] State of the Union Address 2013, Plenary session of the European Parliament/Strasbourg, Speech/13/683, 11 September 2013.
[82] Ibid.
[83] "The EU and the Rule of Law – What next?", Speech/13/677, 4 September 2013.
[84] Ibid.
[85] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (2012/2130(INI)).
[86] For further analysis and references, see P. Bárd and L. Pech, "How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The "Hungarian model"", RECONNECT Working Paper No. 4, October 2019: https://reconnect-europe.eu/publications/working-papers/.
[87] Council conclusions on fundamental rights and rule of law, Council meeting Luxembourg, 6 and 7 June 2013, para. 9.

a "blueprint for action" in July 2019.[88] The Commission's diagnosis in this Communication is both more sophisticated and worrying if compared to the one offered by Barroso and Reding in 2012-2013:

> While, in principle, all Member States are considered to respect the rule of law at all times, recent challenges to the rule of law in some Member States have shown that this cannot be taken for granted [...] Many recent cases with resonance at EU level have centred on the independence of the judicial process. Other examples have concerned weakened constitutional courts, an increasing use of executive ordinances, or repeated attacks from one branch of the state on another. More widely, high-level corruption and abuse of office are linked with situations where political power is seeking to override the rule of law, while attempts to diminish pluralism and weaken essential watchdogs such as civil society and independent media are warning signs for threats to the rule of law.[89]

This diagnosis may be viewed not only as accurate but also welcome to the extent that the Commission "comes close to finally accepting that some countries are now led by authorities *deliberately* seeking to undermine the rule of law with the aim of *deceitfully* establishing electoral autocracies."[90] Indeed, the Commission, for the first time, acknowledges that we have seen several instances in which "principles such as the separation of powers, loyal cooperation amongst institutions, and respect for the opposition or judicial independence seem to have been undermined – sometimes as the result of *deliberate* [our emphasis] policy choices."[91]

One may nevertheless observe that the challenges identified by the Commission are hardly "recent". Furthermore, the "attempts to diminish pluralism and weaken essential watchdogs" amongst other issues may be said to have fully succeeded in at least one EU Member State.[92] More problematically, the Commission but also other EU institutions continue to appear reluctant to fully accept the reality of rule of law backsliding with their continuing naïve belief in "dialogue" which implicitly reflects their deep-seated inability to move away from "the paradigm of the normally compliant Member State unwillingly sleep-walking into non-compliance".[93] The reality of backsliding Member State is however radically different: In a situation where national authorities deliberately pursue the transformation of a democratic system based of the rule of law into a de facto autocratic regime,[94] soft law and/or dialogue-based instruments or mere monitoring tools will not help neither contain backsliding nor reverse the damage done to the rule of law. Be that as it may, the new EU instruments adopted

[88] European Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, op. cit.
[89] Ibid., pp. 1-2.
[90] L. Pech, D. Kochenov, B. Grabowska-Moroz and J. Grogan, *The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism*, RECONNECT blog, 4 September 2019: https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/.
[91] European Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, op. cit., p. 5.
[92] See P. Bárd and L. Pech, op. cit.
[93] L. Pech, D. Kochenov, B. Grabowska-Moroz and J. Grogan, *The Commission's Rule of Law Blueprint for Action*, op. cit.
[94] See L. Pech and K. L. Scheppele, 'Illiberalism Within", op. cit.

in response to Barroso's 2012 warning about the emergence of new "threats to the legal and democratic fabric in some of our European states" will now be outlined.

3.2 The creation of new instruments

3.2.1 The Commission's Justice Scoreboard

In a broader context where indexes and other tools which aim to measure a country's adherence to the rule of law have multiplied, the Commission published its first annual Justice Scoreboard in 2013. This initiative was connected to the "European Semester", the EU process of economic policy coordination introduced in 2010, with the Justice Scoreboard primarily justified on business/economic grounds:

> An efficient and independent justice system contributes to trust and stability. Predictable, timely and enforceable justice decisions are important structural components of an attractive business environment. They maintain the confidence for starting a business, enforcing a contract, settling private debt or protecting property and other rights. Experience in Member States subject to the Economic Adjustment Programmes shows that shortcomings in the functioning of a justice system increase the negative growth spiral and undermine the confidence of citizens and enterprises in the justice institutions.[95]

The link between effective justice systems and the strengthening of mutual trust was also rightly made by the Commission which furthermore correctly stressed that in the EU's interconnected legal ecosystem, shortcomings in the national justice systems are "not only a problem for a particular Member State, but can affect the functioning of the Single Market and, more generally, the whole EU".[96]

In more practical terms, the first edition of the EU Justice Scoreboard was primarily about "efficiency indicators" and the provision of data relating to length of proceedings, clearance rate and the number of pending cases with respect to "non-criminal cases". Some basic findings regarding the perceived independence of national judiciaries, derived from the data compiled by other organisations such as the World Economic Forum and the World Justice Project, were also offered. Fast-forwarding to the latest edition of the EU Justice Scoreboard, it is remarkable to see how this tool has evolved not only from the point of view of its length (from 26 pages in 2013 to 68 pages in 2019) but also its substance if one looks at the inclusion of indicators on the following elements in 2019:

- the detailed spending of financial resources in each justice system;
- the standards applied to improve the quality of judgments in highest courts;
- the management powers over the national prosecution services, and the appointment and dismissal of national prosecutors;
- the authorities involved in disciplinary proceedings regarding judges;
- the standards and practices on managing caseloads and backlogs in courts.

[95] Commission Communication, *The EU Justice Scoreboard. A tool to promote effective justice and growth*, COM(2013) 160 final, p. 1.
[96] Ibid.

The inclusion of data in relation to disciplinary proceedings was particularly timely at a time where the Commission had initiated an infringement action regarding Poland's new disciplinary regime for judges[97] as it showed that Poland was an outlier when it came to the authority deciding on disciplinary sanctions regarding judges and the investigator in charge of formal disciplinary proceedings regarding judges. The 2019 edition also showed that Poland was similarly the only country where judges-members of Councils for the Judiciary are proposed not exclusively by judges and appointed by the Parliament and the only country where the executive controls the distribution of main management powers over national prosecution services.

It is worth noting that countries criticised for their rule of law records have at times also been keen to rely on the EU Justice Scoreboard to rebut EU criticism but they have done so in a misleading way. For instance, the 2017 EU Justice Scoreboard was used by the Polish government to make the point that Poland was spending more on its judicial system than most EU Member States (it was the second-highest in 2015 as a percentage of GDP) and yet had been condemned in Strasbourg for excessive length of proceedings.[98] The cases referred to by the Polish government however concerned criminal proceedings which are not covered by the EU Justice Scoreboard with the Polish government also omitting that Poland was only 16th when it came to total expenditure on law courts in EUR per inhabitant. And when the EU Justice Scoreboard offered inconvenient results as regards the above-average effectiveness of the Polish judicial system, the Polish government merely suggested this could be due to "unreliable" statistics.[99]

To defend itself in the context of the ongoing Article 7 procedure initiated against it, the Hungarian Government similarly relied on the EU Justice Scoreboard to reject "the accusations regarding the independence of the Hungarian judiciary" by stressing that "the performance of the Hungarian Court system is in the frontline of Europe according to the objective index numbers of the EU Justice Scoreboard."[100] This was a peculiar defence at a time when Hungarian authorities were still defending the establishment of a new, separate administrative court system which has been widely denounced for not complying with relevant international standards.[101] Furthermore, the Hungarian government conveniently omitted to mention that the EU Justice Scoreboard indicated that less than 50% of the respondents stated that independence of courts and judges was very/fairly good with the main reason among the general public for the perceived lack of independence being "interference or pressure from government and politicians", an issue which is however not unique to Hungary. Whether

[97] See Case C-791/19 Commission v Poland (pending at the time of writing).
[98] Chancellery of the Prime Minister, *White Paper on the Reform of the Polish Judiciary*, Warsaw, 7 March 2018, paras 5, 6 and 8.
[99] Ibid., para. 8.
[100] Council of the EU, Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12 September 2018, Document no 12133/19, 12 September 2019, p. 14.
[101] See e.g. OHCHR, "Hungary: more needs to be done to bring legislation on administrative courts in line with international standards", Information Note, Geneva, 5 April 2019: https://www.ohchr.org/Documents/Issues/IJudiciary/InfoNoteHungary8Apr2019.docx.

misused or not, the examples above show at the very least the importance gained by the Justice Scoreboard in the space of a few years.

3.2.2 The Commission's EU Rule of Law Framework

Adopted by the Commission in 2014 and informally known as the "pre-Article 7 procedure",[102] the Rule of Law Framework is the Commission's direct answer to Barroso's diagnosis that "recent developments in Some Member States have shown that [existing] mechanisms are not always appropriate to quickly respond to threats to the rule of law in a Member State."[103]

The Framework foresees a three-stage dialogue process at the entire discretion of the Commission. It is said to organise a structured dialogue process as the Commission may adopt a formal opinion if, on the basis of its initial assessment (stage 1), it is of the view of that there is a systemic threat to the rule of law in the relevant EU country. In the absence of any satisfactory answers to the Commission's concerns as substantiated in its eventual opinion, the Commission may then issue a formal rule of law recommendation (stage 2). Specific recommendations may be adopted and the relevant Member State given a deadline to implement them. Finally, the final stage of the mechanism consists of monitoring the Member State's compliance or lack thereof. in the absence of compliance, the Commission may activate one of the mechanisms set out in Article 7 TEU, that is, either the "preventive arm" (Article 7(1) TEU) or the "sanctioning arm" (Article 7(2) and (3) TEU) of this provision.

Pre-defined triggering benchmarks were initially promised but never materialised. However, the Commission has made clear that the Framework ought to be activated when national "rule of law safeguards" are no longer capable of effectively addressing threats of a systemic nature. Notwithstanding the soft law nature of the Framework and the lack of any binding acts the Commission may adopt on this basis, the Council Legal Service strongly questioned the legality of the Framework.[104] Both the Council and the Court of Justice[105] have since acknowledged the Framework and in doing so, implicitly rejected the Council Legal Service's analysis.[106]

Despite repeated requests from the European Parliament as early as 2015, the Commission has continuously refused to trigger the Framework in respect of Hungary and justified its stance on two mains grounds: "concerns about the situation in Hungary" can be effectively "addressed by infringement procedures" and national "rule of law safeguards" would still be "capable of effectively addressing" any systemic threats to the rule of law.[107] By contrast, the Commission did not hesitate to activate the Framework for the first time in January 2016 in relation to Poland on two main grounds: the lack of compliance with binding rulings of the Polish Constitutional Tribunal and the adoption of measures by the Polish legislature to

[102] V. Reding, "A new Rule of Law initiative", op. cit.
[103] European Commission, *A new EU Framework to strengthen the Rule of Law*, op. cit., p. 5.
[104] Council of the European Union, Opinion of the Legal Service 10296/14, 14 May 2014.
[105] C-619/18 R *Commission v Poland* (Indépendance de la Cour suprême), ECLI:EU:C:2018:1021, para. 81.
[106] For a critique of the CLS analysis, see e.g. P. Oliver and J. Stefanelli, "Strengthening the Rule of Law in the EU: The Council's Inaction" (2016) 54(5) *JCMS* 1075.
[107] For a critique of the Commission's arguments, see K. L. Scheppele and L. Pech, "Why Poland and not Hungary", *VerfBlog*, 8 March 2018: https://verfassungsblog.de/why-poland-and-not-hungary/.

undermine its functioning.[108] One formal Rule of Law Opinion and four formal Rule of Law Recommendations later, the Commission was forced to admit that

> Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland … The common pattern is that the executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch.[109]

This left no choice to the Commission but to trigger for the very first time Article 7(1) TEU in December 2017. This suggests that the early scholarly criticism of the Framework – a discursive tool was bound to fail in a situation where national authorities are pursuing a *deliberate* strategy of *methodically* annihilating the rule of law[110] – was well-founded. Before examining the use of Article 7(1) TEU, another "soft" dialogue-based mechanism must be briefly presented.

3.2.3 The Council's Annual Rule of Law Dialogue

Within a few months following the adoption of the Rule of Law Framework, rather than lending its unambiguous support for it, the Council decided to adopt its own new tool known as the annual rule of law dialogue by means of conclusions agreed by the Council and the Member States meeting within the Council in December 2014.[111] The conclusions themselves are very brief and what the Council intends to do is explained in no more than seven points. No procedural details were then given. Rather the Council stressed that it aimed to better promote and safeguard the rule of law but without prejudicing inter alia the principle of conferred competences and the need to respect national identities of Member States. Rather childishly, the conclusions did not once mention the Commission's Rule of Law Framework notwithstanding the Council's explicit own commitment not to duplicate the work of other EU institutions and other international organisations.

Since first established in December 2014, several dialogues have taken place and the following topics discussed:

- The rule of law in the digital era (first dialogue during the Luxembourg Presidency in November 2015)
- Migrants' integration and EU fundamental values (second dialogue during the Netherlands Presidency in May 2016)
- Media pluralism and the rule of law in the digital age (third dialogue during the Estonian Presidency in October 2017)
- Trust in public institutions and the rule of law (fourth dialogue during the Austrian Presidency in November 2018)

[108] European Commission, Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71.
[109] European Commission, Rule of Law: European Commission acts to defend judicial independence in Poland, IP/17/5367, 20 December 2017.
[110] see e.g. D. Kochenov and L. Pech, "Monitoring and Enforcement of the Rule of Law in the EU", op. cit., p. 532.
[111] Council of the EU, Press Release No. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20-21.

On the basis of these "dialogues", presidency conclusions have been published but these tend to be as short (two-page long on average) as they are vague with "best practices" often alluded to but without ever being described. The *total* absence of *any* tangible results after several editions of the Council's rule of law dialogue, not to mention the arguably surprising choice of topics considering the pressing issues faced in countries such as Hungary and Poland, suggest early scholarly criticism was correct to point out both the anaemic nature of this tool and the Council's attempt to hide inaction behind a "façade of action".[112]

Some national governments agreed and an evaluation of the Council's rule of law dialogue was undertaken under the Finnish Presidency in the second semester of 2019. However, and to the surprise of no one familiar with the previous behaviour of the two governments subject to Article 7(1) proceedings, the Council proved unable to adopt the conclusions on the evaluation of the annual rule of law dialogue proposed by the Finnish Presidency due to the opposition of the Hungarian and Polish governments. Instead, the conclusions were adopted as presidency conclusions.[113] Anyone reading the two pages of the presidency conclusions could find it difficult to understand the lack of consensus. Indeed, the conclusions merely recall the key elements of the 2014 conclusions on the basis of which the annual dialogue was established before adding, without offering a hint of evidence, that this tool "has proved to be a useful mechanism".[114] Furthermore, no concrete change is being proposed apart from a commitment to undertake "a yearly stocktaking exercise concerning the state of play and key developments as regards the rule of law".[115] The fact that this stocktaking is to be based on the Commission's annual rule of law reports, which are to be produced for the first time in 2020 as part of the Commission's new Rule of Law Review Cycle, appears to have been the main reason for the objection of the Hungarian and Polish governments. Considering the lack of unanimity and the Council's inability to agree on a more ambitious revamping of the annual dialogue, one may expect a similar lack of any tangible results until we get to 2023 at which point "the experience acquired on the basis of this dialogue"[116] is to be re-evaluated.

3.3 The use of pre-2012 tools for the first time

The creation of the two dialogue-based instruments presented above was arguably the outcome of a flawed analysis which mistakenly presented Article 7 TEU as a "nuclear option" and infringement procedures as being unable to address rule of law backsliding. In the absence of any improvement with respect to the situation in Hungary and Poland, the Commission and the Parliament finally but reluctantly decided to make use of a pre-2012 tool, i.e., Article 7 TEU.[117]

[112] See D. Kochenov and L. Pech, "Monitoring and Enforcement of the Rule of Law in the EU", op. cit., p. 535 et seq; P. Oliver and J. Stefanelli, "Strengthening the Rule of Law in the EU", op. cit., p. 1078 et seq.
[113] Council of the EU, Presidency conclusions: evaluation of the annual rule of law dialogue, 14173/19, 19 November 2019.
[114] Ibid, para. 5, p. 1.
[115] Ibid, para. 10, p. 2.
[116] Ibid, para. 16, p. 2.
[117] For the genesis of Article 7 TEU and further analysis, see D. Kochenov, "Article 7 TEU", in M. Kellerbauer, M. Klamert and J. Tomkin (eds.), *The Treaties and the Charter of Fundamental Rights – A Commentary* (Oxford University Press, 2019), p. 88 et seq.

Moving away from the misleading "nuclear option" label, the Commission more accurately described Article 7 TEU in 2019 as "the most prominent mechanism for protecting all common values" even it is meant to be "used only exceptionally".[118] In a nutshell, this Treaty provision provides for two mechanisms: a preventive one (Article 7(1) TEU) and a sanctioning one (Article 7(2), (3) and (4) TEU). Before describing the first two cases which led the Commission and subsequently the Parliament to trigger the preventive arm of Article 7, the key features of this mechanism can be briefly outlined. To begin with, one may first mention that three different actors may each activate this mechanism: the European Commission; the European Parliament or one third of the Member States. The Council *must* hear the Member State subject to the Article 7(1) procedure (which does not necessarily mean a single hearing) before eventually determining the existence of "a clear risk of a serious breach […] of the values referred to in Article 2". There is no legal obligation for the Council to ever make such a determination which requires a majority of four fifths of its members and the consent of the European Parliament. The Council has similarly an option but no obligation to address recommendations to the relevant Member State at any stage of the procedure.

As previously noted, Article 7(1) is the Treaty provision has been activated twice in respect of Poland and Hungary. At the time of writing, three hearings have been organised in relation to the rule of law situation in Poland with two hearings organised in relation to the broader Article 2 situation in Hungary.[119] Several differences between the two procedures are worth noting. First, as regards the topics covered, the hearings held in respect of Poland have exclusively dealt with rule of law issues such as the lack of effective constitutional review in Poland and the arbitrary dismissal of more than one hundred court presidents and vice presidents. By contrast, the hearings held in respect of Hungary have not only been merely concerned with the independence of the Hungarian judiciary and the functioning of the constitutional system but also with issues such as corruption and academic freedom. A second procedural difference is that unlike the Commission, the Council has refused, arguably in breach of EU primary law and in particular the principle of institutional balance,[120] to allow the Parliament to present and defend its Article 7(1) reasoned proposal at the hearing. Thirdly, unlike what the Commission did in relation to Poland, the Parliament did not include a draft list of explicit recommendations on how to prevent the clear risk of a serious breach of Article 2 values it has identified.

In order to improve the organisation of Article 7(1) hearings, the Council adopted for the first time a set of formal procedural rules in July 2019.[121] These rules distinguish between three main scenarios: (i) activation of Article 7(1) by one third of the Member States; (ii) activation by the European Parliament; and (iii) activation by the European Commission. Two main remarks can be made: The only actor which gained the opportunity to speak without any time limit is the government in the dock; the only actor which was denied the opportunity to present its reasoned proposal is, as previously noted, the European Parliament.

[118] April Communication, p. 2.
[119] L. Pech, "From "Nuclear Option" to Damp Squib? A Critical Assessment of the Four Article 7(1) TEU Hearings to Date", *VerfBlog*, 13 November 2019: https://verfassungsblog.de/from-nuclear-option-to-damp-squib/.
[120] L. Pech, D. Kochenov and S. Platon, "The European Parliament sidelined: On the Council's distorted reading of Article 7(1) TEU", *VerfBlog*, 8 December 2019: https://verfassungsblog.de/the-european-parliament-sidelined/.
[121] Council, *Standard modalities for hearings referred to in Article 7(1) TEU*, 10641/2/19, REV 2, 9 July 2019.

With respect to the "sanctioning arm" of Article 7, several key differences with the preventive arm may be highlighted: two rather than three actors may activate the procedure (the Commission and one third of the Member States but not the Parliament); the European Council rather than the Council may determine "the existence of a serious and persistent breach by a Member State of the values referred to in Article 2"; the European Council must act by unanimity when the Council is "only" required to act by a majority of four fifths of its members under the preventive mechanism; no hearing is explicitly foreseen but the relevant Member State is to be invited to "submit its observations". When it comes to adopting any eventual sanctions, which Article 7(3) non-exhaustively describes as the potential suspension of "certain of the rights deriving from the application of the Treaties to the Member State in question", the Council may do so on the basis of a qualified majority. A qualified majority is also required to subsequently vary or revoke any measures adopted by the Council under Article 7(3).

While this is not well known, the General Court has already dealt with some Article 7 related applications. Due to its limited jurisdiction with respect to this provision, it has however rejected all of the applications it has received to date.[122] In 2004, faced with an application submitted by a Spanish lawyer alleging that he had been persecuted by the Spanish judiciary and requesting the Court to declare that the Commission has failed to act in not investigating the situation in light of what is now Article 2 TEU, the Court concluded that it has no jurisdiction to adjudicate on the action for failure to act brought by the applicant.[123] In 2019, the Court similarly rejected an action for annulment and for failure to act brought by an association against the Commission following its refusal to activate Article 7 TEU in respect of France on the rather bizarre ground that French authorities had allegedly maintained a monopoly to the benefit of the French social security system with respect to life insurance.[124]

Following an annulment action brought by Hungary on 17 October 2018, the Court of Justice will have its first opportunity to interpret Article 354 TFEU in respect of the European Parliament's resolution of 12 September 2018 which called on the Council to determine the existence of a clear risk of a serious breach by Hungary of Article 2 TEU.[125] For the Hungarian government, out of the votes cast by the Members of the European Parliament, only the votes for and against were counted, excluding abstentions, which would allegedly be contrary to Article 354 TFEU.

3.4 The reinterpretation of pre-2012 tools

3.4.1 The reinterpretation of a soft law tool: The European Semester

In addition to motivating the launch of the EU Justice Scoreboard in 2013, the European Semester process has been increasingly used by the Commission as a mean to comment on

[122] See Article 269 TFEU. For further analysis of the Court's limited jurisdiction and the possibility i.a. of seeing the ECJ being asked to interpret any eventual Council decision implementing sanctions adopted on the basis of Article 7, see Steve Peers, "Should the EU sanction its Member States for breaches of rule of law and human rights? Part 1: The Legal Framework", *EU Law Analysis*, 2 July 2019: http://eulawanalysis.blogspot.com/2019/07/should-eu-sanction-its-member-states.html.
[123] Case T-337/03 *Bertelli Gálvez v Commission*, ECLI:EU:T:2004:106.
[124] Case T-304/18 *MLPS v Commission*, ECLI:EU:T:2019:34.
[125] Case C-650/18 *Hungary v European Parliament* (pending).

rule of law developments at Member State level with, to the best of our knowledge, the first country specific recommendation made in relation to judicial independence adopted in July 2018 by the Council in respect of Slovakia.[126]

With respect to the two countries currently subject to Article 7(1) proceedings, the 2019 "edition" of the country reports are particularly noteworthy not only because of the unusually detailed nature of the rule of law diagnosis they offer but also its blunt nature. As regards Poland, the following diagnosis is offered:

> **The rule of law and an effective justice system are crucial for supporting a stable investment climate** […] **The risk of a serious breach of the rule of law in Poland persists** […] The Commission's main concern is that the cumulative effect of the recent changes affecting the judiciary are limiting its independence, infringing upon the separation of powers. The common pattern of these changes is that the executive and legislative powers now can interfere throughout the entire structure and output of the justice system. The situation is deteriorating as many of the contested legislative measures are being implemented and consolidated.[127]

Similarly, the 2019 edition of the country report regarding Hungary offers substantial not only in connection to the rule of law but also broader topics highlighted in the Parliament's reasoned proposal such as academic freedom:

> **Recent policy measures create uncertainty in academic and research fora.** Hungarian higher education institutions have the lowest financial autonomy in the EU […] In addition, the April 2017 amendment of the Higher Education Act raised further concerns regarding academic freedom (EUA, 2017b). The Central European University, the largest higher education beneficiary under Horizon 2020, signalled its intention to leave Hungary because of the regulatory uncertainty created by this amendment.[128]
>
> **Recent developments in Hungary give rise to concerns on judicial independence** […] Over the last year, perceived judicial independence among businesses decreased in Hungary (2019 EU Justice Scoreboard, forthcoming). **Checks and balances within the ordinary courts system have been further weakened.**[129]

In another noteworthy development, the Council followed the Commission's lead when it adopted its recommendations with respect to the national reform programme of both Poland and Hungary. While diverging in parts from the stronger language of the Commission draft proposals, the Council agreed to explicitly recall the Commission's rule of law "concerns" in relation to Poland.[130] In the case of Hungary, the Council went further as it did not only to explicitly note its concerns over Hungary's exposure to corruption and recent developments in

[126] See recommendation no 3 in Council Recommendation of 13 July 2018 on the 2018 National Reform Programme of Slovakia and delivering a Council opinion on the 2018 Stability Programme of Slovakia [2018] OJ C 320/24: "Improve the effectiveness of the justice system, in particular by safeguarding independence in judicial appointment procedures".
[127] Commission Staff Working Document, *Country Report Poland 2019*, SWD(2019) 1020 final, 27 February 2019, p. 42 (in bold in the original).
[128] Commission Staff Working Document, *Country Report Hungary 2019*, SWD(2019) 1016 final, 27 February 2019, p. 34 (in bold in the original).
[129] Ibid, p. 41.
[130] Council recommendation of 9 July 2019 on the 2019 National Reform Programme of Poland [2019] OJ C 301/123, recital 18, p. 127.

relation to the independence of Hungary's justice and higher education systems, but also adopted a formal recommendation whereby Hungary must take action to reinforce the anti-corruption framework and "strengthen judicial independence".[131]

This led the Hungarian government to adopt a strongly worded unilateral declaration – possibly the first time a national government did so in the framework of the European semester – deploring that the "statements on the Hungarian judicial system are politically motivated, biased and do not reflect the reality as the relevant legislative environment has not changed in the reporting period. In addition, the text fails to establish the direct relevance of the highlighted issues for the objectives of the European Semester, thus undermining the credibility of the process."[132]

This reaction indirectly suggests the European Semester's untapped potential for a more critical assessment of national developments in light of Article 2 values.[133] Considering the Commission's recent diagnosis – "the European Semester, complemented by the EU Justice Scoreboard, has proven to be a good framework to develop country-knowledge relating to rule of law",[134] it is likely that the Commission will seek to make a more extensive use of both in order to increase pressure on backsliding governments.

3.4.2 The reinterpretation of a legal form of action: Infringement proceedings

At the time of the Barroso Commission, a narrow understanding of Article 258 TFEU prevailed. This meant inter alia that the Commission felt legally unable to directly protect judicial independence using instead age discrimination as its key legal argument when it challenged the arbitrary lowering of the judicial retirement age of Hungarian judges and which "permitted the Hungarian government many judicial leaders with judges more to their liking".[135] Some scholars had found this restrictive approach to be misguided and suggested instead that infringement actions ought to be considered on the basis of Article 19(1) read in combination with Articles 2 and 4(3) TEU.[136] This is, in essence, precisely what the Court of Justice did in the seminal "Portuguese judges case" whose importance cannot be overstated as it removed any doubt that any national measure which undermines the independence of any national court

[131] Council recommendation of 9 July 2019 on the 2019 National Reform Programme of Hungary [2019] OJ C 301/101, p. 106.
[132] Declaration of Hungary on the Council Recommendation on the 2019 national reform programme of Hungary, annex of draft minutes of the EFA Council meeting of 9 July 2019, 11129/19 ADD 1 REV 1, 22 July 2019, p. 4.
[133] For an overview of the current shortcomings of the European semester process and possible reforms when it comes to anti-corruption, see A. Hoxhaj, *The EU anti-corruption report. A reflexive governance approach* (2020, Routledge), chapter 7.
[134] European Commission, *Further strengthening the Rule of Law within the Union. State of play*, op. cit., p. 9.
[135] K. L. Scheppele, "Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures", in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (CUP, 2016) 105, p. 109.
[136] See e.g. D. Kochenov and L. Pech, "Better late than never: On the European Commission's Rule of Law Framework and its first activation" (2016) 54(5) *Journal of Common Market Studies* 1062; L. Pech et al, *An EU mechanism on democracy, the rule of law and fundamental rights*, Annex I (EPRS study) PE 579.328, April 2016, p. 200.

which may hear questions of EU law may be directly challenged on the basis of Article 19(1) TEU.[137] The Court of Justice justified its interpretation in the following way:

> 32. Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals […]
>
> 37. It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection […]
>
> 41. In order for that protection to be ensured, maintaining [a national] court or tribunal's independence is essential.[138]

Soon after this ruling, Poland's so-called "judicial reforms" were found to violate Article 19(1) TEU in two instances to date.[139] This was the first time a Member State was found to have failed to fulfil its Treaty obligations by violating the principle of judicial independence and in particular the principle of irremovability of judges.[140] The Court of Justice has since seen "a proliferation of cases"[141] raising judicial independence issues originating from national courts with at this time of writing, close to twenty cases raising Article 19(1) TEU issues referred by Polish Courts,[142] ten cases originating from Romanian courts,[143] and one case from Hungary[144] and from Malta.[145]

Considering the lack of tangible results in connection to the two ongoing Article 7 proceedings, it is unsurprising to see that both Article 258 and Article 267 TFEU being increasingly used by the Commission and national courts. In this respect, it is worth stressing that the Court of Justice has implicitly confirmed that the same issue can be the subject of both an Article 7 procedure and an Article 258 action in line with the explicit and compelling reasoning of

[137] For further analysis, see L. Pech and S. Platon, "Judicial independence under threat: The Court of Justice to the rescue" (2018) 55 *Common Market Law Review* 1827.
[138] Case 64/16 *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.
[139] Case C-192/18 *Commission v Poland (Indépendance des juridictions de droit commun)*, ECLI:EU:C:2019:924; C-619/18 Commission v Poland (Indépendance de la Cour suprême), ECLI:EU:C:2019:531.
[140] L. Pech and S. Platon, "The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in *Commission v Poland* (Independence of the Supreme Court case)", *EU Law Analysis* blog, 2 July 2019: http://eulawanalysis.blogspot.com/2019/06/the-beginning-of-end-for-polands-so.html.
[141] CJEU, Address by the President, Mr Lenaerts, Press release No 1/2020, 13 January 2020: "More recently, concerns regarding respect for the rule of law, democracy and fundamental rights and freedoms have emerged in several Member States and have led to a proliferation of cases, particularly requests for preliminary rulings, before the Court."
[142] Case C-537/18; Joined Cases C-558/18 and C-563/18; Case C-623/18; Case C-824/18; Case C-487/19; Case C-508/19; Cases C-748/19 to C-754/19 (total of seven cases from same court); Cases C-763/19 to C-765/19 (total of three cases from the same court). The Court of Justice issued its very first preliminary ruling in response to questions raised by two Polish courts on 19 November 2019 in Joined Cases C-585/18, C-624/18 and C-625/18 on the basis of which the Polish Supreme Court subsequently found the so-called Disciplinary Chamber not to constitute a court within the meaning of EU and Polish law. For further analysis, see L. Pech and P. Wachowiec, "1460 Days Later: Rule of Law R.I.P. in Poland", Part I, *VerfBlog,* 13 January 2020: https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-i/.
[143] Case C-83/19; Case C-127/19; Case C-291/19; Case C-355/19; Case C-357/19; Case C-379/19; C-547/19.
[144] Case C-564/19.
[145] Case C-896/19.

Advocate General Tanchev according to whom "Article 7 TEU and Article 258 TFEU are separate procedures [which] may be invoked at the same time."[146]

With respect to Article 258 TEU, the Commission has since positively indicated that it "will pursue a strategic approach to infringement proceedings related to the rule of law, requesting expedited proceedings and interim measures whenever necessary."[147] If one could be allowed to make a prediction, should systemic corruption-related problems continue not to be tackled, one cannot exclude to see the first-ever infringement action initiated by the Commission based on Article 325 TFEU in a situation where a government is deliberately seeking to undermine the effective investigation of tax fraud or fraud with EU funds.[148] The perspective of seeing Article 259 TFEU being used for the first time to tackle systemic rule of law issues[149] should also not be discarded especially if the Commission's latest rule of law mechanism put forward in July 2019 – the Rule of Law Review Cycle – proves (as is likely) ineffective to deal with deliberate rule of law backsliding.

3.5 The forthcoming evolution of the EU's rule of law toolbox

National governments of the Member States have shown half-hearted efforts when it comes to defending the rule of law within the EU. This tendency is not new and precedes the establishment of the Council's anaemic rule of law dialogue whose utter lack of effectiveness has been previously noted. Indeed, at the time of the introduction of Article 7 TEU, one could already see the ambivalent attitude of the Member States. As observed by Gráinne de Búrca, instead of seeking "to give substance to the provision by establishing an ongoing monitoring mechanism", they chose "instead to abolish the embryonic monitoring system which had been created some years previously at the initiative of the European Parliament".[150]

By contrast, the European Commission has at least regularly tried to deal with the rule of law crisis first identified by the Barroso Commission in 2012 with the European Parliament also regularly taking the lead when it comes to raising the alarm or making concrete proposals.[151] In this respect, one may regret that the Commission has resisted the European Parliament's calls for inter alia the establishment of a new expert panel to assess EU Member States' continuing adherence to Article 2 values post-accession on the grounds that the proposed independent expert panel would "raise serious questions of legality, institutional legitimacy and accountability".[152] The Commission did, however, build on the European Parliament's

[146] Opinion delivered on 11 April 2019 in Case C-619/18, op. cit., para. 50.
[147] European Commission, A blueprint for action, op. cit., p. 14.
[148] L. Pech, S. Platon and V. Perju, "Rule of law backsliding in Romania: The case for an infringement action based on Article 325 TFEU", *VerfBlog*, 29 May 2019: https://verfassungsblog.de/how-to-adress-rule-of-law-backsliding-in-romania/.
[149] D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool' (2016) 15(7) *Hague Journal on the Rule of Law* 153.
[150] "The Road Not Taken: The EU as a Global Human Rights Actors", op. cit., p. 58.
[151] For an overview of the multiple initiatives, activities and proposals of the Parliament, see J. Sargentini and A. Dimitrovs, "The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States" (2016) 54 *JCMS* 1085.
[152] European Commission, Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, SP(2017)16, 17 February 2017.

proposal for a new permanent monitoring cycle[153] when it announced in July 2019 that it would establish a new Rule of Law Review Cycle (hereinafter: RLRC) to monitor the situation in Member States, the main features of which may be summarised as follows:[154]

(i) A wide scope of application as it is supposed to cover all the different components of the rule of law as understood by the Commission ranging from the lack of effective judicial protection to issues connected to media pluralism and elections;
(ii) A potentially variable intensity "where risks of regression, or particular weaknesses, have been identified";
(iii) A participatory process to the extent that all Member States are expected to engage "in a mutual exchange of information and a dialogue on rule of law related topics";
(iv) An annual rule of law report which is expected to summarise the situation in the Member States and serve as a point of reference for dialogue-based processes with and within the European Parliament and the Council but also with EU Member States and stakeholders.

By contrast to the 2016 Parliament's proposal, the Commission's review cycle will exclusively monitor rule of law-related developments. One may also question the Commission's decision to ring-fence the review "to matters of direct relevance to the rule of law in the EU,"[155] but perhaps this will not prevent a broad view of what "direct relevance" means. No immediate action is also to be expected on the basis of the RLRC and one may, therefore, remain sceptical about its likely effectiveness to prevent or help address a situation where there is a clear risk of a serious breach of Article 2 values. Most worryingly, the Commission's "blueprint for action" continues to reflect a naïve belief in the virtues of dialogue with legal actions presented as last resort solutions.[156] To begin with, this approach is difficult to reconcile with the correct acknowledgement that "time is of the essence when addressing a potential rule of law crisis".[157] The objective "to ensure a swift de-escalation or exit perspective […] as soon as the Member State concerned has taken the steps required to restore respect for the rule of law"[158] may also strike one as failing to draw the right lessons from the past and present dealings with Hungarian or Polish authorities and more generally a failure to accept that national authorities in some countries are or may attempt to *deliberately* and *deceitfully* pursue a process of rule of law backsliding. To suggest that procedures could be closed as long as a specific follow-up monitoring is established does not reassure in this slightest considering the Commission's record when it comes to assessing Bulgaria and Romania's rule of law record under the special Cooperation and Verification Mechanism.[159]

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[153] See European Parliament resolution of 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).
[154] *A blueprint for action*, op. cit., p. 9 et seq.
[155] Ibid., p. 11.
[156] For further analysis, see L. Pech, D. Kochenov, B. Grabowska-Moroz and J. Grogan, *The Commission's Rule of Law Blueprint for Action: A missed opportunity to fully confront legal hooliganism*, RECONNECT blog, 4 September 2019: https://reconnect-europe.eu/blog/commission-rule-of-law-blueprint/.
[157] *A blueprint for action*, op. cit., p. 14.
[158] Ibid., p. 15.
[159] See e.g. Magistrats Européens pour la Démocratie et les Libertés, *MEDEL Letter to the President of the EU Commission and to the EU Commissioner of Justice about the CVM report on Bulgaria and Romania*, 18 December

On a more positive note, the Commission's blueprint for action must be nonetheless commended for making clear that threats to the rule of law "challenge the legal, political and economic basis of how the EU works" and that "deficiencies as regards respect for the rule of law in one Member State impact other Member States and the EU as a whole".[160] Similarly welcome is the Commission's ambition to promote a rule of law culture, including through education and civil society.

4. Concluding remarks

In a significant letter to the then President-elect of the European Commission in September 2019, the president of three major European judicial networks offered the following diagnosis:

> Our common legal order is at risk, considering that several Member States are *systematically undermining* [our emphasis] the core values on which the Union is based. In particular, the independence of the judiciary is being *severely threatened* [our emphasis], and the separation of powers between the executive branch and the judicial branch is *being dismantled* [our emphasis]. These Member States are seeking to use the judiciary in their countries primarily as an instrument for government policy.[161]

The language is extremely strong and unprecedented yet entirely warranted considering the diagnosis, on all points correct, offered by the presidents of these three European judicial networks. When compared to the diagnosis made by the President of the Commission in 2012, the conclusion is inescapable: the rule of law situation within the EU has seriously deteriorated to the point of endangering the functioning of the whole EU legal order. This explains the multiplication of new tools and the concomitant "reinvention" of pre-2012 mechanisms we have witnessed in the past few years.

The swift evolution and densification of the EU's rule of law toolbox may be understood both in a positive and negative way: It may be positively understood as the sign of a broad consensus regarding the critical importance of the rule of law and an increasing awareness of the existential nature of the threat that rule of law backsliding poses to the EU. Conversely, this evolution may be understood as a failure to fully confront those who have deliberately undermined the rule of law in their countries by instead focusing in a quasi-permanent new instrument creation cycle at the EU level. To put it differently, "rather than acting decisively using existing tools in a mutually reinforcing and forceful way, there seems to always be a persistent temptation to blame the instruments available to either justify their non-inactivation, or their timid use".[162] It is to be hoped that the forthcoming new RLRC will not

2018: https://medelnet.eu/index.php/news/europe/483-medel-letter-to-the-president-of-the-eu-commission-and-to-the-eu-commissioner-of-justice-about-the-cvm-report-on-bulgaria-and-romania.

[160] *A blueprint for action*, op. cit., p. 1.

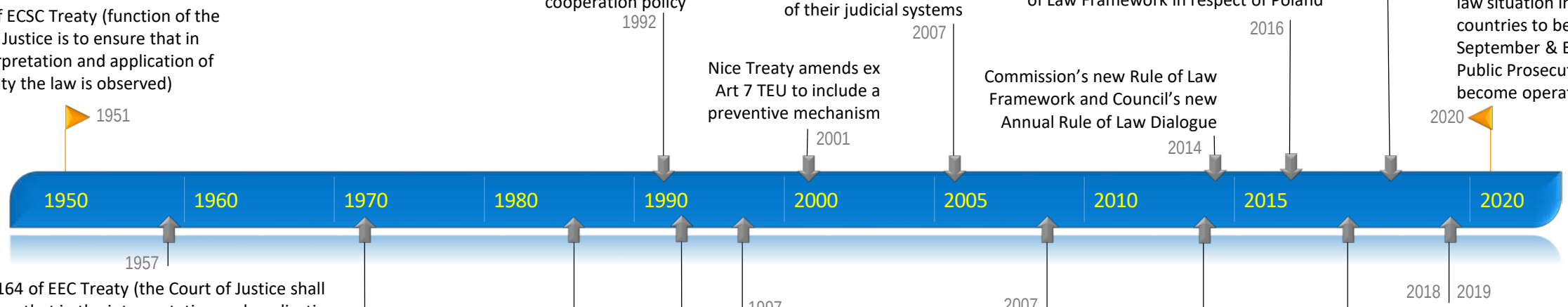
[161] Letter to the President-Elect of the European Commission from the president of the Network of Presidents of the Supreme Courts of the EU; the president of the European Association of Judges; and the president of the European Network of Councils for the Judiciary, Brussels, 20 September 2019: https://www.encj.eu/node/535

[162] A. Wójcik, "A Bad Workman always Blames his Tools": an Interview with Laurent Pech*, VerfBlog,* 28 May 2018: https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/.

end up being the post-accession equivalent of pre-accession window-dressing reporting on values,[163] in which case it will fall on the European Court of Justice to save the day.

[163] E. de Ridder and D. Kochenov, "Democratic conditionality in Eastern enlargement: Ambitious Window Dressing" (2011) 16 *European Foreign Affairs Review* 589.

The evolution of the EU Rule of Law (1951-2020)



1951
Art 31 of ECSC Treaty (function of the Court of Justice is to ensure that in the interpretation and application of this Treaty the law is observed)

1957
Art 164 of EEC Treaty (the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed)

1973
Declaration on European Identity (the rule of law is identified as one of the "fundamental elements of the European Identity")

1986
EEC described as a "Community based on the rule of law" in ECJ *Les Verts* ruling

1992
Maastricht Treaty confirms Member States' attachment to the rule of law and makes it one of the objectives of EU's CFSP and EC's development cooperation policy

1993
EU accession political criteria set by the European Council meeting in Copenhagen includes the rule of law

1997
Amsterdam Treaty: Rule of law is referred to as one of EU's common principles (ex Art 6 TEU); new special mechanism to determine (and sanction) existence of a serious and persistent breach of EU's common principles (ex Art 7 TEU) and codifies Copenhagen criteria (ex Art 49 TEU)

2001
Nice Treaty amends ex Art 7 TEU to include a preventive mechanism

2007
Specific monitoring mechanism for Bulgaria and Romania which includes benchmarks in respect of their judicial systems

2007
Treaty of Lisbon: revised text of ex Art 6 TEU (now Art 2 TEU); ex Art 49 TEU (now Art 49 TEU) with new Art 21 TEU providing that all of the EU's external policies must be guided i.a. by the rule of law

2013
Launch of EU Justice Scoreboard

2014
Commission's new Rule of Law Framework and Council's new Annual Rule of Law Dialogue

2016
First activation of the Commission's Rule of Law Framework in respect of Poland

2017
First activation of Art 7(1) TEU by the Commission in respect of Poland

2018
First activation of Art 7(1) TEU by the European Parliament in respect of Hungary

2018 2019
European Semester country reports and country-specific recommendations begin to include detailed critical developments relating to judicial independence (European semester itself was established in 2010) & first ECJ interim order suspending application of national law undermining independence of a national court & first ECJ rulings finding a Member State (i.e. Poland) to have violated the principles of irremovability of judges and judicial independence under Art 19(1) TEU

2020
Launch of Commission's Rule of Law Review Cycle with reports on the rule of law situation in all EU countries to be published in September & European Public Prosecutor's Office to become operational

@ProfPech 1 March 2020

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