



VOLUME 9

## **Safeguarding Democracy in the European Union**

*A Study on a European Responsibility*

By Christoph Möllers and Linda Schneider



# **SAFEGUARDING DEMOCRACY IN THE EUROPEAN UNION**



**HEINRICH BÖLL STIFTUNG  
PUBLICATION SERIES ON EUROPE  
VOLUME 9**

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**By Christoph Möllers and Linda Schneider**

**On the initiative of and edited by the Heinrich Böll Foundation**

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Volume 9 of the Publication Series on Europe

Design: feinkost Designnetzwerk, Constantin Mawrodiew (derivation design by State Design)

Title photo: Clem Onojeghuo – Unsplash

Printing: ARNOLD group, Großbeeren

ISBN 978-3-86928-191-9

This publication can be ordered from: Heinrich-Böll-Stiftung, Schumannstraße 8, 10117 Berlin,  
T +49 30 28534-0 F +49 30 28534-109 E [buchversand@boell.de](mailto:buchversand@boell.de) W [www.boell.de](http://www.boell.de)

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## FOREWORD

Liberal democracies are under pressure, both worldwide and in Europe. Populist forces of various persuasions promise protection and security through isolation and a strong, authoritarian state. Their straightforward-sounding proposals find a receptive audience among people who have been made insecure by the breakneck pace of change and radical socioeconomic transformation. The European Union is not immune to these developments. Even in the EU, right-wing authoritarian parties are winning majorities. In Hungary and Poland, far-right nationalist to nationalistic parties of different forms and with different historical backgrounds are in government. Both propagate an 'illiberal' democracy, by which they understand majority rule, which turns its back on a pluralist social order characterised by critical public debate and the guaranteeing of minority rights. They are undertaking a restructuring of the State, intended to restrict the independence of the jurisdiction of constitutional courts, of media and of the law, and they are receiving political support in this endeavour from right-wing populist movements in other EU countries. The democratic state upholding the rule of law, until now a unifying guiding principle and the fundamental basis of European integration, has become the object of serious debate, possibly even threatening the existence of the Peace Project of the European Union. The dismantling of democracy in an EU member state is not a national problem, it is a European one. The EU is an alliance of states with constitutions based on the rule of law: a community of democracies. If the rule of law is impeded in one member state, this affects the community at its core and threatens the basis of cooperation within it. EU states are legally and institutionally so closely interconnected that they are not able to tolerate a member state doing lasting damage to the democratic rule of law and turning towards an authoritarian system. For this reason, the developments in Poland and Hungary are not purely national problems that the other EU states can simply look away from.

The EU – meaning also the member states – is forced to act when the protection of democratic opposition, freedom of speech and of the media, the law on elections and political parties, and the independence of the judiciary – all guarantors of fair political competition – are at stake. But how should the EU react to the dismantling of democracy within its ranks? How can it prevent this and protect the democratic state upholding the rule of law? This is the subject matter of the present study. A simple answer, a straightforward solution, a panacea that can immediately solve all problems does not exist. The study makes clear the dilemma in which the EU finds itself and what possibilities for action are, nonetheless, available to it. Current measures on the part of the EU and its member states have achieved hardly anything.

They have failed to stop the restructuring of the state in Poland and Hungary. What possibilities remain in the face of this sobering evaluation?

Probably the most important message of the study is its plea for a culture of intervention: its promotion of increased political debate both within political institutions and among the general public. In particular, the European Council of the heads of state or government ought to concern itself regularly with questions of the rule of law and of democracy in the member states and bring its weight to bear. This requires a genuine change of culture to take place in the Council. Regular reports on the situation in member countries, on which the European Council would be required to take a position, could push this necessary change in the right direction. This would also strengthen the authority of the European Commission to be more resolute and consistent in its use of the legal means at its disposal and to initiate proceedings against member states where necessary.

The protection of democracy in member states is however not a task that can be left to the institutions of the European Union alone. The reactions of the Polish and Hungarian governments to interventions show that legal procedures alone will not help when right-wing authoritarian movements enjoy broad political support. They can readily condemn any EU intervention as improper interference in their national affairs. For this reason, it is essential to promote transnational support of civil society – including in those situations where the rights and freedoms of civil society are threatened – and in this way to strengthen the country’s self-healing powers. For wrong turns in the practice of the rule of law can only be lastingly righted by new political majorities. Better and more straightforward access to EU Support Funds and more closely connected transnational networks could also be of assistance.

But more important than all of this is a European awareness of a problem that concerns all of us and demands that we act. By way of this study, the Heinrich Böll Foundation wishes to contribute to the more robust development of the so urgently needed European public sphere. At a time when many parts of Europe continue to face the rise of right-wing populist movements, it is more important than ever for a united Europe to defend its foundations and to offer a spirited defence against attacks on a pluralist and open society.

We owe thanks to those who have contributed to the success of this study. For their valuable comments, we would like to thank Annalena Baerbock, member of the German Bundestag (MdB), Dr. Franziska Brantner MdB, Prof. Dr. Ulrich K. Preuß, Manuel Sarrazin MdB, and Prof. Dr. Michaele Schreyer, who have accompanied the progress of the study in the form of an editorial advisory committee. We would like to extend special thanks to the author, Prof. Dr. Christoph Möllers, and his co-author, Linda Schneider.

Berlin, December 2018

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# PREFACE

The present study comes at a critical juncture. After the fall of the wall that divided Europe, liberal democracy seemed to be the uncontested system that all societies were trying to achieve. In recent years, however, new challenges for liberal democratic values have been emerging: the rise of populism and nationalism in Europe and beyond, the increasing popularity of autocratic rulers, and the dismantling of the legal foundations of democratic systems by governments such as the Hungarian and the Polish governments are clear warnings that defending and safeguarding democracy is an ongoing task for all societies. If democratic institutions in one EU member state are undermined, this has negative consequences for the entire EU and its citizens.

This study claims that there is no need for new institutional mechanisms. What is lacking rather is the political will to enforce these mechanisms. In particular, it has been considered highly unlikely that Art. 7 TEU, the so-called nuclear option of the EU, would be triggered. However, just before Christmas 2017, the European Commission put forward a reasoned proposal to do exactly this in the case of the Polish government. This proposal received support from the European Parliament when it adopted a «*Resolution on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland*» on the 1st of March 2018. Now the ball has been passed to the Council of Ministers, which so far has not shown great eagerness to deal with this particular issue. But developments did not stop there. In September 2018, the EP by a large majority adopted the so-called Sargentini report, named after rapporteur MEP Judith Sargentini (NL/Greens), which claims that the Hungarian government is in breach of the values of the EU and hence calls for triggering Art. 7. Among those who voted in favour of this report were members of the European People's Party (EPP) of which Fidesz is a member. Not only is this a political signal insofar as it was the first time that the EP has called for the activation of Art. 7, but also because it shows that the EPP, until then rather subdued in its criticism of the Hungarian government, does not stand united behind Viktor Orbán anymore.

It remains to be seen how and when the Council will react. Rumour has it that the upcoming presidencies might be rather hesitant to table this matter. Again, the institutional mechanisms are there, now it depends on the political will of the parties involved. Nevertheless, the fact that Art. 7 has been triggered, that there is an open discussion about the violation of European values, and that the supranational institutions of the EU agree on this course of action, is already a positive sign for European democracy. It demonstrates that European institutions are aware of the fact that these are not just domestic problems, but that they have an impact on the other member states as well and hence on European democracy in general. It also

demonstrates that member states cannot simply get away with violations of fundamental rights they agreed upon when gaining accession to the EU in the first place. More than that, it demonstrates that these values are not simply words on paper, but that the European institutions are ready to defend them.

In so doing, both the European Parliament and the Commission have stressed that triggering Art. 7 TEU is directed against the actions of the Polish and Hungarian governments, not their citizens. And it is precisely the rights of the citizens, in all EU member states, that have to be protected.

Brussels, December 2018

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## EXECUTIVE SUMMARY

In states all over the world, democracy and the rule of law are increasingly being put under pressure. This also holds for the European Union and its member states, where a fundamental debate over the future of democracy and rule of law is currently being fought out. In Hungary and Poland, right-wing authoritarian parties have begun a comprehensive restructuring of the state, which threatens the very existence of the democratic order in these countries. There is nothing to suggest that the ongoing crisis will soon be resolved; rather, it is easily imaginable that further member states could also move towards authoritarianism. Historical examples show how long it can take to overcome such a crisis. The European Union will have constantly to re-examine the question of how to deal with authoritarian political movements within its community. However, the continuing political success of right-wing authoritarian movements in many member states and their representation in the bodies of the European Union poses a double challenge to the institutional safeguarding of democracy. On the one hand, the rise of these parties seems to make the need for the protection of democratic structures ever more urgent. On the other hand, this rise is in part the result of the democratic process itself.

### **The dismantling of democracy in one member state affects every other member, as well as the unity of the European Union**

The dismantling of democracy in a member state of the European Union is far from simply being a domestic matter. Given the institutional interconnections within the European Union, it poses a serious constitutional problem – both for other member states and for the European institutions themselves. In a vertical sense, the democracies of each member state necessarily contribute to the legitimacy of the Union, which is only democratically legitimate because its member states are. Horizontally, legal acts of a member state regularly have effects in and on other member states through the application of European law. If one member state is lacking democratic legitimacy, this lack also has a bearing on the structures of legitimacy in the other member states. The current level of political integration thus rules out the possibility of the European Union simply ignoring the restructuring of some of its member states into authoritarian systems.

### **Concentration on threats to democracy as a whole**

The following study is dedicated to analysing the backgrounds to *safeguarding democracy* in the European Union, going beyond individual breaches. We speak

of the dismantling of democracy, if a member state's government aims fundamentally to alter the democratic basis of legitimacy of its political order in such a way that it can no longer be described as a democratic legal order. Questions regarding democracy are tightly interlinked with questions of the rule of law in member states: questions that concern deficient structures that hinder regular law enforcement. Both developments can go hand in hand, but they need, nonetheless, to be distinguished. Since any form of intervention into a democratic process for the purpose of improving the functioning of said process is a delicate matter and can fail due to its own lack of legitimacy, the EU must work with a well-defined mandate. Not every irregularly counted vote, not every case of corruption, and not every other kind of institutional imperfection should trigger procedures for safeguarding democracy. The safeguarding of democracy involves preserving the institutional framework of a democratic order, not curbing unwelcome political developments.

### **The criterion for EU intervention: The protection of the political opposition**

The core criterion to assess the dismantling of democracy in member states should be the protection of potential future majorities. If democratic equality and participation is no longer guaranteed, the system in the respective member state is transformed into an authoritarian system. This study develops criteria for an analysis of the point at which a national legal order turns into an authoritarian system in this sense: namely, based on the protection of the political opposition. Accordingly, a system remains democratic as long as it permits a minority to later become a majority. It follows from this criterion that three areas are worthy of particular attention: firstly, *freedom of expression and of the media*; secondly, *the institutions of electoral law and the regulatory framework of political parties*; and, thirdly, *the independence of the judiciary* – all as institutional guarantors of fair political competition. Any reform efforts targeted at safeguarding democracy at the European level should therefore look at these areas.

### **A disillusioning result: Intervention of the EU to safeguard democracy has so far been ineffective**

So far, the European Union has reacted in varying ways to the decline of democratic structures in individual member states. Experiences in Austria, Hungary, and Poland, but also in other member states, illustrate the multifaceted difficulties. The results of EU intervention are disillusioning. The instances of intervention remained selective and led, when they had any effect at all, rather to a consolidation and hardening of the political situation in the member states concerned. On the one hand, the mechanism laid out in Art. 7 TEU for dealing with authoritarian developments has for a long time not been put into practice, because of the possibility of a veto by individual states. On the other hand, the Commission's newly developed Rule of Law framework lacks any substantial possibility of sanctions. The procedure depends instead on a functioning dialogue with the member states and their willingness to

take action. However, the developments in Hungary and Poland show that this kind of trust in mutual cooperation is often misplaced in the context of states with right-wing authoritarian governments. The Court of Justice of the European Union (ECJ) has not been able to solve the conflict by way of its judgments. This is understandable, since courts are only equipped to intervene on specific points and occasions and thus are structurally unable to react to broader political developments.

### **Instead of creating new institutions, make better use of existing mechanisms**

In light of the weaknesses of available procedures on the EU level, new problem-solving mechanisms are being discussed. It is, however, doubtful whether these weaknesses can be removed by way of institutional reforms. It is unlikely that the necessary consensus for changes to the European Treaties could be reached among the member states. At the same time, broadening the competencies of the Commission and the ECJ would stretch the legitimacy of these bodies to its limits. The study therefore calls for taking up existing mechanisms, further developing and improving them. This, however, requires that the member states and the bodies of the EU recognise the dismantling of democracy in member states as a European problem and regard themselves as responsible for taking action against it in a politically-oriented process.

### **Political problems call for political solutions**

The revitalising of democratic structures and culture in all member states is a long-term and primarily political project. This project admittedly is in need of some administrative and judicial support. However, behind the erosion of democratic standards in individual member states lies a political conflict, which must primarily be resolved by political means. For this reason, it would appear highly important that an ongoing political debate be conducted both with and particularly among the member states. Of course, some changes in these member states are only to be obtained through electoral losses in democratic elections, which obviously are determined by the domestic political landscape. It is not up to the European Union, however, to determine the domestic political landscape or to choose among personnel alternatives. It is only by appealing to the common values of Art. 2 TEU and showing itself to be something other than a distant technocratic regime in Brussels that the European Union can have an influence on such matters. For this to happen, EU institutions must re-define their roles.

■ *A culture of intervention is necessary.* Up to now, problems with democracy in member states have rarely been discussed in the European Council or in the Council of Ministers. This tradition of diplomatic reticence must end. All member states should accept that under the treaties in their current state, such problems cannot be handled as domestic matters. The heads of states and government should develop a practice of open debate and make national constitutional

structures a subject of discussion, in order to fulfil their duties as set out in the treaties. The development of a such a culture of conversation cannot be formally decreed, but it could form the subject of a formalised and regular institutional political debate. Such a debate could help the most important representatives of the member states to recognise that their own institutions are dependent on the institutional arrangements of the other member states.

- *Transform the General Affairs Council into a forum for dialogue on the situation of the rule of law in member states.* The General Affairs Council should be made a forum for dialogue on the situation of the rule of law and other important developments in the member states. At regular intervals – for example, on the basis of reports of the European Commission or the European Commission for Democracy through Law (Venice Commission) – it should discuss the state of the rule of law and democracy in the member states and, subsequent to its discussions, it should take a public stance.
- *The need for more consistent interventions by the European Commission.* It is very important for the European Commission to use the instruments at its disposal, including the right to take legal action, in a consistent and systematic fashion. In this regard, the Commission should neither exercise friendly discretion, nor should it give the currently prevailing impression that a procedure against a member state could form part of a negotiating package. The fundamental principles of the European Union must be off-limits for any supranational culture of negotiation.
- *The European Parliament should be strengthened as a venue for inter-parliamentary debate.* The European Parliament has used its function as a political forum in previous conflicts and was the venue in which anti-democratic developments were debated and also documented (for example, in the form of the comprehensive Tavares Report on the Situation of Fundamental Rights in Hungary). Its role is, however, restricted in two respects. Firstly, domestic authoritarian parties are themselves part of larger political groups and therefore can make it difficult for the European Parliament to take a position. For instance, the European People's Party (EPP) has for a long time politically backed the Hungarian party Fidesz, which is part of the EPP. But it is precisely in this context that the Parliament has the opportunity to establish a key framework for political discussions with members that display authoritarian tendencies. Furthermore, the European Parliament has shown itself to be capable of taking action: for example, when, at the end of May 2017, it voted by a large majority to call for the EU to activate Article 7 (1) TEU against Hungary. Secondly, its possibilities for institutional influence are restricted in practice to taking positions and its right to initiate an Article 7 (1) TEU procedure. Nevertheless, the value of parliamentary debates should be more appreciated and should be strengthened.
- *Make better use of the European Party Statute.* European political party federations – or «political parties at European level» – are recognised by their own special statute on European political parties and European political foundations. A Europeanisation of political families is a useful way to sharpen awareness within

party structures for the fact that threats to democratic values and structures in a member state are a common European problem. Furthermore, there may be desirable side-effects on the culture of discussion within the EU institutions. The European Party Statute also makes the legal recognition of Europe-wide party federations and the EU funding tied to it conditional upon compliance with the fundamental values set out in Article 2 TEU. The resulting legal options to investigate member-parties of European political federations for possible anti-democratic activities should be used more often and more decisively.

- *Promote European networks of civil society.* The Europeanisation of civil society is of the greatest importance for the maintenance of democratic structures. The European Union should promote the self-organising capacities of civil society groups in member states, as long as this is still possible. Restrictions on foreign NGOs form part of standard practice in states moving in an authoritarian direction. These restrictions represent a weakening of constitutive elements of a democratic society, such as freedom of expression and freedom of political association. For this reason, European networks of trade unions, journalists' associations, and organisations of teachers, university professors and lecturers are important to provide support for the like-minded. A European political consciousness, which regards developments in other member states as its own political problem, is perhaps the most important desideratum of European democratisation and also the most difficult to achieve. But it is even more important that such support takes place, on the one hand, horizontally among member states and, on the other hand, at the level of civil society without the participation of public authorities of the member states concerned.
- *Establish easier, decentralised access to EU funds for civil society organisations.* Specifically, EU funds – such as those granted through the «Europe for Citizens» programme, the EuropeAid programme of the Commission or Education, Audio-visual and Culture Executive Agency (EACEA) projects – should be available to civil society organisations without the involvement of national governments or other state authorities. As long as the distribution of support is left to member state authorities, organisations loyal to the regime might be privileged. In addition, thresholds for support should be lowered and funding conditions simplified. This is particularly relevant for smaller national initiatives, whose members have neither knowledge of funding programmes nor the capacity necessary for overcoming the bureaucratic hurdles or language barriers involved in EU procedures. Furthermore, the «Strategic Communications Task Force» of the European Union should be strengthened, in order to counter propaganda hostile to the EU, particularly in the neighbouring Eastern European countries, and to make information available to the population concerned.
- *A more rigorous use of all available mechanisms.* Already existing mechanisms, such as the Article 7 TEU procedure or the Commission instruments, should be used when and where applicable. Even if they fail due to the resistance of one or more states, they, nonetheless, document a carefully reasoned and politically broad disapproval of a given political practice. The symbolic value of this is not

to be underestimated. Should the tendencies to dismantle democracy in individual member states persist, the introduction of further monitoring institutions to assess and evaluate these developments should also be considered. It should be kept in mind, however, that in the form of the Venice Commission of the Council of Europe, there already exists a highly recognised monitoring institution for evaluating developments in member states. The Venice Commission has performed this function very well up to now, and, as a non-EU institution, it has the advantage of an institutional distance from the Union that vouches for its neutrality.

■ *Expanding the infringement procedure and the linkage to EU funds.* As regards existing mechanisms and their effectiveness, consideration should be given to merging Art. 7 TEU procedures against two or more member states and to expanding the scope of the infringement procedure, such as to include systemic domestic shortcomings. Furthermore, the re-structuring of the EU Structural and Investment Funds should be discussed. Above all, tying the awarding of EU structural funds to compliance with particular political conditions in the member states could provide leverage against those member states that rely on EU support, including Poland and Hungary. The new orientation and arrangements would have, however, to follow clearly defined criteria, to be sufficiently contextualised, and to allow member states dependent on funding sufficient room for manoeuvre.

■ *The Role of the European Court of Justice.* An increased involvement of the ECJ is not unproblematic. It would present an immense challenge to the Court and could damage public perceptions of its legitimacy, similarly to what already happened with the European Central Bank. If we wanted to take this route at all, this would need to be accompanied by a significant reform of the substantive criteria of Article 2 TEU. In our opinion, these criteria would need to be made more specific, in order for them to be used for safeguarding democracy. Expanding the competencies of the ECJ would only come into consideration in the case of persistent and massive anti-democratic developments in the member states, which cannot be held in check, despite both vertical and horizontal pressure from the European Union. Admittedly, this would be a revolutionary and, therefore, problematic development (both from the point of view of democratic theory and from a domestic-constitutional perspective). It would test the legitimacy of the ECJ similarly to the ground-breaking decisions of the 1960s. It could also founder on the resistance of the courts in member states with functioning democratic systems. The ECJ's increased involvement would, however, have the advantage that no treaty amendment procedure would have to be initiated, so that individual member states would not be able to prevent the reform. In particular, the expansion of the scope of application of the infringement procedure to cover systemic deficiencies in member states could even have the advantage of making conflicts between the Union and its member states a subject of discussion, under the pressure of the requirement to pay a lump sum or a periodic financial penalty – although, admittedly, this would not solve these conflicts. It would, however, serve to avert political deadlock.

## **Desideratum: European consciousness for a Europe-wide responsibility**

The protection of democracy in member states is not a task that can be left to the institutions of the European Union alone. In dire situations, national governments should not hide behind the EU institutions, but rather they should take a public stand on developments that threaten democratic structures in member states. In all EU member states, the political system, and society more broadly, must develop consciousness of the fact that the dismantling of democracy in any one country represents a problem for all. We must recognise that we are dealing with a pan-European, society-wide responsibility, which cannot simply be delegated to the EU institutions.



# THE NATURE OF THE PROBLEM

Democratic states upholding the rule of law are under enormous political pressure all over the world. It seems almost as if their era is coming to an end.<sup>1</sup> But the developments of recent years could also be seen as challenging us thoroughly to consider how – from a social as well as an institutional perspective – new life can be breathed into democratic processes or how these processes can be reformed. This goes as much for the European Union<sup>2</sup> as for its member states, which simultaneously function as the arena and the object of a fundamental political debate over the future of democracy and the rule of law, even extending beyond the state. Authoritarian political movements also exist outside the European Union. Hence, it is not convincing to attribute them to the member states or to explain them as a consequence of the current state of the Union.<sup>3</sup> Rather, if the European Union is a political community in the making, it will have continually to re-examine the question of how to deal with authoritarian political movements. The present level of political integration should in any case make it impossible to ignore the metamorphosis of member states into what – from the perspective of other member states or from that of European institutions – appear to be authoritarian systems. The various layers are simply too closely connected with respect to their legitimacy. On the other hand, the institutional responses discussed in recent years within the European Union often reveal a technocratic or legalistic understanding of politics. This belief in the capability of its institutions is consistent with a European Union whose rapid institutional development has not been accompanied by a Europeanisation of the member states' societies. Institutional instruments are important, but they will not be able to solve the problem by themselves.

This study investigates the problem of safeguarding democracy in the European Union against the aforementioned backdrop. Since any form of intervention in a democratic process for the purpose of improving this process is a delicate matter, it must have a well-defined mandate. All solutions to the problem of safeguarding democracy should therefore start by limiting themselves. Not every irregularity in vote counting, not every case of corruption, and not every other kind of institutional

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- 1 See also Schorkopf, Frank, «Wertesicherung in der Europäischen Union. Prävention, Quarantäne und Aufsicht als Bausteine eines Rechts der Verfassungskrise?», 2 *Europarecht*, 2016, pp. 147 ff.
  - 2 We use the term European Union uniformly throughout this study, and not only in relation to the developments since the Treaty of Lisbon (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December 2007).
  - 3 Möllers, Christoph, «Krisenzurechnung und Legitimationsproblematik in der Europäischen Integration», 43/3 *Leviathan*, 2015, pp. 339–364.

imperfection should trigger the demand for measures to safeguard democracy. Such measures must be treated as an institutional instrument of last resort, to be used sparingly, in order for them not to fail as a result of their own lack of legitimacy. For this reason, the present investigation is restricted to the phenomenon of the tipping point when member states' domestic legal orders turn into authoritarian systems. An analysis of the problem has to start with the aspects of the democratic order that are desirable to maintain. Safeguarding democracy cannot mean the curbing of unwelcome political developments, but rather has to restrict itself to the protection of the institutional scaffolding of a democratic order. The democracy-specific core of the EU constitutional order explicitly protects potential future majorities. If this democratic equality and participation is no longer guaranteed, we consider a member state's system as authoritarian.

This investigation develops criteria for analysing the tipping point at which a national order becomes an authoritarian system.

One important political facet of the problem will not, however, be discussed in this study. As an actor on the international stage, the European Union is only credible as a champion of constitutional democratic order in member states and non-EU states insofar as it itself represents such standards. The manner in which the Union responds to democracy-threatening developments in its member states is also important for the manner in which it can permit itself to deal with such developments in states outside the Union. That the Union, as is the case at the moment, is more willing to criticise the health of democracy in non-EU states than among its own members is a sign not only of inadequate adherence to its own principles, but is also – in no small measure, precisely for this reason – unwise in terms of its effectiveness in the sphere of power politics.

# The Democratic Dilemma in Federations: Structural Constraints and Approaches to their Solution

## 1 Introduction

### a) Political homogeneity in democratic federations

Federations are political communities composed of other political communities. This construction is intended both to secure the diversity of its members and also to produce political cohesion among them. It gives rise to tensions, however, that are common in federations. Disputes over competencies between organisational levels are, in any case, a preoccupation for federations, since there is genuine political diversity in and between its constituents. While this diversity causes disputes, it is also what necessitates the federal structure. But of course, such conflicts take on a more dramatic character when they no longer concern individual matters of policy, but rather the fundamental political principles by which the legitimacy of the federal structure as a whole is ensured. The founding documents of democratic federations commonly require that all members adhere to the same political form. A minimum of political and constitutional similarity is the basis for their functioning. Such provisions can be found, for example, in the Constitution of the United States, in the Basic Law of the Federal Republic of Germany, and in the Swiss Federal Constitution.<sup>4</sup>

What does this mean for the European Union? It is not a federation in the sense of a federal state.<sup>5</sup> Do other rules apply here than for genuine federal states like Germany, the USA or Switzerland? Rather than looking for a general answer, it would appear more useful to make comparisons and thereby to ascertain which considerations are appropriate to which kind of federal institution(s). Recent, highly insightful, research on institutions emphasises that precisely in the realm of federalism comparability should not be excluded by an insistence on overly rigid categorisation – such

<sup>4</sup> Art. IV sect. 4 of the U.S. Constitution; Art. 51 sect. 1 of the Federal Constitution of the Swiss Confederation; Art. 28 sect. 1 of the German Basic Law.

<sup>5</sup> See e.g. Nettesheim, Martin, Art. 1 EUV, in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2016, para. 66 ff.

as the distinction, which comes from the German monarchical constitution, between confederation and federal state.<sup>6</sup> It is not by chance that criteria corresponding to those in the US Constitution, the German Basic Law and the Swiss Federal Constitution are also to be found in the European Treaties. The Treaty of Maastricht commits the member states, through Art. 2 TEU (ex. Art. 6 TEU, ex. Art. F), to a particular set of common values, which will be gone into in greater detail later. According to Art. 2 TEU, 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. Furthermore, according to the wording of Art 2 TEU, these values are common to the constitutions of all member states, which ensure pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men.

This set of values also obliges member states to adhere to a particular political form. Art. 2 TEU and its equivalents at the level of the member states reveal how federations function as a system and what they demand of their political institutions: i.e. the federation can only be constituted as federation, if all constituents adhere to essentially similar legitimacy criteria. From a historical point of view, the democratic and federal organisation of states is often related. Logically considered, this is no accident, since the degree of freedom that a federation permits its constituents presumes a plurality of political processes<sup>7</sup> that is alien to authoritarian systems.<sup>8</sup> At the same time, this plurality necessarily rests on an underlying political consensus.

It thus becomes clear that the question of what should happen when individual constituents of a federation no longer respect the fundamental obligations of their political organisation represents a difficult, and as yet unresolved, problem. What would happen in Germany, the USA or Switzerland, if Hessen, Texas or Graubünden turned away from democratic principles? Despite the fact that, as we shall see, there are institutional mechanisms that have been established to deal with this question, the problem has never been solved institutionally. The situation expresses a dilemma at a very basic level: the member state concerned will regard its deviation as the result of democratic self-determination and, in the name of democracy, will not be inclined to subject itself to a different set of rules. This is all the more the case, if the democratic legitimacy of the superior structure is itself considered questionable. Such doubts are, however, common among federations. Thus, US federal authorities are traditionally suspected of behaving in a bureaucratic and aloof manner. A similar

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6 For a more general critique, see Schönberger, Christoph, «Die Europäische Union als Bund», 129/1 *AöR*, 2004, pp. 81–120; Beaud, Olivier, *Théorie de la Fédération*, 2007, pp. 67 ff.

7 Möllers, Christoph, «Verwaltungsrecht und Politik», in *Handbuch Ius Publicum Europaeum Volume V* (eds. von Bogdandy, Armin, Cassese, Sabino and Huber, Peter), 2014, sect. 93.

8 For a remarkable exception to the federal, rule of law-based system of the second German Empire, see Mayer, Otto, «Republikanischer und monarchischer Bundesstaat», 18 *AöR*, 1903, pp. 337 ff; Möllers, Christoph, «Der parlamentarische Bundesstaat – Das vergessene Spannungsverhältnis von Parlament, Demokratie und Bundesstaat», in *Föderalismus – Auflösung oder Zukunft der Staatlichkeit* (eds. Aulehner, Josef, Denger, Andreas et al.), 1997, pp. 81–112.

political discourse is to be found in Switzerland – and, of course – in assessments of the European Union within its member states.

One might ask: What exactly is the problem? Why is it not permissible for individual constituents to differ fundamentally from others? Why would a democratic federation not be able to integrate even a monarchical member state into its community? The answer to this question derives from the institutional power relationships among the member states, on the one hand, and between the member states and the federal level, on the other. In the first place, in most federations, the democratic legitimacy of the superior level is partially dependent on the lower level. In other words, there is vertical, reciprocal relationship of legitimacy. Thus, in Germany, political representatives elected in state elections (*Landtagswahlen*) are seated in a federal organ, the *Bundesrat*. In the USA, in many cases, federal elections are regulated by state law. The lack of democratic legitimacy in one constituent of the federation affects the legitimacy of the superior level. In the second place, the constituents are horizontally integrated. The rules and decisions of one member state are recognised and applied in the others. This, however, can only happen when there is confidence that the standards on the basis of which these decisions are made meet common minimum standards.<sup>9</sup> Otherwise, non-legitimised decisions made in one member state would have legal effects in other democratically-legitimised member states. In turn, they would also call into question the legitimacy of those other, democratically-legitimised, member states.

## **b) Is the European Union a democratic federation?**

What does this mean for the European Union? The question of the democratic legitimacy of the Union is among the most controversial problems of political theory, the academic discussion of which parallels the political debate.<sup>10</sup> It is impossible to provide a detailed treatment here; instead, we will build on working hypotheses. We do not agree with the view that ultimately regards the European Union as a primarily technocratic body and that bases the legitimacy of its performance on its status as a body of experts and on its political independence.<sup>11</sup> There is much to be said for this view, and it continues to describe an important element of both the organisational structure of the Union and its regulatory requirements: in particular, in the area of non-discrimination. However, in our view, it adequately describes neither the level of integration nor the overall condition of the political institutions of the EU. Similarly, we are not convinced by approaches that attempt to derive the democratic legitimacy of the European Union solely from the democratic legitimacy of its member states. These approaches are, for the most part, grounded in the assumption that genuine democratic processes can only take place in the context of the nation

<sup>9</sup> Lerche, Peter, «Föderalismus als nationales und internationales Ordnungsprinzip», 21 *VVD-StRL*, 1964, pp. 77–87.

<sup>10</sup> Amongst others Grimm, Dieter, *Europa ja – aber welches?*, 2016, pp. 29 ff.

<sup>11</sup> See e.g. Majone, Giandomenico (ed.), *Regulating Europe*, 1996. For a more descriptive account, see Vauchez, Antoine, *Démocratiser l'Europe*, 2014.

state.<sup>12</sup> Nonetheless, it is true that the legitimacy of the European Union cannot be considered independently of the legitimacy of its member states. The measures for safeguarding democracy in member states that we are investigating are based precisely on the assumption that a lack of legitimacy in one member state can have a negative «horizontal» effect on other member states, as well as «vertical» repercussions for the legitimacy of the European Union. This is true even though – through elections to the European Parliament (EP) and through the participation of the EP in the EU legislative process, through its power of nomination and supervision over the European Commission, and through the Commission's right to supervise subordinate authorities – the Union as a political community provides for its own political process(es), entailing its own notions of democratic legitimacy.<sup>13</sup>

This political process would be incomplete without the democratic structures and politics of the member states, whose significance is greatest in the different institutions of the Council of the European Union and of the European Council.<sup>14</sup> One could spend considerable time discussing which of these contributions is more important for the legitimisation of the European Union. One could both analyse the treaties' parameters from a normative perspective and examine the political significance of the different levels from a descriptive point of view. In this regard, the elections to the EP especially pose problems. Their organisation is unbalanced, due to the failure to harmonise electoral processes in different member states.<sup>15</sup> Furthermore, despite the growing institutional importance of this organ, elections to the EP suffer from low and nationally very uneven voter turnout. This is a serious criticism, but not as important for our investigation as the fact that the European Union, which began as an organisation based on a purely contractual structure established by a treaty between sovereign states, has been transformed – by these same sovereign states – into an independent political entity by establishing its own mechanisms of legitimacy. Thus, the legitimacy of each level of the organisation depends upon the legitimacy of each of the other levels. A member state that is no longer governed by democratic norms calls into question the legitimacy of the European Union as a whole, because of its highly complex and variously intertwined processes of legislation and implementation of the law. EU law is predominantly implemented and applied by the member states, so that their own legitimacy is dependent, in turn, on that of the Union's institutions.

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12 On the German perspective, see Kaufmann, Marcel, *Europäische Integration und Demokratieprinzip*. 1997; Grimm, Dieter, «Braucht Europa eine Verfassung?», 50 JZ, 1995, pp. 581 ff.

13 In particular von Achenbach, Jelena, *Demokratische Gesetzgebung in der Europäischen Union*, 2014.

14 The Council of the European Union consists of one representative of each member state at ministerial level, Art. 16, sect. 2 TEU. The European Council is composed of the heads of state or government of the member states, the President of the European Council and the President of the Commission, Art. 15, sect. 2 TEU.

15 But in its defence, see Schönberger, Christoph, «Die Europäische Union zwischen «Demokratie-defizit» und Bundesstaatsverbot. Anmerkungen zum Lissabon-Urteil des Bundesverfassungsgerichts», 48/4 *Der Staat*, 2009, pp. 535–558.

At the same time, the Treaties of the European Union contain provisions that make some fundamental statements about the constitutional structure of the member states. Art. 2 TEU stipulates the values on which the Union is founded; Art. 6 TEU anchors the European Union in the European tradition of fundamental rights;<sup>16</sup> and Art. 7 TEU lays down the steps to be taken in the event that the values named in Art. 2 TEU are breached. The interpretation and application of these provisions has become problematic and highly controversial with regard to political developments in some member states, such as Austria, Hungary and Poland, and this has led to some institutional reform. In this respect, it seems at first glance as if the dilemma discussed above also applies to the EU: deviations from basic democratic values are themselves conceived as being the result of democratic self-determination; therefore, any call to amend the political structure, such as to bring it back into line with these values, cannot be made in the name of democracy. Moreover, this problem is particularly critical for the Union, since the organisation's democratic legitimacy has long been the object of extensive debate. Beyond reference to particular norms of the European Treaties, which, as we shall see, does not provide a sufficient framework for analysing the problem, one might also ask: What political and institutional mandate do the EU institutions have to demand compliance with standards of democracy and the rule of law from member states.

Within the constellation of dual legitimacy, however, member states preserve an important political role going far beyond that of members of consolidated federations. This comes partly from their ability to make amendments to the EU treaties.<sup>17</sup> They are able to change the rules to which they have committed themselves, so that they hold a power like that of the members of a constituent assembly. In addition, since the entry into force of the Treaty of Maastricht, the role of government-driven intergovernmental politics has become increasingly important. Many major questions – from the euro crisis to the refugee crisis – seem to circumvent the Commission and thus also the oversight of the European Parliament. The legislative process has become increasingly informal. The institutional rise of the European Council is one sign of this development, but it often goes much further: e.g. when the heads of state or government, operating as sovereign state representatives, conclude agreements under international law and bypass EU law, as occurred with the measures taken to stabilise the euro.<sup>18</sup>

In the end, at least for now, the societies of the member states remain the principle forum in which questions of European politics are discussed. The concept of an «Ever Closer Union of Peoples» elevates the integration of national societies to the level of a normative project. It is, however, likely that institutional developments over the last few decades have proceeded much faster than societal change, even

**16** Schorkopf, Frank, «Art. 6 EUV», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, Amend. 66 ff.

**17** Art. 48 TEU.

**18** See e.g. Bauerschmidt, Jonathan, «Der einheitliche Bankenabwicklungsmechanismus: Legalität und Legitimation einer neuartigen Konstruktion», in *Konstitutionalisierung in Zeiten globaler Krisen* (eds. Bauerschmidt, Jonathan, Fassbender, Bardo et al.), 2015, pp. 347 ff.

if they should have occurred in parallel. This is not a new problem for federations, but it can only be solved through the use of legal mechanisms to a limited extent. This is all the more the case, since the societies of the member states differ markedly in their attitudes to sovereign authority and to the European Union. Whereas for many the national level represents the decisive political realm of communication and decision-making, for others the European Union or subnational units are of greater importance. In Spain and in the United Kingdom especially, the question of the dominant political identity is highly controversial. In other countries, EU membership also legitimises public authority. The result is multiple asymmetries in the relationship of member states to the European Union.<sup>19</sup>

Decisions taken within the European Union require, as we have seen above, a double legitimacy through EU institutions and through the member states.<sup>20</sup> If member states can no longer generate democratic legitimacy, this entails a lack of legitimacy for EU law-making in its entirety. The same applies to member states' election law (in the field of EP elections) and to the transnational recognition and enforcement of decisions of one member state in other member states.<sup>21</sup> As consequence, the lack of democratic legitimacy of one member state produces a lack of legitimacy both in other member states and at the level of the European Union as a whole. In this respect, it does not matter whether the Union can or should continue to develop into a genuine democratic federal state or whether the level of integration could even be reversed. Instead, as long as the European Union takes binding decisions that affect the rights of citizens and in which the member states represented in the Council are significantly involved, and as long as the Union remains a system of mutual recognition of member state decisions, the adoption of elementary standards of legitimacy in one member state affects the entire system of the European Unions at all levels.<sup>22</sup> By saying this, we neither want to deny the controversial issue of the legitimacy of the Union itself, nor will this be irrelevant to the question we are addressing here. We will come across this issue again and again; not, however, in the form of the question of *whether* democratic deficits in member states represent a problem, but rather in dealing with the question of *how* this problem is to be solved.

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19 Möllers, Christoph, «Multi-Level Democracy», 24/3 *ratio iuris*, 2011, pp. 247–266.

20 On this duplication, see von Achenbach, Jelena, *Demokratische Gesetzgebung in der Europäischen Union*, 2014; Franzius, Claudio and Preuß, Ulrich K, *Die Zukunft der europäischen Demokratie*, 2012.

21 On this, see Ruffert, Matthias, «Rechtsquellen und Rechtsschichten des Verwaltungsrechts», in *Grundlagen des Verwaltungsrechts*, Volume I (eds. Hoffmann-Riem, Wolfgang, Schmidt-Aßmann, Eberhard and Voßkuhle, Andreas), 2nd Edition, 2012, sect. 17.

22 Lenaerts, Koen, *The Principle of Mutual Recognition in the EU's Area of Freedom, Security and Justice*. (Sir Jeremy Lever Lecture) All Souls College, University of Oxford, 30 January 2015.

### c) The distinction between democratic deficits and rule of law deficits

The European Union has a multiplicity of structural problems related to the member states, that need to be distinguished from the issue which forms the subject of this study. This is notably the case with regard to certain deficiencies in the rule of law.<sup>23</sup> We can identify systematic problems in the *application* of European law and other international standards in countries such as Bulgaria, Romania and Greece. In no small measure, these shortcomings in application have their origin in widespread systemic corruption and the weakness of independent oversight: namely, of an independent judiciary. These shortcomings mainly concern questions of compliance with fundamental rights. The failure to respect and effectively to guarantee fundamental rights of refugees in some member states has, for example, led to a partial suspension of the principle of mutual recognition: certain decisions taken in one member state may and must be reviewed by authorities in other member states, if there is a clear risk of inhumane or degrading treatment of an asylum seeker.<sup>24</sup>

Admittedly, it is difficult to draw a clear dividing line between deficient democratic structures and deficiencies in the rule of law. The two values overlap: for example, with regard to the protection of minorities. Furthermore, a systemic lack of enforcement of the law cannot be separated from the question of democratic legitimacy, but is, in fact, closely linked to it.<sup>25</sup> We will further examine this question when discussing the criteria for the protection of democracy.<sup>26</sup> Deficits in the foundations of the rule of law are always a serious problem for the Union. Nevertheless, they will not be the subject of our study in what follows. While questions regarding the rule of law are characterised by the fact that a democratically legitimised government is either unwilling or unable to organise equal application of the law, they need to be distinguished from transformations on the member state level that aim at fundamentally altering the democratic basis of legitimacy of its political order, in such a way that it can no longer be described as a democratic order. The two developments may go hand in hand with, but they must be distinguished. Only those inner-state transformations of a political order that make a change of majority impossible – such that the political order can no longer be regarded as democratic – will be examined in what follows. The European Union is poorly equipped to deal with these developments.

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23 von Bogdandy, Armin and Ioannidis, Michael, «Das systemische Defizit – Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens», 74 *ZaöRV*, 2014, pp. 283–328.

24 See ECJ, decision of 21 December 2011, joined cases C-411/10 and C-493/10, Case Reports 2011, I-13905; now also Art. 3 sect. 2 Regulation (EU) No. 604/2013 of the European Parliament and the European Council of 26 June 2013 (the so-called Dublin III Regulation); see also German Constitutional Court, decision of 15 December 2015, 2 BvR 2735/14 (*European Arrest Warrant II*).

25 Habermas, Jürgen, «Über den internen Zusammenhang von Rechtsstaat und Demokratie», in *Die Einbeziehung des Anderen: Studien zur politischen Theorie*, 1996, pp. 293 ff.

26 See below in Chap. 5, sect. 1.

## 2 Lessons from history

In many federations, disagreements over internal political structure led to major upheavals and armed conflicts. These conflicts may ultimately have strengthened the political constitution of the federal level, but the general public paid a very high price. The history of Germany, the United States and the Swiss Confederation illustrate the extremely burdensome complexity of political unification in a federal system. These historical insights also provide lessons for European integration. As a supranational federation, the EU is based on the principle of mutual trust and depends on the respect of democratic standards in all member states for its own sake.<sup>27</sup>

### The political consolidation of federations is a protracted process

The emergence of a stable democratic federation is a protracted process that takes decades. In Germany, the founding of a consolidated federation even took centuries. Starting from the beginning of the 19th century, in the aftermath of the French Revolution and the American War of Independence, the ideals of unity and freedom had a significant influence on the German national movement.<sup>28</sup> But it was only after the founding of the German Confederation in 1815, the Second Schleswig War that Prussia and Austria fought against Denmark in 1864, and the subsequent war of Prussia against the German Confederation in 1866 that the first modern German federal state was established by military means through the dissolution of the German Confederation and the founding of the North German Confederation. The hegemonic position of Prussia was a major price paid for this development and ultimately led to the founding of the German Empire.<sup>29</sup>

Similar stories can be told about many other federations. For instance, the history of the United States reminds us of how difficult it can be for even the central powers of an already consolidated federation to enforce fundamental democratic rights of freedom and equality in its federated states. From the 1830s onwards, the question of the legitimacy of slavery formed the key aspect of political conflict in national politics.<sup>30</sup> The divisions ran both within the party-political system and along the boundary between two blocks of states, so that no political force was available to moderate the conflict. The secession of some southern states from the confederation in 1860/61 and the founding of the Confederate States of America led to the American Civil War. During the course of the subsequent Reconstruction period, the states that had left the Union were reintegrated by 1877 and the central powers were

27 Closa, Carlos, Kochenov, Dimitry and Weiler, Joseph H. H., «Reinforcing Rule of Law Oversight in the European Union», EUI Working Paper, 2014/25 RSCAS, pp. 6 ff.

28 Boldt, Hans, *Deutsche Verfassungsgeschichte Volume II: Von 1806 bis zur Gegenwart*. 1990, pp. 17 ff. For an account of the events immediately preceding the founding of the Reich, see Nipperdey, Thomas, *Deutsche Geschichte 1866–1918 Volume I*, 1993, pp. 34 ff.

29 Nipperdey, Thomas, *Deutsche Geschichte 1866–1918 Volume II*, 2013, pp. 39 ff.

30 Scott v. Sandford, 60 U.S. 19 How. 393 393 (1856).

strengthened as a whole.<sup>31</sup> However, the idea of granting equal rights of political participation, as well as other rights, to the black population of the southern states was increasingly thwarted after the end of the Reconstruction era and was only achieved much later – after the Second World War.

### **Federal conflicts do not end with a political founding act**

The example of the American Civil War also leads to a second insight: formal founding moments alone are not always sufficient to pacify a federation. The colonies declared their independence during the American War of Independence (1775–1783) and organised themselves as a loose confederation in a «Continental Congress». In the context of the subsequent Constitutional Convention (1787), however, major conflicts became apparent between federalists, who advocated a strong central government, and anti-federalists, who emphasised the sovereignty of the states. This fundamental conflict in the American constitutional debate, which ultimately led to the withdrawal of the southern states from the Confederation in 1860/1861 and the American Civil War (1861–1865), continued after the Civil War – for instance, in the political criticism of the New Deal – and still continues up to the present day. Even if it does not threaten the political structure of the United States, it goes well beyond a legal discussion of the scope of jurisdiction and concerns the fundamental question of the appropriate form of federation.<sup>32</sup>

At the same time, the conflict shows that the question of the correct allocation of powers within a federal system is, in fact an old one: namely, inasmuch as the southern states called into question the supremacy of the federal constitution in the case of a conflict of norms.<sup>33</sup> Even today, the question remains the subject of a typical party-political debate, in which one party (today the Republicans, but before the New Deal, the Democrats) regard themselves as the advocates of state power and decry any form of federal intervention as overcentralizing and hence potentially undemocratic.

In Germany, the idea of a serious and persistent political conflict between the federal and the state level is uncommon. This has to do with the long history preceding the founding of the German Empire, the rapid centralisation after 1871, and the further phases of centralisation during the Weimar Republic and in Nazi Germany, which made the Federal Republic of Germany, from the very beginning, a highly unified entity, in which the states mainly exercise their political influence through the Bundesrat: hence through an institution that is itself part of the federal level.<sup>34</sup> In Switzerland, on the other hand, political tensions between liberal-Protes-

<sup>31</sup> Foner, Eric, *Reconstruction: America's unfinished revolution, 1863–1877*, 2014.

<sup>32</sup> See e.g. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 1995. Also Sullivan, Kathleen, «Comment: Dueling Sovereignties: *U.S. Term Limits, Inc. v. Thornton*», 109/1 *Harvard Law Review*, 1995, pp. 78–111.

<sup>33</sup> Calhoun, John C., «Fort Hill Address, 27th July 1831» in *Union and Liberty: The Political Philosophy of John C. Calhoun* (ed. Lence, Ross M.), 1992.

<sup>34</sup> For a significant contribution, see Hesse, Konrad, *Der unitarische Bundesstaat*, 1962.

tant cantons, which were in favour of democratisation under a central government, and Catholic-conservative cantons, which rejected this idea and came together in a Separatist League (*Sonderbund*), also led to a civil war (1847). The victory of the liberal powers led to a new Federal Constitution (1848), which linked the founding of a federal state to the establishment of a basic democratic order.<sup>35</sup> At the same time, the constitution integrated the cantons into the decision-making process on the federal level, in exchange for their giving up their sovereignty.<sup>36</sup> To this day, the cantons exercise all rights which have not been transferred to the federal level (Art. 3 of the Federal Constitution of the Swiss Confederation): such as police powers, for instance. But, just as in the United States, the question of the correct regulatory level within the federation is related to a political conflict between right and left: for or against government power as such.

Against this background, one may well ask whether the political importance of the rejection of a European Constitution in referenda in France and the Netherlands in 2005 – sometimes referred to in European political debate as a missed opportunity – has not been overestimated. The Treaty establishing a Constitution for Europe was quite similar to the Treaty of Lisbon, and political conflicts between member states, such as the United Kingdom's withdrawal from the Union, would not have been avoided had it succeeded.

### **The political consolidation of federations is accompanied by crises of modernisation**

Federal tensions are frequently the expression of conflicts between liberal groups and conservatives who wish to maintain the status quo. Political consolidation of federal systems is thus accompanied by crises of modernisation. The conflict in Switzerland, the tensions between Austria and Prussia before the founding of the German Empire, and those between the American northern and southern states all have this in common. These conflicts were also conflicts of economic modernisation, in which one part of the federation saw itself as threatened by the other part's drive towards liberalisation.

The European financial crisis represents one among many comparable constellations of the debate in the European Union. The potential for conflict between the «poorer» and the «richer» member states of the European Union had always existed, but this conflict was intensified by the introduction of the euro and clearly reached a high-point in the debt crisis. The austerity measures and stricter budgetary constraints that were introduced within the framework of the rescue packages were met with resistance, on the one hand, in the affected member states, but also, on the other, in the financially stronger eurozone countries. Since then, the crisis has been viewed through the – albeit inaccurate – prism of the distinction between «northern states» and «southern states» wrestling over the appropriate economic and financial

35 On this, see e.g. Brühl-Moser, Denise, «Der Schweizer Föderalismus: Ausgestaltung, Neugestaltung und Herausforderungen», in *Handbuch Föderalismus Volume IV, chap. 99* (ed. Härtel, Ines), 2012, pp. 697–744.

36 Lind, Wolf and Müller, Sean, *Schweizer Demokratie*, 2012, pp. 35 ff.

policy, which is reflected, for example, in the debate about the right way to deal with the Greek crisis.

This experience further illustrates the fact that the origins of political conflict in federations are to a considerable extent structural in nature. In other words, they are related to political ideals, economic interests and social differences, and hence they can only to a limited extent be resolved by way of institutional measures. The correct question, therefore, is not so much how to recapture member states moving away from democratic standards, but rather what forms are available on the European level through which the conflicts could be constructively resolved. The introduction of the euro shows that a logic of modernisation that is too rapid and that is perceived as compulsive may lead to setbacks: namely, in the form of re-nationalisation. At best, these are necessary political detours in the process of European integration process. At worst, they are harbingers of the federation's collapse.<sup>37</sup>

### **Heterogeneity and size of federations are not necessarily factors of its instability**

Since early modern times, the thesis that republics or democracies can only exist in small, compact political units – possibly, only in city states – has been a widespread in European political theory.<sup>38</sup> This thesis has not been empirically confirmed. Numerous, rather mixed, historical examples show that neither size nor social heterogeneity necessarily present structural obstacles to the building of a democratic federation. This can be seen in the development of the United States.

Social, religious or ethnic homogeneity are not only factors that promote democratic development. They can also hamper it, by confronting the formalised, democratic alteration of majority and minority with a closed informal structure of authority, through which formally democratic structures are constantly staffed with the same elites.<sup>39</sup> This is important for our topic, since while, on the one hand, there may be structural reasons for the breach of democratic standards, it should not, on the other hand, be understood as an inevitable consequence of the size and complexity of the project of European integration.

### **Federations develop from horizontal structures**

The establishment of federations is generally not the result of a single political decision to construct an overarching political entity. In fact, federations often begin with a form of horizontal social integration, which is made possible and accompanied by analogous legal structures. The rights to enter into another territory, to do business there, and, under certain circumstances, to stay there belong to the core institutional

<sup>37</sup> See e.g. Scharpf, Fritz W., «Das Dilemma der supranationalen Demokratie in Europa», 43/1 *Leviathan*, 2015, pp. 11-28.

<sup>38</sup> See Levy, Jacob T., «Beyond Publius: Montesquieu, Liberal Republicanism, and the Small-Republic Thesis», 27/1 *History of Political Thought*, 2006, pp. 50-90.

<sup>39</sup> On India, see Khilnani, Sunil, *The Idea of India*, 1997, pp. 162 ff.

inventory of emerging federations.<sup>40</sup> These horizontal or even transnational interdependencies of legal systems, which both enable and follow the integration of social structures, make it necessary also to develop vertical institutional structures, which support these changes through regulatory measures, standardise as far as possible, and prevent externalities.<sup>41</sup> The emergence of many, if not all, federations can be described in this way, and this is certainly true for European integration.

This is of importance for political conflicts of the kind in which we are interested here, because these also involve an imbalance between horizontal and vertical integration. The synchronicity of enlargement and consolidation, which dramatically changed the European Union after 1989, meant that new member states had much less time to adapt to a legal system that was already overwhelmingly vertical in its orientation. At the same time, the old member states were trying, in a reciprocal process, to intertwine themselves legally with new member states that had different levels of institutional and social development.<sup>42</sup>

### 3 Types of solutions

#### a) Preliminary considerations: the limits of institutional engineering in the European Union of today

Before looking more closely at the problem of the shifting of democratic political orders into authoritarian regimes, we will briefly take a look at the kinds of procedures that are available to address such developments. We will distinguish between political, administrative and legal solutions. It will be apparent that many of these approaches are not new, but rather have been discussed or even tested precisely in the context of the European Union. Given the current state of crisis of European integration, it has to be noted that there is not an institutional solution to every political problem. Such a perception has been widespread at least since the emergence of governance research.<sup>43</sup> The European Commission, in particular, has contributed to it both practically and theoretically. While the European Parliament has at least occasionally served as a forum for political debate, in which the crises could be discussed, the Commission has conveyed the impression that the problematic developments in some member states can be solved without political conflicts over distribution or, in other words, without political costs.<sup>44</sup> On the other hand, we should keep in

40 For Germany and the European Union, see Schönberger, Christoph, *Unionsbürger*, 2005, pp. 110 ff, pp. 315 ff.

41 Möllers, Christoph, *Gewaltgliederung*, 2005, chap. 6.

42 Krastev, Ivan, *Europadämmerung*, 2017.

43 For a critique, see Möllers, Christoph, «European Governance: Meaning and Value of a Concept», 43/2 *CMLRev*, pp. 313–336.

44 On the problematic self-image of the Commission in this respect, see Weiler, Joseph H. H., «The Commission as euro-sceptic: A task-oriented Commission for a project-based Union», in *Mountain or Molehill? A critical appraisal of the Commission White Paper on Governance* (eds. Joerges, Christian et al.), 6/01 *Jean Monnet Working Paper*, 2001, pp. 207 ff.

mind the historical developments and experiences outlined above. The political integration of federations has often dragged on for centuries and has almost never taken place without dramatic political conflicts. Moreover, the European Union has experienced rapid institutional change and displayed a relatively pronounced willingness to experiment with the introduction of institutional instruments. Since the Single European Act of 1986, the European Union has changed dramatically. Despite the currently widespread impression of institutional sluggishness, it could be claimed that institutional developments have attained a speed with which the societies of the member states have not been able to cope.

For this reason, as outlined above, we doubt that the introduction of new institutional structures would really be capable of «solving» the problem. Of course, institutional solutions are not the only possible solutions and not all institutional solutions have to involve the state or supranational bodies. Societies can also change, and institutional interventions can contribute to such change. On the whole, however, we should keep in mind how unlikely it is that a possibly deep-seated political or social problem can simply be organised away. It is only subject to this reservation that we will now turn to types of institutional solutions.

## b) Legal approaches

Many consolidated federations adopt legal solutions for jurisdictional conflicts between constituent states and the federal level: namely, by introducing institutions of judicial review. Historically, federal conflicts were an important reason for the introduction of oversight by constitutional courts.<sup>45</sup> Of course, this is not to say that a court is always a suitable place to address such fundamental federal problems in a satisfactory manner. There are several reasons why this expectation needs to be relativized.

- *Firstly*, legal institutional measures require a high level of political consolidation at the higher level. It is only such a high level of consolidation that enables binding decisions. However, this requires a high level of political legitimacy not only of the court, but also of the sovereign level to which the court is assigned. In other words, if there is agreement that the resolution of the conflict is a legal matter, the conflict is essentially already resolved.
- *Secondly*, examples from consolidated federations show that courts are not always able to resolve these fundamental conflicts.<sup>46</sup> The relevant historical cases may not all correspond directly to undemocratic structures in constituent states,

<sup>45</sup> Beaud, Olivier, «De quelques particularités de la justice constitutionnelle dans un système fédéral», in *La notion de la «justice constitutionnelle»* (eds. Jouanjan, Olivier, Maulin, Eric and Wachsman, Patrick), 2005, pp. 49 ff.

<sup>46</sup> That such a conflict resolution does not always have to be the case, is seen in the following decision of general principle of the U.S. Supreme Court: *Marbury v. Madison*, 5 U.S. 137 (1803) and in ECJ, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*, Case Reports 1963/3; judgment of 15 July 1964, case 6/64, *Costa/E.N.E.L.*, Case Reports 1964/1251.

but they do concern similar problems: namely, one member state's claim to leave the federation. The examples of Catalonia and Quebec illustrate how different the consequences of judicial interventions can be in such a scenario. While the decisions of the Supreme Court of Canada have contained and restricted the conflict,<sup>47</sup> those of the Spanish Tribunal Constitucional are regarded as the cause of an escalation.<sup>48</sup> Furthermore, in both cases, the courts had to rule on the claims without an explicit constitutional basis. A similar situation exists at the level of the European Union, since the Treaties' provisions on the EU's fundamental values and on the procedures to safeguard them are not sufficiently differentiated. At the same time, the institutional impact of such courts is mainly felt in a politically sensitive area – and hence on the border between politics and law. This, however, bears risks, as illustrated by the disastrous role of the US Supreme Court in the outbreak of the American Civil War.<sup>49</sup>

Thirdly, and finally, we will see how difficult it is to develop clear legal criteria for judicial review of de-democratising tendencies. Once democratic equality and participation, as well as the protection of potential future majorities, are no longer guaranteed as democratic core tenets of the EU constitutional order, the system of a member state is, in our view, transformed into an authoritarian system. As we shall see, however, such developments proceed incrementally and often also involve a conscious attempt to bypass existing barriers for safeguarding democracy. The shift from democracy to an authoritarian legal system is a creeping, gradual process made up of the sum of many small changes, which regularly evade a judicial review that is mainly designed to respond to individual cases.

### c) Functional-administrative approaches

Functional-administrative approaches address the problem of safeguarding democracy by way of a strict, perhaps even quantified, system of criteria. Practical implementation of measures derived from these criteria is left to an independent, de-politicised authority. In this context, implementation frequently consists more of offering support than overcoming political resistance. One example of the use of such technocratic tools is the rule-of-law-based support offered by the European Commission to certain member states. In providing such support, the European

47 Supreme Court of Canada, judgment of 20 August 1998; on this, see Leslie, Peter, «The Supreme Court Sets Rules for the Secession of Quebec», 29/2 *The Journal of Federalism*, 1999, pp. 135–151.

48 Tribunal Constitucional, judgment of 28 June 2010, Rs. STC 31/2010; on this, see Ferreres Comella, Victor, «The Catalan Secessionist Movement and Europe – Remarks on the Venice Commission's Opinion 827/2015», *Verfassungsblog*, 22 March 2017, [www.verfassungsblog.de/the-catalan-secessionist-movement-and-europe-remarks-on-the-venice-commissions-opinion-8272015](http://www.verfassungsblog.de/the-catalan-secessionist-movement-and-europe-remarks-on-the-venice-commissions-opinion-8272015), accessed 26 April 2018.

49 *Scott v. Sandford*, 60 U.S. 19 How. 393 393 (1856); on this, see Ackerman, Bruce, *We the People vol. 1: Foundations*, 1991, pp. 63 ff.

Commission decides on its own to provide advice and other resources to particular states, in order to combat corruption and strengthen an independent judiciary. These instruments are accompanied by formalised reporting in a manner typical of international organisations. Another example is the European Union Agency for Fundamental Rights, which was founded in 2007.<sup>50</sup> The agency is an expert commission dealing with questions of fundamental rights in the European Union and its member states in the context of the implementation of EU law.<sup>51</sup> Its function is to provide both the European Union itself and its member states with professional expertise – for example, through the production of advisory opinions and studies or the development of standards and methods of comparison – in order to support their full respect of fundamental rights when they introduce measures or commit themselves to actions within their respective areas of authority.<sup>52</sup>

Apart from the question as to how successful these procedures have been so far, functional-administrative approaches are better suited to some scenarios than to others. They are applicable to situations where the presence of a systemic problem is recognised by the member state involved. This is because only such a consensus between the European Union and the member state permits the establishment of technical solutions and their being assigned to administrative actors. If the very existence of a problem is a matter of controversy, and if the European level warns of a domestic deficiency, while the member state invokes its democratic mandate, the problem unavoidably turns into a political conflict. There are, however, no administrative bodies with an adequate political mandate to deal with such conflict. Thus, this type of solution rapidly reaches its limits. Consequently, at least in a supporting role, political solutions are indispensable.

#### d) Political Approaches

Regarding political solutions, the choice of the countermeasures to be taken is made by political bodies. This approach may have the advantage of openly addressing the political background of the conflict. But this does not alter the fact that it remains a political conflict, which threatens to overextend the existing institutional set up and boundaries of the European community.

Such political procedures are well known in comparative constitutional law. Under the German Basic Law, for example, the enforcement of federal law by the federal government against a *Land* (federated state) depends on the agreement of

<sup>50</sup> On its oversight of fundamental rights, see von Bogdandy, Armin, «Grundrechtsschutz durch die Europäische Grundrechteagentur», in *Handbuch der Grundrechte in Deutschland und Europa, Volume VI/1, Europäische Grundrechte I* (eds. Merten, Detlef and Papier, Hans Jürgen), 2010, pp. 1241–1268; von Bogdandy, Armin and von Bernstorff, Jochen, «Die Europäische Agentur für Grundrechte in der europäischen Menschenrechtsarchitektur und ihre Fortbildung durch den Vertrag von Lissabon», 2010/2 *EuR*, 2010, pp. 141 ff.

<sup>51</sup> Art. 3 sect. 3 Council Regulation (EC) No. 168/2007 of 15 February 2007, Establishing a European Agency for Fundamental Rights.

<sup>52</sup> Art. 2 and Art. 4 Council Regulation (EC) No. 168/2007.

the *Bundesrat*, representing the *Länder* (Art. 37, para. 1, Basic Law).<sup>53</sup> The procedure in accordance with Art. 7 TEU, which we shall examine more closely, is also a political procedure. It requires the consensus of the other member states, and – as a last resort – provides for the suspension of all political participation rights of the member state concerned. In other federal conflicts, even military measures have formed part of the political «tool kit»: for instance, in the case of the «German-Prussian» War that preceded the founding of the North German Confederation<sup>54</sup> or in that of the American Civil War, which, on the view of the northern states, was necessary in order to uphold the supremacy of the federal constitution.<sup>55</sup>

When assessing possible political solutions, it is, however, necessary to note the dialectic of these historical experiences. If we do not accept the military enforcement of political rules as a legitimate means – and there are many arguments in favour of this view – then the enforcement of federal rules simply reaches certain limits that do not exist in the case of state law that is being enforced against individuals or groups of citizens. According to the continental European understanding, the notion of the «rule of law» also includes the possibility of compulsory enforcement of state norms.<sup>56</sup> If this option is not available, because the use of force would not be limited to the enforcement of individual decisions, but rather amount to a full military conflict, the last resort in a conflict of this nature either lies in the exclusion of the federated state in question or in the toleration of its deviant political practice. But neither of these options is available in the case of the European Union. Unlike the Council of Europe, the European Union does not have the right to exclude a state for serious violations of its common principles.<sup>57</sup> Nor is tolerating disregard for common political rules an option, since this would call into question the validity of these rules for the entire community. Given the level of integration of the European Union, developments in its member states are no longer merely questions of national sovereignty, but rather they have an effect on the Union as a whole. It is therefore unacceptable to tolerate political practices that deviate from the fundamental consensus

53 For an early work on federal execution, see Triepel, Heinrich, *Die Reichsaufsicht: Untersuchungen zum Staatsrecht des Deutschen Reiches*. 1917, pp. 665 ff. See also Shirvani, Foroud, «Die Bundes- und Reichsexekution in der neueren Deutschen Verfassungsgeschichte», 50/1 *Der Staat*, 2011, pp. 102–121.

54 For a concise summary of the judicial background, see Boldt, Hans, *Deutsche Verfassungsgeschichte Volume II: Von 1806 bis zur Gegenwart*, 1990, pp. 164 ff.

55 Amar, Akhil R., *America's Constitution: a biography*, 2005, p. 355.

56 Schmidt-Aßmann, Eberhard, «Der Rechtsstaat», in *Handbuch des Staatsrechts der Bundesrepublik Deutschland, Volume II* (eds. Isensee, Josef and Kirchhof, Paul), 3rd Edition, 2004, ref. 71; Heuschling, Luc, *État de droit, rule of law, Rechtsstaat*, 2002; See also the German Constitutional Court on the relationship between the state's monopoly of force and fundamental basic rights in a liberal democracy BVerfG, judgment of 17 January 2017, 2 BvB 1/13 [*NPD-Verbotsverfahren (Banning of the NPD)*], ref. 547.

57 Art. 8 of the Statute of the Council of Europe of 5 May 1949 states: «Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.»

of the Union and the other member states. This leads to a general dilemma: the loss of a member state's democratic form of government is the expression of a political conflict for which no simple solution exists.

# Safeguarding Democracy in the European Union: An overview

The provisions of the EU Treaties concerning the internal organisation of the member states were not included in the first Treaties of Rome. They only found their way into the text of the Treaties over time and reflect a certain level of European integration.<sup>58</sup> In the Treaty of Maastricht<sup>59</sup> of 1992, the European Union finally went beyond the ambition of creating a single market. The treaty institutionalised political cooperation in foreign and security policy, as well as in the fields of justice and home affairs, and combined these areas of cooperation under the umbrella of the newly founded European Union. By virtue of a comprehensive transfer of competencies, the Union developed into a political community that went far beyond a liberalised internal market. The question of safeguarding democracy, however, seems initially to have been regarded rather as a symbolic problem. Since then, beginning with the crisis in Austria in the year 2000, there have been various problematic cases that raise the question of how to safeguard democratic structures in member states.

## 1 Treaty amendments since the Treaty of Maastricht

If early European integration is simply regarded as the combination of a foreign policy peace project and a domestic regulatory project, then it is hardly surprising that questions of safeguarding democracy at the domestic and at the European level were basically ignored. Domestic policies largely remained a domestic matter, and questions of legitimacy at the European level were resolved in accordance with the model of traditional international organisations. According to this model, member states hold significant control over the actions of the international organisation, such that the indirect democratic legitimacy conveyed by the member states suffices. But from the very beginning, the functions of the Higher Authority, which ultimately became the European Commission, and the jurisdiction of the Court of Justice of the European Union went beyond what was known from the secretariats and tribunals of international organisations. Moreover, the competencies of both bodies expanded: the Parliamentary Assembly developed into a Parliament and the regulatory reach

<sup>58</sup> Calliess, Christian, Art. 2 TEU, in *EUV/AEUV* (eds. Calliess, Christian and Ruffert, Matthias), 5th Edition, 2016, para. 31 ff.

<sup>59</sup> Treaty on the European Union, 2 February 1992.

of the community increasingly went beyond mere market liberalisation. Finally, the admission of more and more member states led to increasing institutional variety and social heterogeneity.

The 1992 Treaty of Maastricht once again accelerated these tendencies. By virtue of the creation of the «three pillar» structure comprising the European Community, the Common Foreign and Security Policy, and Police and Judicial Cooperation in Criminal Matters, and by virtue of the assumption of further regulatory powers and the creation of a common market and an economic and monetary union among several member states,<sup>60</sup> the question of the legitimacy of what had become the European Union became particularly urgent.<sup>61</sup> The problem was addressed at various levels: many member states, including Germany, adjusted the constitutional bases for their cooperation in the European Union.<sup>62</sup> The European Parliament became more important in the legislative process. With the increasing number of member states (after the accession of Denmark, the United Kingdom, and Ireland in 1973, Greece in 1981, Spain and Portugal in 1986, and the accession of the new *Bundesländer* to the Federal Republic of Germany) and the intensified calls for political integration, it became increasingly urgent to define and put in place common constitutional foundations of the member states. These calls became even more pressing in light of the future accession of Eastern European states after 1989. The member states thus focused on the democratic and legitimacy deficits of the newly founded European Union. These deficits were to be offset by reference to certain common «values».<sup>63</sup> Thus, Art. F para. 1 of the Treaty of Maastricht for the first time laid down that the European Union respected the national identities of its member states, whose systems of government are founded on the principles of democracy. The intention of these measures was also to improve and benefit the legitimacy of the EU level as such.

In preparing the enlargement of the Union to the east, member states and the institutions of the Union for the first time developed explicit criteria for accession to the European Union,<sup>64</sup> which eventually became the so-called «Copenhagen Criteria».<sup>65</sup> At the Copenhagen Summit in June 1993, the European Council agreed upon these criteria as guidelines for accession negotiations. They consist of four points. Firstly, there is the political criterion of the «stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and the protection

**60** Graig, Paul and de Búrca, Gráinne, *EU Law*, 6th Edition, 2015, pp. 11 ff.

**61** For an example of the debate in Germany, see Huber, Peter M., «Maastricht – ein Staatsstreich?», in *Jenaer Schriften zum Recht Volume I*, 1993.

**62** See e.g. Mayer, Franz C., «Verfassungsgerichtsbarkeit». in *Europäisches Verfassungsrecht* (eds. Bast, Jürgen and von Bogdandy, Armin), 2nd Edition, 2009, pp. 559–610 (esp. 572 ff).

**63** Hilf, Meinhard and Schorkopf, Frank, «Art. 2 TEU», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 1 ff.

**64** But see previous remarks of the Commission directed to an authoritarian Spain in ECJ judgment of 22 November 1978, Case 93/78, *Mattheus/Doego*, Case Reports I 1978, 2203.

**65** For a summary of previous preliminary considerations, see Hillion, Christophe, «The Copenhagen Criteria and their Progeny», in *EU enlargement* (ed. Hillion, Christophe), 2007, pp. 2 ff.

of minorities». In addition, candidates for accession have to fulfil economic criteria and demonstrate the capacity to implement European law (the so-called *acquis communautaire* criterion). Finally, the European Union itself must have the capacity to incorporate new members.<sup>66</sup> With the goal of bringing about an ever closer union among the peoples of Europe, which is set out in Art. 1 para. 2 TEU, a certain political homogeneity is required among the member states.<sup>67</sup> With the Treaty of Amsterdam,<sup>68</sup> in 1997, these criteria were partially integrated into primary law, i.e. into the EU Treaties. According to them, 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. Thereby, the Copenhagen criteria were constitutionalised and became binding not only on the member states, but also on the European Union itself. At the same time, the criteria became accession criteria, i.e. essential conditions that all candidate countries must meet before gaining accession to the European Union. According to Art. 49 TEU, candidate countries must comply with the principles laid down in Art. 2 TEU. The application of these criteria is left to the discretion of the EU institutions. However, the political criteria, in particular, have proven to be difficult to assess based on legal standards. Furthermore, they are subject to highly fluctuating political tides: for instance, with regard to the pluralism that political parties and the media in member states are expected to demonstrate.<sup>69</sup>

In light of the continued success of communist parties in several member states and due to fears that some of the future members – in particular, the Eastern European states, as well as Malta and Cyprus – would not adhere to the common values, it became clear that effective mechanisms for reacting to developments in different member states were lacking. Therefore, a two-step sanctions procedure was integrated into Art. F of the EU Treaty of Amsterdam. In a first step, the Council, meeting in the composition of the heads of state or government, would determine unanimously the existence of a serious and persistent breach of these values by a member state. In a second step, the Council, acting by qualified majority, would decide to suspend certain rights of the member state concerned.

## 2 The Crisis in Austria

Starting in the 1980s, right-wing populist and right-wing extremist parties became increasingly popular in various member states of the European Union: initially, in the Netherlands, in Belgium, and in France; then later also in Denmark, Italy,

<sup>66</sup> European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, SN 180/1/93, p. 13.

<sup>67</sup> Ohler, Christoph, «Art. 49 TEU», in *Das Recht der Europäischen Union: EUV/AEUV, Supplement 61* (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 22

<sup>68</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed 2 October 1997.

<sup>69</sup> Ohler, Christoph, «Art. 49 TEU», in *Das Recht der Europäischen Union: EUV/AEUV, Supplement 61* (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 18.

Sweden, Norway, Austria, Switzerland, and in Germany. In Belgium, Italy, France and Austria, in particular, they established themselves as permanent fixtures in the political landscape<sup>70</sup> and formed part of the government: for example, in the coalition between the Alleanza Nazionale and the Lega Nord under Berlusconi in Italy in 1994.<sup>71</sup> But it was the crisis in Austria that induced the member states of the European Union to question the formation of a government resulting from democratic elections for the very first time.

It was the statements of the Chairman of the Austrian Freedom Party (FPÖ) Jörg Haider, who had praised the German Reich and the Waffen-SS, that led to particular concerns in other member states about a potential coalition of nationalist groups in Europe.<sup>72</sup> In the elections to the national parliament in October 1999, the FPÖ became the country's second largest party with around a quarter of the votes. After negotiations to form a coalition between all the other parties had failed, a coalition between the FPÖ and the Austrian Peoples Party (ÖVP) became a more and more realistic scenario, and therefore the other member states of the European Union saw a need for immediate action. Although the Treaty of Amsterdam (1997) already provided a two-step sanctioning mechanism, in case a member states departed from the fundamental values of the Union,<sup>73</sup> the Portuguese EU Council Presidency did not activate this mechanism. Instead, in January 2000, and on behalf of the other thirteen governments, it threatened to impose sanctions against Austria in the event of the participation of the FPÖ in the government. Nevertheless, the ÖVP and FPÖ signed a coalition agreement in February 2000. The Portuguese Council Presidency then published a statement announcing the entry into force of sanctions, which were also adopted by some non-EU states. Even before the violation of fundamental European values had been identified in a sanction procedure, Vienna was increasingly isolated, bilateral relations on a political level were put on hold, Austrian candidates no longer received support in the international arena, and diplomats were only received on a technical level.<sup>74</sup>

In Austria, these steps were regarded as unjustified interference into domestic affairs. In response, Haider announced his resignation as FPÖ leader in February 2000. But he remained active as a regional politician and in the steering committee of the coalition. The Austrian government adopted an action plan intended to dissolve the political tensions and, in particular, to protect national interests. At the intergovernmental conference in June 2000, it submitted a proposal that Art. 7 TEU (formerly Art. F) should be supplemented by an early warning mechanism.<sup>75</sup>

**70** Schorkopf, Frank, *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich*, 2002, pp. 6 ff.

**71** The coalition was renewed in 2001, but due to the negative experiences in the Austrian case, the member states were deterred from taking further measures.

**72** Schorkopf, Frank, *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich*, 2002, p. 10 ff.

**73** For a full explanation of the process of Art. 7 TEU, see below in chap. III, sect. 3.

**74** Schorkopf, Frank, *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich*, 2002, pp. 28 ff.

**75** Conference of the Representatives of the Governments of the Member States, 6 September 2000, CONFER 4748/00.

The other member states had increasingly to face the fact that Austria's isolation stood legally on shaky ground<sup>76</sup> and was proving to be politically counterproductive, since Haider's popularity was growing. Towards the end of the Portuguese Council Presidency, the parties aimed to resolve the conflict. They announced that the sanctions against Austria were to continue unchanged; but they also requested that the President of the European Court of Human Rights, Luzius Wildhaber, appoint a three-member panel of «wise men», who were to evaluate the legal situation in Austria and contribute to finding a resolution of the conflict. Wildhaber announced that Austria's consent to the proposal was required. He obtained the agreement of the Austrian Chancellor, Wolfgang Schüssel, to cooperate with the expert panel.<sup>77</sup> The panel was given a mandate of assess the Austrian government's commitment to common European values and to the rights of minorities, refugees and immigrants, as well as to review the development and political nature of the FPÖ.<sup>78</sup> In an *ad hoc* procedure, Wildhaber appointed a three-member expert panel in July, composed of the German international law professor Jochen A. Frowein, the former Finnish President Martti Ahtisaari, and the former Spanish Foreign Minister Marcelino Oreja. In accordance with their mandate, a series of discussions was held with, among others, the Federal President and the Federal Chancellor of Austria, several Ministers of State, each of the political parties represented in the Austrian Parliament, trade unions, various NGOs, and representatives of the FPÖ.<sup>79</sup> The «wise men» submitted their report on the basis of these discussions and written submissions. This report concluded that although the Austrian government did uphold European values, the FPÖ was to be characterised as a «right wing populist party with radical elements».<sup>80</sup> But it also concluded that the measures taken by the fourteen member states were counterproductive, if they were to continue, and that they should, therefore, be terminated.<sup>81</sup> After the submission of the report in September 2000, the French EU Council Presidency issued a joint statement on behalf of the fourteen. According to this statement, the measures against Austria had been useful and would, therefore, be suspended, although the nature of the FPÖ and the further evolution of the situation remained uncertain and continued to be cause for serious concern. Reflections

76 See e.g. Hummer, Waldemar and Obwexer, Walter, «Österreich unter «EU-Kuratel» – Die EU als Wertegemeinschaft: vom völkerrechtlichen Interventionsverbot zum gemeinschaftsrechtlichen Interventionsverbot», *Europa-Blätter*, 2000, pp. 52 ff (Part 1), 93 ff (Part 2); «Die Wahrung der «Verfassungsgrundsätze» der EU – Rechtsfragen der «EU-Sanktionen» gegen Österreich», *EuZW*, 2000, pp. 485 ff; Schorkopf, Frank, «Verletzt Österreich die Homogenität in der Europäischen Union? – Zur Zulässigkeit der «bilateralen» Sanktionen gegen Österreich», *DVBl*, 2000, pp. 1036 ff.

77 Hummer, Waldemar and Obwexer, Walter, «Die Wahrung der «Verfassungsgrundsätze» der EU – Rechtsfragen der «EU-Sanktionen» gegen Österreich», *EuZW*, 2000, pp. 485 ff.

78 *Ibid.*, p. 496.

79 Ahtisaari, Martti, Frowein, Jochen and Oreja, Marcelino, «Österreich-Bericht für die 14 Mitgliedstaaten der Europäischen Union», *EuGRZ*, 2000, p. 405.

80 *Ibid.*, p. 414.

81 *Ibid.*, p. 415.

on developing an early warning system for similar situations in the future were, however, to be continued at the European level.<sup>82</sup>

Following the issuance of the statement, political relations between Austria and the other member states returned to normal. However, the conflict left its mark. On the one hand, it made clear that even after the Treaty of Maastricht, The EU had no adequate mechanism at its disposal to monitor developments in member states after their accession. On the other hand, the Austrian case had a lasting impact on the political landscape. In no small measure due to the feeling among the population that the European Union was unjustifiably interfering in domestic matters, the FPÖ was able to establish itself permanently as a party able to compete with both of the traditional major parties, the SPÖ and the ÖVP.

Overall, the bilateral measures of the fourteen proved to be counterproductive. Although the programme of the FPÖ of that time can be judged as contrary to the values of Art. 2 TEU, it is undeniable that, despite the participation of the FPÖ in the government, the Republic of Austria did not slip into an authoritarian system and that such an eventuality never really appeared likely. On the one hand, the measures of the other member states stood on shaky legal ground, and, on the other, they had been adopted too early. Austria was isolated, without applying the existing reaction mechanisms, in response to a new democratic government that was unwelcome by the other member states and even before this government had taken any domestic measures.

### 3 The procedure of Article 7 TEU

A formal sanctioning mechanism was set up for the first time, as we have seen, in the Treaty of Amsterdam in 1997. The former Art. 7 TEU procedure was a two-step procedure, with the first step being the recognition of the existence of a breach of common European values and the second step a sanctions procedure. The conflict over Austria had, however, made clear that other mechanisms were necessary at the level of the European Union, in order to enable regular monitoring of developments in member states after their accession to the EU. Both the «Wise Men» and the Austrian Government therefore demanded the introduction of measures at a preliminary stage, before the use of (bilateral) sanctions, as occurred in the Austrian case. The Treaty of Nice (2001)<sup>83</sup> introduced such a preliminary stage as a further procedural step in its new Art. 7(1) TEU.<sup>84</sup> Since that time, this provision also allows measures to be taken by the European Union in situations in which there is a clear risk of a serious breach by a member state of the values referred to in Article 2 TEU.

<sup>82</sup> «Französische Präsidentschaft der Europäischen Union», *EuGRZ*, 2000, p. 416.

<sup>83</sup> The Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed 26 February 2001.

<sup>84</sup> Becker, Ulrich, «Art. 7 TEU», in *EU-Kommentar* (ed. Schwarze, Jürgen), 3rd Edition, 2012, para. 1.

## a) The functioning of the procedure

Art. 7 TEU serves to preserve a certain degree of normative homogeneity within the European Union and is meant to prevent the deviation of one or more member states from its fundamental values.<sup>85</sup> By now, the procedure consists of three steps, each of which presupposes a threat to or violation of the fundamental values referred to in Art. 2 TEU (formerly Art. F, formerly Art. 6). Alongside the respect for human dignity, freedom, equality, and the protection of human and minority rights, these also include democracy and the rule of law. Per the discussion in the academic literature, these fundamental principles are considered to have been violated when they are systematically ignored over an extended period of time:<sup>86</sup> for example, if actions of a member state have been found to be unlawful by international courts on repeated occasions or if international bodies have repeatedly criticised domestic developments. Art. 7 TEU aims to prevent the legal systems of member states from abandoning the principles of Art. 2 TEU. Therefore, individual cases are not supposed to be covered by the procedure. These can, however, still be subject to an infringement procedure under Art. 258 ff. TFEU<sup>87</sup> or under the preliminary ruling procedure per Art. 267 TFEU, albeit only on the previously mentioned condition that these actions fall within the scope of EU law. For example, a violation of fundamental Union rights, as granted in the EU Treaties and the Charter of Fundamental Rights, presupposes that a member state is implementing EU law (Art. 51 EU Charter of Fundamental Rights). However, due to its systemic perspective, Art. 7 TEU is the only provision within the EU Treaties that applies to all areas of member state activities, including those that concern their own sole competencies.<sup>88</sup>

In this respect, the Treaties of the Union go beyond their scope of application. At the same time, the procedure of Art. 7 TEU, according to Art. 19 TEU and

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**85** Schorkopf, Frank, «Art. 7 TEU», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 11; for an extensive analysis, see Kochenov, Dimitry, «Busting the myths nuclear: A commentary on Article 7 TEU», 2017/10 *EUI Working Paper*.

**86** Schmahl, Stefanie, «Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett», *EuR*, 2002, p. 822; Schorkopf, Frank, «Art. 7 TEU», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 31 ff; Ruffert, Matthias, «Art. 7 TEU», in *EUV/AEUV* (eds. Calliess, Christian and Ruffert, Matthias), 5th Edition, 2016, para. 5; Besselink, Leonard F.M., «The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives», in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (eds. Jakab, Andras and Kochenov, Dimitry), 2016, pp. 128 ff.

**87** On the proposal of a process in the event of systematic breaches of the Treaties, see below in chap. IV, sect. 1. a).

**88** Ruffert, Matthias, «Art. 7 TEU», in *EUV/AEUV* (eds. Calliess, Christian and Ruffert, Matthias), 5th Edition, 2016, para. 4; Schmahl, Stefanie, «Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett», *EuR*, 2000, p. 822; von Bogdandy, Armin and Ioannidis, Michael, «Das systemische Defizit – Merkmale, Instrumente und Probleme am Beispiel der Rechtsstaatlichkeit und des neuen Rechtsstaatlichkeitsaufsichtsverfahrens», 74 *ZaöRV*, 2014, p. 292.

in conjunction with Art. 269 TFEU, is only justiciable in its procedural component. Therefore, the European Court of Justice can only examine whether the formal requirements for the initiation of the procedure have been fulfilled: for example, whether the decision has been made with the necessary majority or whether, before making a determination, the Council has heard the member state in question. In contrast, the Court cannot examine whether the material requirements of Art. 7 TEU are met: hence, it cannot assess whether there ever was or continues to be an actual risk of a serious breach by a member state of the values referred to in Art. 2 TEU. This political, substantive monitoring of the European «community of values» is not justiciable.<sup>89</sup>

## **b) A clear risk of a serious breach**

In the first step of the procedure, the Council of Ministers, acting by a majority of four-fifths of its members<sup>90</sup> and after obtaining the consent of the European Parliament<sup>91</sup>, may determine that there is a clear risk of a serious breach by a member state of the values referred to in Article 2 TEU [Art. 7 (1) TEU]. It can then make recommendations to that member state. The procedure can be triggered on a reasoned proposal by one third of the member states<sup>92</sup>, the European Parliament or the European Commission. The proposal needs to be justified and must take into account the factual circumstances that gave rise to the risk of the breach of values. The proposal, however, does not necessarily lead to a determination of the existence of a clear risk by the Council of Ministers. Instead, the Council of Ministers is merely required to address the initiative. The decision itself is subject to the Council's own risk assessment and to its political discretion. For a positive determination to be made, there should, however, be no doubt that an unchanged situation in the member state would lead in the near future to a breach of the values referred to in Art. 2 TEU.<sup>93</sup> The member state concerned shall be heard before any determination is made [Art. 7 (1) TEU]. This determination by the Council of Ministers and its recommendations, however, do not trigger operative consequences. They are not binding and – as part

<sup>89</sup> Schorkopf, Frank, «Art. 7 TEU», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 50; Schmahl, Stefanie, «Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett», *EuR*, 2000, p. 828.

<sup>90</sup> However, the representative of the member state concerned shall not be entitled to vote and not be included in the calculation of the four fifths of the member states (Art. 7 sect. 5 TEU together with Art. 354 sect. 1 TFEU).

<sup>91</sup> The assent of the European Parliament must be given by a qualified majority. It requires a two-thirds majority of the casted votes, representing a majority of the component Members of Parliament. (Art. 7 sect. 5 TEU together with Art. 354 sect. 4 TFEU).

<sup>92</sup> The member state concerned is not included in the calculation of the one third (Art. 7 sect. 5 TEU together with Art. 354 sect. 1 TFEU).

<sup>93</sup> Becker, Ulrich, «Art. 7 TEU», in *EU-Kommentar* (ed. Schwarze, Jürgen), 3rd Edition, 2012, para. 4 f.; Pechstein, Matthias, «Art. 7 TEU», in *EUV/AEUV* (ed. Streinz, Rudolf), 2nd Edition, 2012, para. 7; Ruffert, Matthias, «Art. 7 TEU», in *EUV/AEUV* (eds. Calliess, Christian and Ruffert, Matthias), 5th Edition, 2016, para. 8 ff.

of an early warning mechanism – should rather be seen as a further diplomatic channel of the European Union intended to persuade the member state to remedy the situation giving rise to the infringement.<sup>94</sup>

### c) Serious and persistent breach

Art. 7(2) and (3) TEU introduce the second and third steps of the sanction procedure against a member state. A determination of a clear risk of a serious breach in accordance with Art. 7(1) does not need to precede their initiation. Either one third of the member states<sup>95</sup> or the European Commission may trigger Art. 7(2) TEU. The European Council, meeting in the composition of the heads of state or government, the President of the European Council and the President of the Commission [Art. 15(2) TEU], may determine the *existence* of a serious and persistent breach by a member state of the values referred to in Art. 2 TEU. The European Council acts by unanimity and after obtaining the consent of the European Parliament.<sup>96</sup> Although the vote of the representative of the member state concerned is not counted, the requirement for unanimity has up to now represented the greatest obstacle to the sanction mechanism. However, to our knowledge, this very high threshold has not yet been the object of serious political contestation.<sup>97</sup>

The determination according to Art. 7(2) TEU itself already institutes a de facto sanction. In contrast to Art. 7(1), it requires the actual existence of a serious and persistent breach by a member state. Such a serious and persistent breach has two main requirements: on the one hand, the breach must be of sufficient weight such as to call into question<sup>98</sup> the values referred to in Art. 2 TEU;<sup>99</sup> on the other hand, the breach (or the events leading to the breach) must have lasted for a certain amount of time and/or must still exist.<sup>100</sup> With regard to democratic elections, a serious and persistent breach would exist, if political parties were seriously obstructed during the campaign, if particular groups of people were prevented from voting, if there was significant interference with the freedom of the election, or if elections were

94 Becker, Ulrich, «Art. 7 TEU», in *EU-Kommentar* (ed. Schwarze, Jürgen), 3rd Edition, 2012, para. 6; Pechstein, Matthias, «Art. 7 TEU», in *EUV/AEUV* (ed. Streinz, Rudolf), 2nd Edition, 2012, para. 9.

95 Once again, the vote of the member state concerned is not included (Art. 7 sect. 5 TEU together with Art. 354 sect. 1 TFEU).

96 The decision of the European Parliament requires a qualified majority (Art. 7 sect. 5 TEU together with Art. 354 sect. 4 TFEU).

97 Schorkopf, Frank, «Art. 7 TEU», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 1 ff.

98 Becker, Ulrich, «Art. 7 TEU», in *EU-Kommentar* (ed. Schwarze, Jürgen), 3rd Edition, 2012, para. 8.

99 Art. 7 sect. 2 TEU requires only the violation of one of the values mentioned in Art. 2 TEU, between which no further distinction is made in the standard and which are likely to be cumulatively violated in practice; on this, see Becker, Ulrich, «Art. 7 TEU», in *EU-Kommentar* (ed. Schwarze, Jürgen), 3rd Edition, 2012, para. 8; Pechstein, Matthias, in *EUV/AEUV* (ed. Streinz, Rudolf), 2nd Edition, 2012, para. 11.

100 *Ibid.*, para. 8.

completely omitted.<sup>101</sup> One-off and short-lived infringements, on the other hand, are not by themselves sufficient; they can, however, be the subject of infringement proceedings. The member state concerned must be informed of the accusations and is invited to submit its own statement, with or without a deadline being set.<sup>102</sup>

#### d) Sanction proceedings

Once a determination has been made under Art. 7(2) TEU – a determination that itself only has a declaratory character – the Council, acting by a qualified majority,<sup>103</sup> may decide to suspend certain of the rights of the member state in question deriving from or under the Treaties [Art. 7(3) TEU]. This decision on actual sanctions is once again subject to the Council's discretion<sup>104</sup> and is directly binding for the member state concerned.<sup>105</sup> With regard to possible sanctions, Art. 7(3) TEU mentions the suspension of certain of the rights deriving from the application of the Treaties, including the voting rights of the Council representative of the member state in question, whereas all its obligations under the Treaties remain fully in force [Art. 7(3) third sentence TEU]. Other possible sanctions include suspension of the member state's rights to attend and to speak in EU bodies,<sup>106</sup> as well as its power to appoint a representative to important positions within the EU institutions.<sup>107</sup> There is, however, no possibility of entirely excluding a member state from the European Union.<sup>108</sup>

The sanctions must adhere to the Union's principle of proportionality. Thus, they need to be limited to *certain* rights and cannot cover all powers and competencies of a member state.<sup>109</sup> Furthermore, the significance of the suspended rights, as well as the efforts made by the member state to address the breach and the possible effects on the rights and obligations of natural and legal persons, have to be taken into account [Art. 7(3) second sentence TEU]. This principle also requires that any

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**101** Schmahl, Stefanie, «Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett», *EuR*, 2000, p. 823.

**102** Pechstein, Matthias, in *EUV/AEUV* (ed. Streinz, Rudolf), 2nd Edition, 2012, para. 5.

**103** The vote of the member state concerned will not be included (Art. 7 sect. 5 TEU together with Art. 354 sect. 3 and 4 TFEU).

**104** Pechstein, Matthias, in *EUV/AEUV* (ed. Streinz, Rudolf), 2nd Edition, 2012, para. 17.

**105** Biervert, Bernd, «Art. 288 AEUV», in *EU-Kommentar* (ed. Schwarze, Jürgen), 3rd Edition, 2012, para. 34.

**106** Pechstein, Matthias, in *EUV/AEUV* (ed. Streinz, Rudolf), 2nd Edition, 2012, para. 19.

**107** Schmahl, Stefanie, «Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett», *EuR*, 2000, p. 824.

**108** Schorkopf, Frank, «Art. 7 EUV», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 47; Ruffert, Matthias, «Art. 7 EUV», in *EUV/AEUV* (eds. Calliess, Christian and Ruffert, Matthias), 5th Edition, 2016, para. 24 ff.; Hofmeister, Hannes, «als erster Anwendungsfall des neuen «EU-Rahmens zur Stärkung des Rechtsstaatsprinzips»», *DVBl*, 2016, p. 872; For some further evidence, see Schmahl, Stefanie, «Die Reaktionen auf den Einzug der Freiheitlichen Partei Österreichs in das österreichische Regierungskabinett», *EuR*, 2000, pp. 829 ff.

**109** Becker, Ulrich, «Art. 7 EUV», in *EU-Kommentar* (ed. Schwarze, Jürgen), 3rd Edition, 2012, para. 10.

measures taken must be amended or revoked, once the situation in the member state that led to their imposition has changed [Art. 7(4) TEU]. If, on the other hand, the infringement deepens, more severe sanctions can be considered.<sup>110</sup>

## 4 Hungary

The codification of common values in Art. 2 TEU and the introduction of the sanctioning mechanism in Art. 7 TEU were based on the assumption that monitoring prior to accession to the European Union would suffice to avert any risk of serious antidemocratic developments in the member states. This optimism, however, has proved unfounded for a number of reasons. One reason lies in the vagueness and ambiguity of Art. 2 TEU and its related mechanism, Art. 7 TEU. Art. 2 TEU failed to set out clear criteria as to which developments in the member states were permissible and which were not. Another reason is the perspective of the member states concerned. Frequently, they present themselves as friends of the European Union and claim that they are devoted to its values. On their account, it is rather the European Union that is inadmissibly interfering in domestic affairs that are reserved for the national level and whose actions should therefore be regarded as an attack on their sovereignty. It is precisely this combination of a lack of clarity of Art. 2 TEU and the self-presentation of the member states, in which an intervention by the European Union appears as unnecessary, that brings about the specific problems in the application of Art. 7 TEU. This can be seen in the case of Hungary.

In the parliamentary elections of April 2010, the electoral alliance of the conservative Fidesz party, under party chairman Viktor Orbán, and the Christian Democratic People's Party (KDNP) received 52.8 % of the vote and thereby the two-thirds majority in Parliament required to amend the constitution. Immediately after coming to power, Fidesz began to carry out comprehensive reforms within an extremely short period of time.

### a) Changes to the press and media law

Shortly after the change of government, a new media law package was enacted, including substantial changes to Hungary's press and media law. These changes significantly weakened the independence of the media and were met with widespread international criticism.<sup>111</sup> For instance, these measures included a statutory prohibition of certain statements, as well as the imposition of prior registration requirements, and they were also applicable to media companies operating outside

<sup>110</sup> Becker, Ulrich, «Art. 7 EUV», in *EU-Kommentar* (ed. Schwarze, Jürgen), 3rd Edition, 2012, para. 13 ff.

<sup>111</sup> Venice Commission, Opinion No. 798/2015 on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, 22 June 2015, para. 1 ff.

Hungary in other EU member states.<sup>112</sup> At the same time, the supervision of all media was entrusted to a media control board made up of members of the ruling party. This board was empowered to impose financial penalties for «politically unbalanced reporting» and to compel the disclosure of informants where required for reasons of national security and public order.<sup>113</sup> Numerous journalists of the national broadcasting services were dismissed. In addition, the work of private media critical of the government was increasingly obstructed: for example, by the refusal to grant broadcasting licenses.<sup>114</sup> It was only after the European Commission threatened to initiate infringement proceedings that the Hungarian government, at the beginning of 2011, made some marginal changes to these new provisions of the media law: albeit exclusively with regard to those aspects that concerned citizens or persons from or operating in other EU countries.<sup>115</sup> In December 2011, the Hungarian Constitutional Court declared the new media law to be unconstitutional.<sup>116</sup>

## b) Comprehensive constitutional amendments

In April 2011, on the strength of its votes alone, the parliamentary majority of the electoral alliance between Fidesz and the KDNP passed a new constitution, which came into effect on 1 January 2012. Four further amendments to the constitution were adopted in June, October, and December 2012, as well as in March 2013. These changes were criticised by both the European Commission for Democracy through Law, the so-called Venice Commission,<sup>117</sup> and the European Parliament for their haste, their lack of transparency, and the failure to respect the opposition's right of parliamentary participation.<sup>118</sup> Although it is undisputed that these amendments fulfilled the formal requirements, since the electoral alliance held the necessary

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- 112** Venice Commission, Opinion No. 798/2015 on Media Legislation (ACT CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, 22 June 2015, para. 19; Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, p. 294.
- 113** Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, p. 294.
- 114** Blauburger, Michael, «Europäischer Schutz gegen nationale Demokratiedefizite?», 44/2 *Leviathan*, 2016, p. 285.
- 115** Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, p. 294.
- 116** *Ibid.*, p. 294.
- 117** On the role of the Venice Commission, see chap. III. 7. b). Venice Commission, Opinion No. 614/2011 on three legal questions arising in the process of drafting the new constitution of Hungary, 28 March 2011; Opinion No. 621/2011 on the new constitution of Hungary, 20 June 2011; Opinion No. 720/2013 on the fourth amendment to the fundamental law of Hungary, 17 June 2013.
- 118** Report of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report), para. AB ff.

majority to make constitutional amendments, they ultimately broke with the legitimising basis of the constitution itself.<sup>119</sup>

The constitutional amendments included comprehensive reforms, such as the lowering of the retirement age for judges, public prosecutors and notaries from 70 to 62 years old; according to many observers, the purpose of this reform was to dismiss many judges whom the regime found objectionable. Following the initiation of infringement proceedings by the European Commission, in November 2012, the European Court of Justice found this lowering of the retirement age to be unjustified age discrimination.<sup>120</sup> But the practical consequences of the decision remained marginal, since the majority of the dismissed judges did not return to their previous positions. Matters took a similar course with respect to the head of the Data Protection Authority. When the new Hungarian constitution came into effect, its function was delegated to the newly formed Hungarian National Authority for Data Protection and Freedom of Information and the term of office of the Data Protection Supervisor was prematurely terminated. Following the initiation of infringement proceedings by the Commission, in April 2014, the European Court of Justice declared that the termination of the mandate violated the EU Data Protection Directive.<sup>121</sup>

In addition to these measures, since the beginning of its term, the Fidesz/KDNP coalition has passed hundreds of new laws in the form of «cardinal laws»: these are laws that can only be changed by a two-thirds majority in Parliament, i.e., in effect, only by the electoral alliance of Fidesz and the KDNP.<sup>122</sup> Legislation adopted in this form included, in particular, the judicial reform bill, the church law, the new electoral law, and the media laws.<sup>123</sup> Although such cardinal laws were also common under previous governments, the new cardinal laws of the Fidesz/KDNP coalition are different in scope: they are no longer reserved for regulating specific questions, but rather cover entire domains of life or areas of regulation *en bloc*.<sup>124</sup> As a result of the qualified majorities required to amend these laws, this has led to a kind of

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**119** For a more rigorous account, see Lane Scheppelle, Kim, «The Unconstitutional Constitution», *The New York Times*, 2 January 2012.

**120** ECJ judgment of 6 November 2012, Case C-286/12, *Commission vs Hungary*.

**121** ECJ judgment of 8 April 2014, Case C-288/12, *Commission vs Hungary*.

**122** The Venice Commission has made numerous statements on this matter; see e.g. Venice Commission, Opinion No. 663/2012 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, 19 March 2012; Opinion No. 665/2012 on Act CLI of 2011 on the Constitutional Court, 19 June 2012; Opinion No. 683/2012 on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, 15 October 2012; see also the resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report), para. AB ff.

**123** Resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report), para. AG ff; Venice Commission, Opinion No. 621/2011 on the new constitution of Hungary, 20 June 2011, para. 22.

**124** Venice Commission, Opinion No. 720/2013 on the fourth amendment to the fundamental law of Hungary, 17 June 2013, para. 132.

«setting in stone» of Fidesz/KDNP economic, social, fiscal, family, and education policies.<sup>125</sup>

### c) Reform of the constitutional court

These reforms were accompanied by an institutional weakening of the constitutional court. The judges of the constitutional court are elected by the Hungarian Parliament. Using its parliamentary majority, the Fidesz/KDNP electoral alliance was thus able to change the composition of the court. With the completion of the terms of those judges who had been elected in the previous legislative period, the constitutional court will now exclusively consist of pro-government judges. Moreover, as part of the judicial reforms, the number of judges was raised from 11 to 15 and their term of office increased from the original three to twelve years.<sup>126</sup>

The fourth amendment to the constitution also amended the powers of the constitutional court and the procedure for a case to be brought before it. The *ex post* judicial review of legislation via an *actio popularis* was replaced by two new forms of constitutional appeal with considerably stricter standing requirements. The jurisdiction of the court was narrowed and the *ex post* review of the substantive constitutionality of laws with a budgetary impact was limited to a definitive list of rights. The constitutional court was also stripped of the power to undertake substantive review of changes made to the Hungarian constitution made after 2010. Furthermore, decisions of the constitutional court handed down before the new constitution took effect were stripped of their status as constitutional precedent.<sup>127</sup>

The parliamentary elections of 2014 again resulted in the electoral alliance of Fidesz and the KDNP being the strongest force with a two thirds majority<sup>128</sup>; this time the alliance was assisted by a new voting system that favoured the ruling parties.<sup>129</sup> In addition, election observers from the OSCE criticised the partisan composition of the electoral commission, the prohibition of electoral canvassing by private

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**125** Venice Commission, Opinion No. 720/2013 on the fourth amendment to the fundamental law of Hungary, 17 June 2013, para. 119 ff.

**126** Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, pp. 294 ff.

**127** Resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report), para. AM ff.

**128** Following the appointment of MEP Navracsics as European Commissioner for Education, Culture, Youth and Sport, by-elections were necessary, which were won by the non-party candidate Kész. In 2015, Fidesz there lost a two-thirds majority in the Hungarian Parliament.

**129** The voter registration procedure introduced by the fourth constitutional amendment, which replaced the previous registration of all citizens residing in Hungary with a voluntary registration system as a condition for exercising voting rights, was declared unconstitutional by the Hungarian Constitutional Court on 6 December 2012 and did not come into effect; see e.g. Resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report), para. BD ff.

individuals, and discrimination against eligible voters living abroad.<sup>130</sup> By this time, the power of the Hungarian government had already been consolidated. The tentative and selective interventions of the European Union, which had been restricted to occasional complaints about the new media laws and the new Hungarian constitution, had no significant impact.<sup>131</sup>

#### d) «Lex CEU»

The new legislative period also marked an increase in changes to laws regarding freedom of speech and academic freedom. One of these changes concerned the Hungarian Higher Education Law. In April 2017, the Hungarian Parliament, using an expedited legislative procedure, tightened the existing legal framework and introduced more demanding requirements for the licensing and operation of foreign universities in Hungary. The reason given by legislators was a desire to protect the quality of the Hungarian education system.<sup>132</sup> The law, in fact, clearly targeted the Central European University (CEU).<sup>133</sup> This institution had been founded in 1991 by the US-based investor George Soros and was accused by the Hungarian government of violating various laws. The new Higher Education Law stipulated various conditions for the operation of foreign-based universities in Hungary, which the CEU can only fulfil with considerable effort: these included the requirement to run a parallel university in its country of origin, i.e. the USA (whereas the CEU only has a presence in Hungary), and a provision making operations in Hungary dependent on the existence of an agreement between Hungary and the US federal government.<sup>134</sup> Unless the CEU fulfilled these requirements, the university would no longer be allowed to admit new classes from January 2018 onwards (or at least not with the prospect of awarding American diplomas). Following the passage of this new legislation, the CEU made an effort to fulfil all licensing requirements by – among other things – opening an additional campus in the State of New York. However, while the State of New York is prepared to sign the necessary intergovernmental agreement, the

<sup>130</sup> Blauburger, Michael, «Europäischer Schutz gegen nationale Demokratiedefizite?», 44/2 *Leviathan*, 2016, p. 284.

<sup>131</sup> Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, pp. 294 ff.

<sup>132</sup> Venice Commission, Preliminary Opinion No. 891/2017 on Act XXV of 4 April 2017 on the amendment of Act CCIV of 2011 on Tertiary Education, 11 August 2017, para. 11 ff.

<sup>133</sup> For a detailed exposition, see «Lex CEU – Orbán's attack on academic freedom in Europe», *Heinrich-Böll-Stiftung*, 2017, [www.boell.de/en/feature-lex-ceu-orbans-attack-academic-freedom](http://www.boell.de/en/feature-lex-ceu-orbans-attack-academic-freedom), last accessed 4 September 2017; Halmai, Gábor, «The Hungarian Constitutional Court betrays Academic Freedom and Freedom of Association», *Verfassungsblog*, 8 June 2018, <https://verfassungsblog.de/the-hungarian-constitutional-court-betrays-academic-freedom-and-freedom-of-association>, accessed 23 July 2018.

<sup>134</sup> Venice Commission, Preliminary Opinion No. 891/2017 on Act XXV of 4 April 2017 on the amendment of Act CCIV of 2011 on Tertiary Education, 11 August 2017, para. 11.

Hungarian Government has been delaying and has – thus far – refused to sign the agreement.<sup>135</sup>

On the level of the European Union, reactions were more straightforward this time. In April 2017, the European Commission initiated infringement proceedings against Hungary, claiming several violations of fundamental freedoms: in particular, the freedom of establishment and the freedom to provide services, as well as violations of the right to academic freedom, the right to education, and the freedom to conduct a business.<sup>136</sup> In May 2017, the European Parliament passed a resolution on the situation in Hungary, in which it criticised these recent domestic developments.<sup>137</sup> Nevertheless, it seems that the CEU has finally given up and is now going to open a new campus in Vienna.<sup>138</sup>

### **e) Measures against non-governmental organisations (NGOs)**

Only three days after the adoption of the new Higher Education Law on 7 April 2017, the Fidesz government submitted another draft law. According to the proposed legislation, all NGOs and foundations that annually receive more than 24,000 euros in foreign support would need to be entered in the registry of associations as «organisations receiving support from abroad». They would further be required to label themselves as such on all their websites, and in all their press announcements and other publications. Moreover, the proposed law provides for sanctions for those who fail to comply, including, in the most extreme cases, the dissolution of the organisation and its removal from the registry of associations.<sup>139</sup> In defence of this law, the government invoked the need to protect the political and economic interests of the country, to combat money laundering, and to prevent the financing of terrorism.<sup>140</sup> On 13 June 2017, the Hungarian Parliament adopted the law with minor amendments. In response, the European Commission initiated infringement proceedings, claiming a violation of the freedom of association, of the right to the protection of private life and personal data, and of the free movement of capital.<sup>141</sup>

**135** Halmai, Gábor, «The Hungarian Constitutional Court betrays Academic Freedom and Freedom of Association», *Verfassungsblog*, 8 June 2018, <https://verfassungsblog.de/the-hungarian-constitutional-court-betrays-academic-freedom-and-freedom-of-association>, accessed 23 July 2018.

**136** European Commission – Press release, Hungary: *Commission takes second step in infringement procedure on Higher Education Law*, 13 July 2017.

**137** Resolution of the European Parliament of 17 May 2017 on the situation in Hungary [2017/2656(RSP)].

**138** See Lajtai-Szabó, Gergely, «The decision is made – new CEU campus being opened in Vienna», *Daily New Hungary*, 11 April 2018, <https://dailynewshungary.com/decision-made-new-ceu-campus-opened-vienna>, accessed 23 July 2018.

**139** Venice Commission, Opinion No. 889/2017 on the Draft Law on the Transparency of Organisations receiving support from abroad, 20 June 2017, para. 6 ff, 57 ff.

**140** Venice Commission, Opinion No. 889/2017 on the Draft Law on the Transparency of Organisations receiving support from abroad, 20 June 2017, para. 29.

**141** European Commission – Press release, Hungary: *Commission launches infringement procedure for law on foreign-funded NGOs*, 13 July 2017.

## f) Evaluation and classification of measures taken by the European Union

The intervention of the European Union had no perceptible effect on the developments in Hungary. Following the debacle in the «Austrian Affair», the EU mostly shied away from sanctions and put its trusted in the self-regulation of the member states concerned. Especially at the outset, intervention was also restrained due to the fact that the measures taken by the Hungarian government were not directed against Europe as such, but rather were internally directed and only impaired European values as an ancillary effect. In fact, the measures aimed at strengthening the powers of the government and at solidifying the majority of the ruling parties, with the consequence that it became harder for other political groups to win an electoral majority.<sup>142</sup>

The most comprehensive analysis of the developments in Hungary was conducted by an institution that is not part of the European Union: the Venice Commission of the Council of Europe. This advisory body has issued numerous opinions on the situation in Hungary and has called for changes. Although these opinions served as a basis for the European Parliament's assessment of the situation,<sup>143</sup> they are not binding in and of themselves and they only provide guidance to the member states.

Thus far, the European Parliament has been the organ of the European Union that has been most active in dealing with matters related to de-democratisation in Hungary. The Parliament has taken a clear position on the developments: for example, by way of resolutions on the media law,<sup>144</sup> on the amendments to the constitution,<sup>145</sup> and in the form of the comprehensive Tavares Report on the situation of fundamental rights in Hungary,<sup>146</sup> which was passed by a large majority in the EP.<sup>147</sup> The initiation of Art. 7 TEU proceedings has hitherto faced the obstacle that the European People's Party (EPP), the largest political group in the EP and also the group of which *Fidesz* is a member, has long resisted any measures directed against Hungary. In May 2017, however, the Parliament for the first time proposed the opening of an Art. 7 TEU procedure,<sup>148</sup> after some 60 MEPs from the EPP abandoned their policy of protecting their fellow group member *Fidesz* and voted for sanctions.

**142** Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, p. 301.

**143** Resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report).

**144** Resolution of the European Parliament of 10 March 2011 on the Media Law in Hungary.

**145** Resolution of the European Parliament of 5 July 2011 on the revised Hungarian Constitution; see also Resolution of the European Parliament of 16 February 2012 on recent political developments in Hungary [2012/2511(RSP)].

**146** Resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report).

**147** Lane Scheppele, Kim, «Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)», 23 *Transnat. Law and Contemp. Prob.*, 2014, pp. 109 ff.

**148** Resolution of the European Parliament of 17 May 2017 on the situation in Hungary [2017/2656(RSP)].

The European Commission has repeatedly called the Hungarian government to order.<sup>149</sup> In addition, it has made generally very moderate use of its power to open infringement proceedings, only initiating procedures for specific developments: such as the lowering of the retirement age for judges, public prosecutors and notaries,<sup>150</sup> as well as with regard to the premature termination of the Head of the Authority for the Protection of Personal Data.<sup>151</sup> Nonetheless, Hungary's reaction has amounted to little more than marginal adjustments to the national legislation in question. This is also due to the instrument of the infringement procedure itself, which only comes into action when and insofar as the infringement concerns EU law. Moreover, the procedure tends to be ineffective, because – for good reasons – it can only target individual offences. Nonetheless, the aggravation of the developments in Hungary as well as their obvious role model effects, especially with regard to Poland, made it clear that the European Union needed to re-evaluate its existing means of intervention. This seems to be the reason why the Commission is opening infringement proceedings more frequently: such as with regard to the Hungarian changes in the area of asylum law, which were passed during the «migrant crisis»,<sup>152</sup> as well as with regard to the Higher Education Law<sup>153</sup> and the new legislation on NGOs.<sup>154</sup> These rather isolated steps, however, cannot provide a comprehensive solution to the problem.

## 5 The so-called Commission-procedure: The EU Framework to Strengthen the Rule of Law

The second step in the Art. 7 TEU procedure – the determination that a serious and persistent breach of the values referred to in Art. 2 TEU has occurred, which is itself a pre-requisite for a decision to impose sanctions according to Art. 7(3) TEU – will in most cases fail because of the requirement for unanimity in the Council. Thus, when the possibility of opening Art. 7 TEU proceedings against Poland was discussed, the prime minister of Hungary, Viktor Orbán, already announced that he would block any such efforts. In light of this apparent lack of leverage vis-à-vis member states, calls for the introduction of more effective mechanisms at the level of the European

**149** For more details, see Lane Scheppelle, Kim, «Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)», 23 *Transnat. Law and Contemp. Prob.*, 2014, pp. 107 ff.

**150** ECJ judgment of 6 November 2012, Case C-286/12, *Commission vs Hungary*.

**151** ECJ judgment of 8 April 2014, Case C-288/12, *Commission vs Hungary*, para. 6 ff.

**152** European Commission – Press release, *Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland*, 14 June 2017.

**153** European Commission – Press release, *Hungary: Commission takes second step in infringement procedure on Higher Education Law*, 13 July 2017.

**154** European Commission – Press release, *Hungary: Commission launches infringement procedure for law on foreign-funded NGOs*, 13 July 2017.

Union have become more frequent.<sup>155</sup> They culminated, in March 2014, in an initiative by the then President of the Commission, Jose Manuel Barroso, introducing the EU Framework to Strengthen the Rule of Law.<sup>156</sup> According to its initiators, the purpose of the Framework is to enable the Commission to enter into an ongoing dialogue with the member state in question. It is based on the assumption that the protection of the rule of law serves as the backbone of every modern democratic order and is inseparable from the commitment to respecting democracy and human rights.<sup>157</sup> This is because democratic rights and the upholding of the rules governing political affairs and voting rights can only function when they are safeguarded by the rule of law.<sup>158</sup>

The EU Framework to Strengthen the Rule of Law serves to address gaps in the Art. 7 TEU procedure.<sup>159</sup> Its requirements are less stringent. For the Framework to be triggered, it is sufficient to establish the existence of a threat to the rule of law: i.e. a certain likelihood of future systemic violations of the values referred to in Art. 2 TEU. In the Framework too, what is at issue are questions of the political, institutional and/or legal order as such. It is concerned with constitutional structure, the separation of powers, the independence and impartiality of the judiciary, and the system of judicial oversight, including constitutional jurisprudence.<sup>160</sup> The Rule of Law Framework enables the Commission to enter into a dialogue with the member state in question without requiring the consent of the European Council or the European Parliament and without facing the risk of being blocked by individual member state interests in the Council of Ministers or the European Council.<sup>161</sup> From a legal point of view, it is, however, an internal procedure of the European Commission. Since the Commission has no legislative powers of its own, Framework measures are neither binding on other EU bodies nor on the member states,<sup>162</sup> nor are they backed by any sanctions. As a procedure based on dialogue, the Framework can, however, present an effective means of exerting sensible pressure. Nonetheless, its success remains

<sup>155</sup> See in particular within the framework of the resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report).

<sup>156</sup> Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, 11 March 2014.

<sup>157</sup> Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, 11 March 2014, p. 2.

<sup>158</sup> Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, 11 March 2014, pp. 4 ff.

<sup>159</sup> Ruffert, Matthias, «Art. 7 EUV», in *EUV/AEUV* (eds. Calliess, Christian and Ruffert, Matthias), 5th Edition, 2016, para. 32 ff.

<sup>160</sup> Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final, 11 March 2014, pp. 7 ff.

<sup>161</sup> Critical of this Kochenov, Dimitry and Pech, Laurent, «Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation», 54/5 JCMS, 2016, pp. 1062–1074.

<sup>162</sup> Ruffert, Matthias, «Art. 7 EUV», in *EUV/AEUV* (eds. Calliess, Christian and Ruffert, Matthias), 5th Edition, 2016, para. 32 ff.

dependent on the willingness to cooperate of the member state in question. In the absence of such willingness, the procedure will therefore be ineffective.<sup>163</sup>

Like the Art. 7 TEU procedure, the EU Framework to Strengthen the Rule of Law is also a three-stage procedure. The first stage of the procedure involves an assessment of facts: the Commission examines all relevant information and assesses whether there are clear indications of a systemic threat to the rule of law. This preliminary assessment is based on information and analyses provided by other institutions: such as the Venice Commission or the EU Agency for Fundamental Rights. If the Commission identifies a threat, it enters into a confidential dialogue with the member state concerned. It then sends an internal, i.e. unpublished, «Rule of Law Opinion» to the member state, providing the grounds for its concerns and giving the member state the opportunity to respond.

If the member state fails to respond to the opinion or does so inadequately, the procedure enters into its second phase: the phase of recommendations. The Commission then issues a public «Rule of Law Recommendation» addressed to the member state in question. This recommendation may include specific measures to resolve the situation and sets a deadline for the resolution of the infringement of fundamental European values. The member state concerned is required to inform the Commission of any steps undertaken.

In a third stage, the follow-up phase, the Commission monitors the measures undertaken by the member state, in order to decide whether problems persist or have been resolved in the meantime. If the member state does not remedy its domestic legal situation within the given delay, or does so insufficiently, or if structural deficits persist, the Commission has the option to initiate an Art. 7 TEU procedure. This procedure, however, is not automatically triggered but the decision stays within the Commission's discretion.<sup>164</sup>

## 6 Poland

The Commission activated the EU Framework to Strengthen the Rule of Law for the first time in the case of Poland. Since August 2015, the national conservative party «Law and Justice» (Prawo i Sprawiedliwość – PiS) has held the presidency of the Republic of Poland in the person of *Andrzej Duda*. In the parliamentary elections of October 2015, it also achieved a majority in the *Sejm* (the lower house of the Polish parliament) with 37.6 % of the vote. Since then, the Polish government – reflecting deep-seated pre-existing tensions between traditional and liberal groupings within society – has been focusing on socially conservative policies of internal and external sovereignty, as well as on the control of the media and the judiciary. These

<sup>163</sup> See also Stephan, Juliane and Yamato, Richard, «Eine Politik der Nichteinmischung – Die Folgen des zahnlosen Art. 7 EUV für das Wertefundament der EU am Beispiel Ungarn», 2014/2 *DÖV*, 2014, pp. 58–65.

<sup>164</sup> Critical of this Kochenov, Dimitry and Pech, Laurent, «Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation», 54/5 *JCMS*, 2016, pp. 1062 ff.

developments have been met with fierce protests and numerous demonstrations all across the country; the Polish government, on the other hand, has pointed out that these reforms were covered by its political mandate and legitimised by the recent elections.

### a ) The conflict over the Polish Constitutional Tribunal

As early as the end of November 2015, the Sejm and the Senate passed an amendment relating to the Polish Constitutional Tribunal. Among other things, the amendment provided for new elections of a total of five of the fifteen judges of the Constitutional Tribunal. In the previous legislative period, however, five judges had already been elected to replace those whose term was set to end in 2015. Three of them were supposed to replace judges whose term of office had ended at the beginning of November, i.e. in the prior legislative period; two were supposed to replace judges whose term was set to end in the beginning of December, i.e. in the new legislative period. But none of these five judges who had been elected in the prior legislative period were sworn in by Duda. Instead, on 2 December 2015, the Sejm, with a majority of PiS members, elected five new Constitutional Tribunal judges, all of whom were sworn in by *Duda*.<sup>165</sup>

In two decisions (of 3 and 9 December 2015), the Polish Constitutional Tribunal, sitting in its former composition, declared unconstitutional the amendment with regard to the composition of the court and the shortening of the terms of office of its president and vice-president. The election of three of the judges in the previous legislative period was held to be constitutional; only the premature replacement of the two judges whose term of office had not been set to end until December was held to have been unconstitutional.<sup>166</sup> Following this ruling, two of the judges duly elected by the new Sejm and sworn in by Duda assumed their positions on the court. But Duda refused to swear in the three judges who had legitimately been elected in the previous legislative period. They were therefore unable to assume their positions on the court. As consequence, these positions remained vacant.

Shortly thereafter, on 22 December 2015, the Sejm passed a further amendment to the Polish Constitutional Law. It stipulated, *inter alia*, that the term of office of Constitutional Tribunal judges would begin with their swearing in, that decisions required a two-thirds majority (rather than the simple majority that was necessary prior to the amendment) and that they further required a quorum of thirteen of the fifteen judges. Additionally, cases were to be dealt with chronologically according to their date of submission and not according to their importance. Finally, the Polish President and the Minister of Justice were given the power to take disciplinary

<sup>165</sup> Venice Commission, Opinion No. 833/2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016, para. 16 ff.

<sup>166</sup> Venice Commission, Opinion No. 833/2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016, para. 26 ff; for further details, see Hofmeister, Hannes, «Polen als erster Anwendungsfall des neuen «EU-Rahmens zur Stärkung des Rechtsstaatsprinzips», *DVBl*, 2016, p. 870.

measures against individual judges.<sup>167</sup> On 9 March 2016, the Polish Constitutional Tribunal declared this amendment void. However, the government claimed that the decision itself was invalid because the Constitutional Tribunal did not adhere to the standards introduced by the new amendment. Therefore, the decision was not published in the Official Journal (which is a condition for a decision to become legally binding), nor was it implemented.<sup>168</sup> Shortly after this decision, the Venice Commission issued an opinion on the developments in Poland. It concluded that the decisions of the Constitutional Tribunal were not sufficiently taken into account, that the constitutional amendment undermined its function as a constitutional court, and that the decisions handed down on 9 March 2016 should be published, since not doing so would pose a threat to the rule of law, democracy and human rights in Poland.<sup>169</sup>

## b) Changes to Media Laws and to the Law on the Police

At the same time, further sensitive legal changes were introduced by the Polish government. These reforms were often passed in an expedited legislative procedure, and dealt, inter alia, with changes to the media law and the law on the police. As early as December 2015, modifications to the broadcasting law («Small Media Act») were adopted. This legislation stipulated changes to the composition of the management and supervisory boards of the previously independent public radio services. The management and supervisory boards were no longer supposed to be appointed by the National Broadcasting Council, but rather directly by the government as represented by the Minister of Finance. Furthermore, the legislation introduced the possibility of immediately removing the current management and supervisory boards from office.<sup>170</sup> According to the government, the purpose of this legislation was to promote the objectivity of reporting, as well as the «national character» of broadcasting.<sup>171</sup> In February and again in March 2016, the European Commission expressed doubts as to whether the new broadcasting laws upheld the freedom and diversity of the media and invited the Polish government to submit written statements. These

**167** Venice Commission, Opinion No. 833/2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016, para. 30; Hofmeister, Hannes, «Polen als erster Anwendungsfall des neuen «EU-Rahmens zur Stärkung des Rechtsstaatsprinzips»», *DVBl*, 2016, p. 870.

**168** Venice Commission, Opinion No. 860/2016 on the Act on the Constitutional Tribunal, 1 October 2016, para. 86 ff.

**169** Venice Commission, Opinion No. 833/2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016, para. 134 ff; For the following statement in October 2016, see Venice Commission on constitutional jurisdiction was published Venice Commission, Opinion No. 860/2016 on the Act on the Constitutional Tribunal, 14 October 2016.

**170** Recommendation of the Commission of 27 July 2016 regarding the Rule of Law in Poland, C (2016) 5703 final, para. 67; European Commission – *Factsheet, Colleague orientation debate on recent developments in Poland and the Rule of Law Framework: Questions and Answers*, 13 January 2016.

**171** For further evidence, see Hofmeister, Hannes, «Polen als erster Anwendungsfall des neuen «EU-Rahmens zur Stärkung des Rechtsstaatsprinzips»», *DVBl*, 2016, p. 871.

requests remained unanswered. In July 2016, a new law on the «National Media Council» came into effect. The council is a five-member body whose members are appointed by the Sejm, the Senate and the President. It is responsible for naming the management and supervisory boards of the public broadcasting bodies and has been monitoring public broadcasting since its creation.

Apart from these amendments of media laws, there followed an amendment of the law on the police and related laws, such as a new anti-terrorism law. The European Commission criticised these laws as being incompatible with fundamental rights: in particular, with EU data protection and privacy law.<sup>172</sup> Similarly, the Venice Commission, in its opinion of June 2016, criticised the reforms as lacking procedural safeguards, as well as substantive protections against covert surveillance. According to the Venice Commission, the new legislation does not provide adequate mechanisms for preventing the excessive use of surveillance measures and disproportionate encroachments upon the privacy of individuals.<sup>173</sup> With regard to the reform of anti-terrorism law, the European Commission likewise noted that its compatibility with European fundamental rights was doubtful.<sup>174</sup>

### **c) Activation of the EU Framework to Strengthen the Rule of Law**

During these developments, the European Commission was in constant dialogue with the Polish government. Nevertheless, the efforts to moderate the situation remained unsuccessful and the concerns of the Commission persisted – especially with respect to the Polish Constitutional Tribunal – whereas the Polish Government claimed that its actions were legitimised by the previous elections. As consequence, in early June 2016, the European Commission initiated the first stage of the EU Framework to Strengthen the Rule of Law. It thus issued an opinion on the situation of the rule of law in Poland in which it set out its concerns. The Polish Government was encouraged to undertake countermeasures. In its response, Poland emphasised, in particular, a draft law on the Constitutional Tribunal, which had been passed by the Sejm in mid-June 2016. This draft made minor changes with regard to the election of the president of the Polish Constitutional Tribunal and to the court's mode of decision-making.<sup>175</sup> At the same time, however, the draft stipulated that the President of the Constitutional Tribunal had officially to submit a request for the publication of judgments in the Official Journal to the Prime Minister, thus entailing the risk that the latter would impede the publication of certain judgments.<sup>176</sup>

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**172** Commission Recommendation of 27 July 2016 regarding the Rule of Law in Poland, C (2016) 5703 final, para. 69.

**173** For a comprehensive account, see Venice Commission, Opinion No. 839/2016 on the Act of 15 January 2016 amending the Police Act and certain other Acts, 13 June 2016.

**174** Commission Recommendation of 27 July 2016 regarding the Rule of Law in Poland, C (2016) 5703 final, para. 70.

**175** Venice Commission, Opinion No. 860/2016 on the Act on the Constitutional Tribunal, 14 October 2016, para. 20 ff.

**176** *Ibid.*, para. 74 ff.

In light of the reaction of the Polish government, the European Commission initiated the second stage of the Rule of Law Framework on 27 July 2016 and issued a first public recommendation outlining its continued concerns. In this recommendation, it demanded the full implementation of the decisions of the Constitutional Tribunal of 3 and 9 December 2015 and the swearing in of the three Constitutional Tribunal judges legitimately elected by the previous Sejm. In addition, it requested that no further judges be appointed until the legal framework had been adjusted and that the judgments of the Constitutional Tribunal be published immediately without preconditions. Furthermore, the Rule of Law Recommendation emphasised that the opinion of the Venice Commission should be taken into account and that the Constitutional Tribunal should be given the jurisdiction to review the recent amendment, i.e. the Law of 22 July 2016 on the Constitutional Tribunal. The Commission called on the Polish government to take further steps to remedy the threat to the rule of law within three months, i.e. by 27 October 2016, and to inform the Commission of the steps taken. Otherwise, Art. 7 TEU proceedings would be opened.<sup>177</sup> Shortly thereafter, on 11 August 2016, the Polish Constitutional Tribunal ruled that the Law on the Constitutional Tribunal of 22 July 2016 was partially unconstitutional. The Government did not recognise this decision and declined to publish it in the Official Journal.

The Polish government eventually issued a response to the Commission. Citing national sovereignty, however, it let the three-month deadline pass without taking any substantial domestic measures to resolve the rule of law issues. After the deadline expired, the Commission at first hesitated to trigger the third stage of the Framework procedure. Since Poland had obviously not changed its legal framework and had not addressed the existing structural deficits, the Commission had, in principle, the option to open Art. 7 TEU procedures. But the Commission apparently felt that its hands were tied.<sup>178</sup> On 21 December 2016, it therefore issued another recommendation on the rule of law in Poland. Under the renewed threat of activating Art. 7 TEU procedures, it invited the Polish government to solve the problems identified within two months. At the same time, it demanded additional measures from the Polish government.<sup>179</sup> On 21 February 2017, the deadline expired without any further action taken by the Polish government.

The Polish government continues to maintain that the constitutional crisis has been resolved, since – due to the appointment of new judges – there no longer is a conflict with the Constitutional Tribunal. It further claims that the amendments to

<sup>177</sup> Commission Recommendation of 27 July 2016 regarding the Rule of Law in Poland, C (2016) 5703 final.

<sup>178</sup> See the remarks of the President of the Commission Jean-Claude Juncker in the Belgian Newspaper *Le Soir*, that nothing more could be done, as Art. 7 TEU would in fact lead to nothing because of the vetoes cast by some member states. [www.eblnews.com/news/europe/juncker-eu-powerless-against-authoritarian-slide-poland-hungary-43122](http://www.eblnews.com/news/europe/juncker-eu-powerless-against-authoritarian-slide-poland-hungary-43122), accessed 4 September 2017.

<sup>179</sup> Commission Recommendation of 21 December 2016 regarding the Rule of Law in Poland, C (2016) 8950 final.

the law on the Constitutional Tribunal of June 2016, which partially incorporated the criticisms of the EU institutions and the Venice Commission, have dealt with any shortcomings. In fact, there hardly remains any potential for conflict between the government and the Constitutional Tribunal. The majority of seats on the Constitutional Tribunal are now filled with pro-government judges. In December 2016, the term of office of the president of the Constitutional Tribunal (who had been critical of the PiS) came to an end. Legislation introduced by PiS ensured that the former president was not succeeded by his vice president (equally critical of PiS). Instead, a judge loyal to the government was appointed to the position.<sup>180</sup>

#### **d) The conflict over the Polish Supreme Court and the appointment of local court judges**

Unimpressed by the threats of sanctions by the European Union, the Polish government passed further judicial reforms in mid-2017. These reforms concerned three sets of regulations in particular, which – according to the European Commission's third Rule of Law recommendation of 26 July 2017 – further amplified the systemic threat to the rule of law in Poland.<sup>181</sup>

Firstly, the reforms included a new law on the Supreme Court (April 2018) and a new law on the National Council of the Judiciary (March 2018). Alongside the Constitutional Tribunal, the Supreme Court is the highest court in the land or, respectively, the court of last resort. It is empowered to review election procedures and is the highest court of appeal for the judgments of lower courts. The judicial reform package cut the number of Supreme Court judges in half and forced almost half of them to retire before the end of their legal term of office. At the same time, two new chambers were created within the Polish Supreme Court. One will be dealing with disciplinary measures against judges. Both will be appointed by the National Council of the Judiciary, which has also been the object of profound reforms. The National Council of the Judiciary is a constitutional body that nominates candidates to be appointed as judges all across Poland, including to the Supreme Court. In March 2018, its composition was amended: the majority of its members are now to be appointed by the Sejm (effectively by the PiS) and not by other judges. At the same time, the National Council of the Judiciary gained important powers, while the members of the former Council were to lose their positions within 90 days.

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**180** For a detailed analysis, see Sadurski, Wojciech, «Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler», *Hague Journal on the Rule of Law*, 13 June 2018; Ibid., «How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding», No. 18/01 *Sydney Law School Research Paper*, 2018; Bugarcic, Bojan, and Kuhelj, Alenka, «Varieties of Populism in Europe: Is the Rule of Law in Danger?», Vol. 10(1) *Hague Journal on the Rule of Law*, 2018, pp. 21-33.

**181** European Commission – Press release, *European Commission acts to preserve the rule of law in Poland*, 26 July 2017.

On 24 July 2017, the Polish President Duda declined to sign these reforms into law, citing concerns regarding their constitutionality.<sup>182</sup> This was preceded by weeks of protests, largely by younger citizens, but also by moderate conservative groups that had historically supported the PiS. Other EU states, such as France and Luxembourg, also sharply criticised the reforms. The protests left the President almost no choice but to intervene. However, Duda's veto had little impact, since it affected only a small part of the reforms. He only criticised the reforms of the Supreme Court and the National Council for the Judiciary. Moreover, his concerns over the amendments pertained merely to formal aspects and disregarded the content of the new laws.<sup>183</sup> He proposed that the National Council for the Judiciary's decisions should be based not on a simple majority (as had been stipulated by the amendment), but on a three-fifths majority, and that appointments to ordinary courts should not be made by the Minister of Justice, who is, since reforms in February 2016, a member of the National Council for the Judiciary and both Minister of Justice and Chief Public Prosecutor.<sup>184</sup>

Secondly, the reforms included a new law on ordinary courts. It came into effect in August 2017 after Duda signed it into law in July 2017.<sup>185</sup> The new law provides for a reform of the appointment of judges to local courts and to the mode of operation of the latter. It displays strong similarities to the judicial reforms carried out in Hungary. The reforms mainly aim at equipping the Minister of Justice, who is *ex officio* also the Chief Public Prosecutor, with broad competencies. The new laws allow the Minister of Justice to extend the term of office of judges who reach the retirement age, as well as to dismiss or appoint presidents of courts at his or her discretion, unless blocked by a two-third majority in the National Council for the Judiciary.

The third pillar of the judicial reforms concerned the National School of Judiciary and Public Prosecution. This legislation was published and entered into force on 13 July 2017.<sup>186</sup> The National School of Judiciary and Public Prosecution is now completely controlled by the Ministry of Justice, including, inter alia, the appointment of the board supervising the content of legal education.

The PiS argued that the draft laws reforming the judicial system gave control of the courts back to the population and allowed for an improved administration of

**182** «Polen: Vertragsverletzungsverfahren und Empfehlungen zur Rechtstaatlichkeit», *European Commission*, 26 July 2017, [https://ec.europa.eu/germany/news/polen-vertragsverletzungsverfahren-und-empfehlungen-zur-rechtstaatlichkeit\\_de](https://ec.europa.eu/germany/news/polen-vertragsverletzungsverfahren-und-empfehlungen-zur-rechtstaatlichkeit_de), accessed 6 October 2017.

**183** For a comprehensive analysis, see Matczak, Marcin, «Who's next? On the Future of the Rule of Law in Poland, and why President Duda will not save it.», *Verfassungsblog*, 19 July 2017, [www.verfassungsblog.de/whos-next-on-the-future-of-the-rule-of-law-in-poland-and-why-president-duda-will-not-save-it](http://www.verfassungsblog.de/whos-next-on-the-future-of-the-rule-of-law-in-poland-and-why-president-duda-will-not-save-it), accessed 9 August 2017; Ibid., «President Duda is Destroying the Rule of Law instead of Fixing it», *Verfassungsblog*, 29 September 2017, [www.verfassungsblog.de/president-duda-is-destroying-the-rule-of-law-instead-of-fixing-it](http://www.verfassungsblog.de/president-duda-is-destroying-the-rule-of-law-instead-of-fixing-it), accessed 2 October 2017.

**184** Karon, Jan Aleksander, «Ein fauler Kompromiss», *Die Zeit*, 19 July 2017, [www.zeit.de/politik/ausland/2017-07/polen-gericht-justizreform-eu-andrzej-duda-kompromiss](http://www.zeit.de/politik/ausland/2017-07/polen-gericht-justizreform-eu-andrzej-duda-kompromiss), accessed 16 August 2017.

**185** «Vertragsverletzungsverfahren und Empfehlungen zur Rechtstaatlichkeit», *European Commission*, 26 July 2017, [https://ec.europa.eu/germany/news/polen-vertragsverletzungsverfahren-und-empfehlungen-zur-rechtstaatlichkeit\\_de](https://ec.europa.eu/germany/news/polen-vertragsverletzungsverfahren-und-empfehlungen-zur-rechtstaatlichkeit_de), accessed 6 October 2017.

**186** Ibid.

justice. Overall, the reforms, in fact, lead to a structural weakening of the independence of the Polish judiciary.

In response to these developments, in December 2017, the European Commission launched infringement proceedings against Poland over the measures affecting the organisation of ordinary courts.<sup>187</sup> The establishment of different retirement ages for female judges (60 years old) and male judges (65 years old) was deemed to be direct discrimination on the basis of sex. In the meanwhile, the Polish government has accepted the introduction of an identical retirement age of 65 for both sexes. More importantly, however, the European Commission underscored that the legislative amendments threatened the independence of the judiciary (Art. 19 (1) TEU in conjunction with Art. 47 EUCFR). In the eyes of the Commission, the vague criteria governing the decision by the Minister of Justice to extend the term of office of a judge, and the lack of any limits to such extensions, give rise to the risk of political influence be exerted on individual judges and of undermining their security of tenure and independence.

Parallel to these measures, the European Commission has reactivated the EU Framework to Strengthen the Rule of Law and, following the unsuccessful recommendations of July and December 2016, issued a further recommendation on the rule of law in Poland on 26 July 2017.<sup>188</sup> The Commission demanded that the Polish authorities correct the problem within one month. This deadline passed on 26 August 2017 without any action being taken. Since Poland refused to undertake any reforms, the Commission triggered Art. 7 TEU for the first time in EU history on 20 December 2017, especially with regard to the forced retirement of judges of the Supreme Court.<sup>189</sup>

## **e) Evaluation and classification of the measures taken by the European Union**

Like in Hungary, in Poland too, the measures taken by the European Union had little impact. In contrast to the situation in Hungary, the Polish government did not have a parliamentary majority sufficient for constitutional amendments. Instead, the reform of the Polish Constitutional Tribunal was carried out *contra legem*. The Polish government continued to invoke its sovereignty and played for time. Without its willingness to engage in a dialogue, means of political pressure have proved ineffective. Despite the opinions of the Venice Commission<sup>190</sup>, the resolutions of the European

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**187** European Commission – Press release, *European Commission launches infringement against Poland over measures affecting the judiciary*, 29 July 2017.

**188** European Commission – Press release, *European Commission acts to preserve the rule of law in Poland*, 26 July 2017.

**189** European Commission – Press release, *Remarks of Frans Timmermans on European Commission action to preserve the rule of law in Poland*, 26 July 2017.

**190** Venice Commission, Opinion No. 860/2016 on the Act on the Constitutional Tribunal, 14 October 2016; Opinion No. 833/2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016.

Parliament<sup>191</sup> and the Commission's initiating of infringement proceedings, no significant changes in the domestic legal situation have occurred: especially not as concerns the conflict over the composition of the Polish Constitutional Tribunal.

Nonetheless, the European Union should not abandon its efforts. In accordance with their numerous threats, the European Commission and the European Parliament should follow through with the procedure under Art. 7 TEU. The initiation of proceedings is already a form of sanction in itself<sup>192</sup> – even if *Viktor Orbán* announced that Hungary would defend Poland against the «inquisition» with which the European Union is threatening the country and would show solidarity with Poland.<sup>193</sup> Since the European Commission has triggered the procedure under Art. 7 TFEU, it is now up to the Council, acting by a four-fifths majority of its members after obtaining the consent of the European Parliament, to determine that there is a clear risk of a serious breach by a member state of the values referred to in Art. 2 TFEU. Only a majority of four-fifths is required, i.e. 22 member states. Hungary would not be able to block the vote at this stage. Whether Poland would be able to find at least four more allies is highly doubtful.

All in all, the European Commission seems intent on positioning itself more strongly, in light of the ongoing developments with regard to the most recent judicial reforms and the lack of sanction powers under the Framework procedure. Among other things, the Commission has opened infringement proceedings against Poland with regard to the refugee crisis<sup>194</sup> and with regard to the reform of appointment procedures for ordinary courts.<sup>195</sup> In this respect, it is notable that the European Commission for the first time – unlike during infringement proceedings against Hungary with regard to the lowering of the retirement age for judges – expressly refers to the fundamental rights stipulated in the Charter of Fundamental Rights of the European Union [Art. 19 (1) TEU in conjunction with Art. 47 EUCFR].

**191** Resolution of the European Parliament of 13 April 2016 on the situation in Poland [2015/3031(RSP)]; Resolution of the European Parliament of 14 September 2016 on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union [2016/2774(RSP)].

**192** von Bogdandy, Armin, «How to protect European Values in the Polish Constitutional Crisis», *Verfassungsblog*, 31 March 2016, [www.verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis](http://www.verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis), accessed 11 August 2017.

**193** «Orbán will Polen gegen EU. Inquisition helfen», *Frankfurter Allgemeine Zeitung*, 22 July 2017 [www.faz.net/aktuell/politik/ausland/orban-will-polen-gegen-eu-inquisition-helfen-15117569.html](http://www.faz.net/aktuell/politik/ausland/orban-will-polen-gegen-eu-inquisition-helfen-15117569.html), accessed 7 August 2017.

**194** European Commission – Press release, *Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland*, 14 June 2017.

**195** European Commission – Press release, *European Commission launches infringement against Poland over measures affecting the judiciary*, 29 July 2017.

## 7 Summary: Experiences at the European and at the member state level

The measures taken by the European Union against authoritarian developments in member states require us to draw sobering conclusions. These measures have mostly remained sporadic and – when they had any effect at all – have typically led to a consolidation and immobilisation of the political situation in the member state concerned. An overview of the situation reveals a picture of helplessness.<sup>196</sup> Even the EU Framework to Strengthen the Rule of Law, which was introduced by the Commission in 2014 and used for the first time against Poland, has proved to be largely ineffective, given its lack of an enforcement mechanism. The procedure relies upon a functioning dialogue with the member states and their willingness to cooperate. In practice, the developments in Hungary and Poland show that this idea of mutual trust is no longer applicable to states with right-wing authoritarian governments. The metaphor of «dialogue», which has always been problematic, conveys little more than helplessness in light of these deep political conflicts.

### a) Experiences with the institutions of the European Union European Commission

#### *European Commission*

At first glance, the European Commission – as «Guardian of the Treaties», which ensures the application of the Treaties and of the measures adopted by the institutions pursuant to them (Art. 17 sect. 1 TEU) – appears to be best suited to address problematic developments in member states as a neutral arbiter. On the other hand, however, through its growing institutional links to the European Parliament and the link between electoral success and the appointment of the Commission President, it is slowly developing into an organ of political leadership. Against this background, the President of the Commission is, for the time being, the political representative of the great coalition of those who are in favour of further integration and who are ready to deepen mutual ties as opposed to a minority of Eurosceptic groups in the EP. Given this situation, it is difficult for the Commission to function as a neutral arbiter applying norms. Instead it is becoming a political authority, but one that lacks the necessary powers that federal governments have at their disposal to take action against renegade members. It is our impression that, at least for the moment, the European Commission does not really regard itself as a political counterbalance to the member states, pursuing the project of integration in keeping

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**196** On the still present deficits in the Rule of Law in Romania and Bulgaria, see e.g. the reports of the Commission COM (2016) 40; COM (2016) 41; also on Romania, see Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, pp. 303 ff.

with own institutional aspirations.<sup>197</sup> Rather, it behaves like a moderator between antagonistic member states: one that allows the relaxation of rules in particular situations – e.g. debt limits or road tolls in Germany («*PkW Maut*») – thereby keeping everyone onboard. But this self-image is likely to weaken the Commission's role in the enforcement of democratic standards in the member states of the European Union. To the extent that the Commission has discretion in this context, such discretion will potentially be open to exploitation by member states, which will invoke the Commission's accommodation toward other member states for their own purposes. The Commission could thereby lose the necessary distance from the member states and this could turn out not to be the right form of its politicisation.

In the light of these circumstances, the measures undertaken by the European Commission have proven to be lacking in consistency.<sup>198</sup> In the case of Hungary, for example, lacking the support of member states, the Commission refrained from adopting more comprehensive measures.<sup>199</sup> Instead, it hastily celebrated its actions and the minor domestic changes that ensued as a success,<sup>200</sup> without taking into account the actual effects of the measures undertaken by Hungary. The infringement procedure in the case of the lowering of the retirement age for judges, public prosecutors and notaries did not, in fact, result in the majority of Hungarian judges returning to their former positions. In most cases, the former office holders were either offered compensation by the government or their positions had already been filled with new appointees and hence were no longer available. The overall deterrent effect of the reforms on public officials remained intact, however, since the constitutional situation that had existed before the measures was in no way restored. Thus far, the Commission has refused to initiate the EU Framework to Strengthen the Rule of Law against Hungary, citing the ongoing infringement procedure and the role of the national courts in the protection of the rule of law as reasons for its inaction.<sup>201</sup> With regard to Poland, the Commission's rule of law procedure proved to be similarly unsatisfactory. Since it is based on a dialogue with the member state in question, the procedure reaches its limits when member states refuse to take part. Consequently, the recommendations of July and December 2016 simply came to nothing. But the European Commission seems increasingly willing to recognise the need for action

**197** The lack of willingness of the Commission to take decisions is clearly visible in the *White Paper on the Future of Europe*, 2017, IP/17/385; In contrast, the Parliament has taken a clear stance, see e.g. European Parliament resolution of 16 February 2017 on possible evolutions of and adjustments to the current institutional set-up of the European Union [2014/2248(INI)].

**198** Kochenov, Dimitry and Pech, Laurent, «Better Late than Never? On the European Commission's Rule of Law Framework and it's First Activation», 54/5 *JCMS*, 2016, pp. 1062–1074.

**199** The only exception is the letter from the Foreign Ministers of Germany, The Netherlands, Denmark and Finland to the Commission President Barroso in which they demanded a mechanism to safeguard fundamental values (6 March 2013).

**200** European Commission – Press release, *Media: Commission Vice-President Kroes welcomes amendments to Hungarian Media Law*, 16 February 2011.

**201** Resolution of the European Parliament of 10 June 2015 on the situation in Hungary [2015/2700(RSP)], para. 11 ff; and the follow-up to the European Parliament Resolution of 10 June 2015 (debate).

and, at least indirectly, to discharge its responsibility to sanction member states by opening infringement procedures with the European Court of Justice. In just 2017, the Commission has opened numerous infringement proceedings against Hungary and Poland. These proceedings concerned, for example, Hungarian asylum legislation that had been passed in the context of the migrants crisis,<sup>202</sup> the «Lex CEU» in Hungary,<sup>203</sup> and the reform of the appointment procedures for local court judges in Poland.<sup>204</sup> These infringement procedures, however, each concern isolated issues and do not capture the domestic developments in their entirety.

But as the guarantor of the application of EU Law, Art. 17 (1) TEU, the Commission will have to continue to take on a central role in any of the possible approaches (to be introduced later) towards solving the problems addressed in this book. This could, for example, be the role of an initiating body of Art. 7 TEU procedures or (if such a procedure is introduced) of a «systemic infringement procedure».<sup>205</sup> Other options might be strengthening the Commission's role as an oversight body within the Framework to Strengthen the Rule of Law or as a monitoring body, equipped with further powers. The political relevance of the Commission will, however, ultimately depend upon its self-image: To what extent does it regard itself only as a moderator of conflicts between member states and to what extent does it take seriously its role as guardian of the interests of the Union?

#### *The European Council and the Council of Ministers*

In contrast to the at least somewhat active role of the European Commission, none of the EU bodies representing member state interests on the EU level have thus far reacted in any way at all to the recent developments, in particular, in Poland and Hungary. Neither the heads of state or government in the European Council nor the ministers of state in the Council of Ministers have taken a position. Their political approach remains characterised to an astonishing degree by the paradigm of state sovereignty, wholly disregarding the repercussions of anti-democratic developments in some member states on the European Union and on other member states. Possibly due to the negative outcome of the Austrian Affair, member states have – in both the European Council and the Council of Ministers – shown great restraint and only sporadically exerted political influence on other member states with regard to their constitutional structures.<sup>206</sup> In many cases, this reticence might also be explained by a concern that their own political practice could at some point become the subject of EU proceedings and that other member states could then be lost to them as

**202** European Commission – Press release, *Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland*, 14 June 2017.

**203** European Commission – Press release, *Hungary: Commission takes second step in infringement procedure on Higher Education Law*, 13 July 2017.

**204** European Commission – Press release, *European Commission launches infringement against Poland over measures affecting the judiciary*, 29 July 2017.

**205** On Kim Lane Scheppele's proposal, see chap. V. 1. a), below.

**206** Again, the only exception is the letter from the Foreign Ministers of Germany, The Netherlands, Denmark and Finland to the Commission President Barroso in which they demanded a mechanism to safeguard fundamental values (6 March 2013).

potential partners. It might, however, also be explained as a consequence of the legal limitations imposed by the Treaties, according to which any determination of an infringement of the fundamental values of the Union under Art. 7 (2) TEU requires unanimity in the European Council. In practice, this high threshold will most likely be impossible to overcome, due to the veto available to each member states. It might, however, be possible to circumvent this obstacle under strict conditions, by joining the Art. 7 TEU proceedings against Hungary and Poland.<sup>207</sup>

In spite of this ongoing de facto moratorium, the representatives of member states remain key actors for confronting anti-democratic developments in member states. The determination that there exists a clear risk of a serious breach by a member state of the values referred to in Art. 2 TEU [Art. 7 (1) TEU] can, for example, be made in the Council of Ministers by a four-fifths majority. Neither Hungary nor Poland would be able to convince one fifth of the member states to exercise their veto. Furthermore, both the Council of Ministers and the European Council are exhibiting an increased tendency to address problems in member states. Since December 2014, the General Affairs Council has hosted an annual forum for dialogue, in which the situation in member states and the promotion and safeguarding of the rule of law is discussed.<sup>208</sup> This new procedure is complementary to the infringement procedure and the procedures under Art. 7 TEU.<sup>209</sup> The first dialogue took place during the Luxembourg Presidency on 17 November 2015. It seems to have been restricted to the discussion of proposals. Thus far, moreover, discussions have been focused on overarching questions of the migrant and refugee crises, rather than on developments in individual member states. It would seem as though member states are afraid of addressing the key problems.

### *The European Parliament*

Thus far, the European Parliament has proven to be the most active participant in the debate. Since the 1990s, it has been demanding more rigorous monitoring of developments in member states and has been emphasising this issue particularly in its annual resolutions on the situation of fundamental rights in the European Union.<sup>210</sup> Its range of possibilities for exerting influence, however, is restricted to the right to adopt resolutions and the right to initiate the EU procedure under Art. 7 (1) TEU. As a body composed of elected representatives, the EP is also, in particular, confronted by the fact that national authoritarian parties are part of larger groups at

<sup>207</sup> See V. 3. below on this proposal.

<sup>208</sup> Council of the European Union, *Presidency non-paper on the rule of law dialogue*, 8774/16, 13 May 2016.

<sup>209</sup> Council of Europe – Press Release, *16936/14*, 16 December 2014, p. 2.

<sup>210</sup> European Parliament resolution of 12 December 2012 on the situation of fundamental rights in the European Union (2010-2011) [2011/2069(INI)]; European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) [2013/2078(INI)]; European Parliament resolution of 10 June 2015 on the situation in Hungary [2015/2700(RSP)].

the European level.<sup>211</sup> Nonetheless, the EP presents – perhaps precisely because of this – the central framework for political debates on authoritarian tendencies.<sup>212</sup> This can be illustrated by the case of Hungary. Fidesz forms part of the conservative EPP group, which holds the majority in the European Parliament. For a long time, initiation of the Art. 7 TEU procedure failed due to resistance by the EPP. In May 2017, however, the EP for the first time exercised its right of initiative, after some 60 EPP delegates decided to no longer protect their member party Fidesz.<sup>213</sup>

#### *Court of Justice of the European Union*

The importance of the Court of Justice of the European Union (ECJ) for the solution to the problem presented here is – for a number of reasons – limited. Firstly, the ECJ can only become active, if the Commission or the member states have triggered an infringement procedure according to Art. 258 ff. TFEU. It can only get involved when called upon to do so. Furthermore, the court only issues decisions on cases, i.e. individual questions, not on political developments. In addition, the questionable measures taken by member states often fall outside the jurisdiction of the ECJ, since they do not bear any specific relation to EU law: for example, if the organisation of the national court system or of domestic election procedures is being altered by member states. Due to this lack of jurisdiction, the court does not have any means to examine anti-democratic developments in member states – let alone the means to stop to them. According to Art. 19 TEU, when read in conjunction with Art. 269 sect. 1 TFEU, the ECJ has jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Art. 7 TEU solely at the request of the member state concerned. Furthermore, it only has the power to review compliance with the procedural rules: such as the question of whether sufficient reasons were given. The existence of a risk of a serious breach of the values of EU law and the determination that such violation has taken place are not matters that fall within the court's jurisdiction.<sup>214</sup>

Thus, it is only under exceptional circumstances that the court may find a technical way to treat the infringement of fundamental European values as an infringement of EU law itself: such as in the case of forced early retirement in Hungary, for instance. In this case, the ECJ found an infringement of the Employment Equality Directive, subtly omitting the fact that the overriding concerns were actually related to the independence of the judiciary.<sup>215</sup> It is to be expected, however, that the proper

**211** Kelemen, Daniel, *Europe's other Democratic Deficit*, Paper presented at the Council for European Studies Conference, 2015.

**212** On this, see Closa, Carlos, Kochenov, Dimitry and Weiler, Josph H. H., «Reinforcing Rule of Law Oversight in the European Union», 2014/25 *EUI Working Paper* RSCAS, 2014, p. 22.

**213** Resolution of the European Parliament of 17 May 2017 on the situation in Hungary [2017/2656(RSP)].

**214** Schorkopf, Frank, in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 51 ff.

**215** Dupré, Catherine, «The Unconstitutional Constitution: A Timely Concept» in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, p. 365.

role of the ECJ will remain an important point of discussion for all institutional approaches to solving the problems expounded in this study. In the longer term, proposals to broaden the jurisdiction of the Court, which we will discuss further on, could produce a path of development that the Court itself might be willing to follow. Such broadening of the jurisdiction of the ECJ would be revolutionary, however, and would test the legitimacy of the ECJ in a way similar to the ground-breaking decisions of the 1960s.<sup>216</sup> It could be met with resistance by the national court systems even in those member states with a functioning democratic order.

## b) Experience with the institutions of the Council of Europe

The fact that the most meticulous and comprehensive analyses of the developments in Europe have been carried out by non-EU institutions does not reflect well on the institutional capacity of the Union. At the same time, however, it illustrates the importance of cooperating with other institutions. This necessitates, in particular, an examination of the Council of Europe, of which all member states of the European Union are part.

The institutions of the Council of Europe had already been involved in the resolution of the conflict in the Austrian Affair, when the member states of the European Union turned to the President of the European Court of Human Rights (ECHR), in order to defuse tension with Austria by way of the involvement of the «wise men». But it is the «European Commission for Democracy through Law», known as the Venice Commission, that has the most important role. All member states of the European Union are members of the Venice Commission, together with twelve other states. The Commission has established itself as a general advisory body in questions of constitutional law<sup>217</sup> and has presented concrete analyses on and proposed possible solutions for the legal situations in Hungary,<sup>218</sup> Poland,<sup>219</sup> and other member

**216** ECJ, judgment of 5 February 1963, Case 26/62, *Van Gend en Loos*, Case Reports 1963, p. 3; Judgment of 15 July 1964, Case 6/64, *Costa/E.N.E.L.*, Case Reports 1964, 1251; agreeing Jakab, András, «Supremacy of the EU Charter in National Courts in Purely Domestic Cases», *Verfassungsblog*, 27 March 2013, [www.verfassungsblog.de/the-eu-as-a-community-of-human-rights](http://www.verfassungsblog.de/the-eu-as-a-community-of-human-rights), accessed 11 August 2017.

**217** Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (von Bogdandy, Armin and Sonnevend, Pál eds.), pp. 292 ff.

**218** See e.g. Venice Commission, Opinion No. 614/2011 on three legal questions arising in the process of drafting the New Constitution of Hungary, 28 March 2011; Opinion No. 621 / 2011 on the new Constitution of Hungary, 20 June 2011; Opinion No. 720/2013 on the Fourth Amendment to the Fundamental Law of Hungary, 17 June 2013; For a comprehensive analysis, see Lane Scheppele, Kim, «Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)», 23 *Transnat. Law and Contemp. Prob.*, 2014, pp. 89 ff.

**219** See e.g. Venice Commission, Opinion No. 839/2016 on the Act of 15 January 2016 amending the Police Act and certain other Acts, 13 June 2016; Opinion No. 860/2016 on the Act on the Constitutional Tribunal, 14 October 2016.

states.<sup>220</sup> Though its opinions are not binding, thanks to their quality and expertise, they nonetheless carry considerable weight within the European Union.<sup>221</sup> For example, they serve as a basis for assessment in Rule of Law Framework proceedings,<sup>222</sup> but are often also consulted for the reports of the European Parliament.<sup>223</sup> Furthermore, sometimes the conflicting parties themselves approach the Venice Commission to sort out their differences.<sup>224</sup>

The European Court of Human Rights (ECtHR) has also increasingly issued decisions pertinent to the problems discussed in this study: in particular, it has supported national constitutional courts.<sup>225</sup> An example of this is the individual application brought by the former President of the Supreme Court of Hungary, whose early termination after only two years was held to be a violation of due process and of freedom of speech.<sup>226</sup> This development is highly relevant. On the one hand, judgments of the ECtHR have significant ripple effects, going far beyond the particular case at hand. In particular, the court may – in particularly representative individual cases – award just satisfaction (Art. 41 ECHR). On the other hand, there is some potential in what is called a «pilot-procedure». In this process, the European Court of Human Rights selects an individual case for priority treatment, in order to address structural or systemic problems or other similar dysfunctions in member states of the ECHR. It, moreover, provides clear indications of what type of measure is required to remedy these problems or dysfunctions (see Art. 61, Rules of Court of the European

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**220** See on Bulgaria e.g. Venice Commission, Opinion No. 816/2015 on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria, 23 October 2015.

**221** Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (von Bogdandy, Armin and Sonnevend, Pál). 2015, pp. 291ff; Lane Scheppelle, Kim, «Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)», *23 Transnat. Law and Contemp. Prob.*, 2014, pp. 89 ff.

**222** On this, see Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM (2014) 158 final, 11 March 2014, p. 4; in addition, the reference to the Report of the Venice Commission in the Resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report).

**223** Report of the European Parliament on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament Resolution of 16 February 2012; [2012/2130(INI)]).

**224** Venice Commission, Opinion No. 614/2011 on three legal questions arising in the process of drafting the new constitution of Hungary, 28 March 2011.

**225** For Hungary, see Lane Scheppelle, Kim, «Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)», *23 Transnat. Law and Contemp. Prob.*, 2014, pp. 88 ff; For examples of ECHR judgments, see judgment of 14 May 2013, *N.K.M./Hungary*, No. 66529/11; judgment of 25 June 2013, *Gáll/Hungary*, No. 49570/11 and judgment of 4 November 2013, *R.Sz./Hungary*, No. 41838/11.

**226** ECHR, judgment of 23 June 2015, *Baka/Hungary*, No. 20261/12.

Convention on Human Rights).<sup>227</sup> Unlike the selective infringement proceedings before the European Court of Justice (ECJ), this procedure offers a means to identify and address general and structural problems in the member states of the ECHR.

### c) Learning Authoritarianisms

The institutions of the European Union, for lack of ability or willingness to confront the problems posed by authoritarian developments, seem increasingly to concentrate on preliminary stages of dialogue, whereas the member states in question rather strengthen their capability to evade democratic standards, by observing and anticipating reactions to these developments.<sup>228</sup> Legal and political debates of these issues are invariably characterised by the same themes. It is argued that the European Union itself is not a neutral agent, that it politicises and instrumentalises the principle of the rule of law, and that it sides with progressive «liberal» actors. According to one commentator, «the latest «constitutional crises» in Hungary and Poland, as well as in Romania, are not to be seen as regressions of and attacks on the rule of law and democracy, but as democratically legitimised, populist «counter-movements» against the previously experienced judicialisation, politicisation and instrumentalisation of horizontal structures of accountability».<sup>229</sup>

The developments also display structural similarities. Once an authoritarian party comes to power, it embarks on limiting the opposition's room for manoeuvre. This includes dissenting voices in the media and the press, in opposition parties and civil society, as well as the (constitutional) courts. At the same time, a strong position of these institutions is not completely rejected, as long as they support the policies of the regime. This culminates in a strategy of «conquest» through the appointment of loyal followers to positions within the media and the judiciary and the selective promotion of groups within society.<sup>230</sup> Another goal of this elimination of dissent is the fragmentation of civil society. Critical voices are branded as opposing the interests of the nation. Participation in civil society then becomes almost impossible. Authoritarian rulers have learned to divide their interventions into many individual aspects, the anti-democratic effects of which only become evident when viewed in the aggregate and are therefore difficult to grasp individually by normative principles.<sup>231</sup> In the event of a conflict with international institutions, these regimes adopt a strategy of marginal amendments, which, when viewed from the outside, appear like changes,

**227** For the first instance judgment, see ECHR, judgment of 22 June 2004, *Broniowski/Poland*, No. 31443/96.

**228** For a fundamental exposition, see Dobson, William J., *The dictator's learning curve: inside the global battle for democracy*, 2012.

**229** From Mendelski, Martin, «Das europäische Evaluierungsdefizit der Rechtsstaatlichkeit», 44/3 *Leviathan*, pp. 367 ff.

**230** Relevant to these aspects, the discussion of Boulanger, Christian, Taborowski, Maciej and Hegedüs, Dániel, «Der «Wille des Volkes» versus Rechtsstaat? Die Entmachtung der Verfassungsgerichte in Ungarn und Polen», lecture at Humboldt University zu Berlin, 24 January 2017.

**231** von Bogdandy, Armin and Ioannidis, Michael, «Das systemische Defizit», 74 *ZaöRV*, 2014, p. 284.

but fail in practice to restore the original state of affairs. This can be illustrated by some of the developments mentioned above: such as the case of the Hungarian judges who were not allowed to return to their former posts or when the Polish government regarded the constitutional conflict as resolved once the critical judges on the Constitutional Tribunal had retired. This silent, but constant drive towards authoritarianism also benefits from the legitimating function of membership in the European Union itself. For as long as the EU has no recourse to effective mechanisms and thus the member state concerned remains in the Union without suffering any substantial sanction, the member state's actions are effectively condoned.

# Safeguarding Democracy in the European Union in Times of Authoritarian Movements

The accelerated political success of right-wing authoritarian movements in several member states of the European Union, but also in the European Parliament, presents a double challenge to the institutional safeguarding of democracy. On the one hand, the need for institutional safeguards for the preservation of democratic structures seems ever more urgent, because of the rise to power of these parties. On the other hand, their coming to power is itself the result of a democratic process. None of the cases discussed above raises significant doubts about the democratic legitimacy of the electoral result – although it should be noted that in both Poland and Hungary, the electoral systems have reinforced relative majorities in such a way as to transform them into absolute and even qualified majorities. Nevertheless, the threat to the democratic order comes from democratic self-determination itself.

This starting point is of great – and as such highly problematic – significance for both the political dynamic and the institutional legitimacy of measures to safeguard democracy. Taking into account the overall political dynamics of the last decade, we can no longer regard the developments in individual member states as merely discrete and marginal deviations from a universally accepted norm. On the contrary, developments such as those in Poland and Hungary have to be understood as an expression of a pan-European political project, the scope of which is further illustrated by the deliberate and Europe-wide cooperation of various, purportedly «nationalist», political parties. Nationalist self-presentation should not obscure the fact that right-wing populist parties often have the same or similar political goals – e.g. with regard to refugees, minorities, gender, environmental or foreign policy – and are very much willing to cooperate with each other at the European level to achieve these goals. Obviously, friction can also arise in these relationships, such as when the Polish and Hungarian right-wing nationalists cannot agree on the appropriate political approach towards Russia. However, such overlapping of ideological and national preferences can also be found in other party groups. This implies that the recent development can also be viewed as the *emergence of a form of political coalition of states*, which has certainly not yet reached its conclusion. It is unusual within the process of European integration, because coalition-building between the member states of the European Union has generally not proceeded according to the

political preferences of the ruling governments. In the abstract, such a development can be interpreted as a positive development; namely as a genuine politicisation at the European level – especially in the Council – which, however, would in turn have to be correspondingly implemented at the institutional level through interventions by the European Council and the Council of Ministers.

In any case, the problem of this form of politicisation is that it does not simply take place in the context of the distinction between right and left, but tends rather towards distinguishing between the continuation or the dissolution of the European Union. It thus introduces a political distinction that is not untypical for party systems in federations. Admittedly, the policies of the various movements within the member states do not fully agree in this respect. Even the right-wing authoritarian governments of Hungary and Poland want their countries to remain in the Union. For example, they spoke out against Brexit, in order to be better able to assert their ideas on European politics with the help of the United Kingdom.

Particularly in this political context, the question arises as to what consequences this may have for the institutional legitimacy of measures to safeguard democracy. For if this development is understood as part of a genuine politicisation at the European level, a situation might occur in which one side of the political divide demands that the other side comply with rules that the other side does not regard as having been breached. Furthermore, if the «problematic» member states have a democratic mandate, it is not clear by virtue of what criteria these member states may be accused of having breached basic democratic principles. It is precisely the democratic principle, rather than its protection by the rule of law, that is at the ideological heart of many right-wing nationalist parties. At this point, one might try to distinguish between populism and democracy,<sup>232</sup> but this distinction is not always clear. It may obscure the fact that populists can come to power through democratic means. Moreover, the distinction can in no way be regarded as a sufficiently established, such as to provide reasonable guidance for a formalised procedure to protect a democratic order. These are not merely theoretical problems. It is precisely because of the lack of ascertained breaches, due to their at best unclear normative basis, that the measures against Austria – one might add *rightly* – failed. Thus, it must be ensured that institutional measures to safeguard democracy will not be exploited as a means of political struggle against the other side of the political divide. This has consequences not only for the criteria under which safeguards are triggered, but also for the design of the safeguards themselves. We shall examine both in detail below, but we will already provide a brief outline here.

Regarding the criteria of application of safeguards, we need to answer the question of how exactly one should evaluate the democratic mandate of an anti-democratic party. The main criterion will be the existence of an institutional opportunity for the minority later to become a majority, this opportunity being constitutive for

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**232** This is of course a distinction by no means lacking in controversy, see e.g. Müller, Jan-Werner, *Was ist Populismus?*. 2016; alternatively Laclau, Ernesto, *On Populist Reason*. 2005; Kelly, Duncan, «Populism and the History of Popular Sovereignty» in *Oxford Handbook of Populism* (eds. Rovira Kaltwasser, Cristóbal et al.), 2017.

any democracy.<sup>233</sup> This corresponds to one strand of empirical research on democracy, which evaluates the establishment of democratic structures by looking at the frequency of actual changes of government within a given period of time.<sup>234</sup> As we shall see, on the one hand, such an approach allows for different forms of democratic institutions – which is a necessity given the diversity of constitutional systems in the member states. On the other hand, the approach is – although formulated in general terms – precisely not formalistic, but rather can take into account the practical, political, and social effects of a given institutional design.

Furthermore, the criterion of the protection of future potential majorities is important for the design of democratic safeguards. The democratic mandate of an anti-democratic government, in conjunction with the precarious legitimacy of EU measures for the safeguarding of democracy, leads to a problematic situation, in which interventions could further impede rather than open up the political process in question. Therefore, when shaping such measures, the perspective of the opposition in the member states must be taken into consideration. At the same time, one should not make the mistake of believing that such a deep-seated and genuine political conflict can be resolved by relying solely on such procedural measures – implemented *top down* upon the affected member states by the institutions of the European Union.

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**233** For a discussion of this criterium in Kelsen, see Vašek, Markus, «Relativität und Revisibilität. Zur Begrenzung der Mehrheitsregel in der Demokratietheorie Hans Kelsens», 41/4 *Rechtstheorie*, pp. 512 ff.

**234** Merkel, Wolfgang, *Systemtransformation. Eine Einführung in die Theorie und Empirie der Transformationsforschung*, 2nd Edition, 2010.

# Institutional Approaches in the Current Debate

In light of the evident ineffectiveness of the available set of institutional instruments, alternative ways to ensure compliance with fundamental European values are being sought.<sup>235</sup> All the proposed approaches to a solution focus on the fact that there currently is no sufficient sanctioning mechanism on the EU level, in the event of anti-democratic developments in member states.

## 1 Legal approaches

Legal approaches confer the assessment of the conflict to the courts: in particular, to the Court of Justice of the European Union (CJEU).<sup>236</sup> The proposals that are currently being discussed may be summarised as broadening the scope of the infringement procedure and broadening the scope of fundamental rights.

### a) Broadening the scope of the infringement procedure

The American sociologist and professor of comparative law, Kim Lane Scheppele, takes the existing infringement procedure under Art. 258 ff. TFEU as the starting point of her considerations and proposes the broadening of its scope.<sup>237</sup> Traditionally, the procedure, sanctioning individual breaches of the duties arising under the Treaties, is not suitable for the sanctioning of persistent and structural problems in member states. The example of Hungary, however, illustrates that democracy and the rule of law can be undermined in several small, individual steps, without any possibility to address the broader political reality in a proper legal procedure. According

<sup>235</sup> See e.g. Closa, Carlos, Kochenov, Dimitry and Weiler, Joseph H. H., «Reinforcing Rule of Law Oversight in the European Union», 2014/25 EUI Working Paper RSCAS, 2014; as well as *An EU mechanism on democracy, the rule of law and fundamental rights*, European Parliamentary Research Service, April 2016.

<sup>236</sup> The Court of Justice of the European Union includes the Court of Justice and the General Court (Art. 19 para. 1 TEU). The Civil Service Tribunal of the European Union was dissolved on 1 September 2016.

<sup>237</sup> Lane Scheppele, Kim, *Enforcing the basic principles of EU law through systematic infringement procedures*, 2015; *Ibid.*, «Enforcing the Basic Principles of EU Law through Systemic Infringement Actions», in *Reinforcing Rule of Law Oversight in the European Union* (eds. Closa, Carlos and Kochenov, Dimitry), 2016, pp. 105 ff.

to Scheppele, individual infringement procedures that, in practice, raise similar concerns and thus appear highly interconnected should, in the future, be joined by the Commission into one «systemic infringement procedure» against the member state in question. The «infringement» of which the member state would be accused in these instances could be identified either as an infringement of the values expressed in Art. 2 TEU by way of a systemic breach or as a violation of the principle of «sincere cooperation» (Art. 4 sect. 3 TEU). Such a systemic infringement procedure would enable the Commission to prevent member states from making only minor corrections following an infringement procedure, without actually changing the underlying fundamental political-institutional problem.

## **b) Broadening the scope of application of EU fundamental rights**

Another possible starting point for a reform of legal responses is the European judicial protection of basic rights. Thus, an extension of the jurisdiction of national courts and of the Court of Justice of the European Union (CJEU) in matters of European fundamental rights has been proposed by Daniel Halberstam,<sup>238</sup> and following him, by Armin von Bogdandy.<sup>239</sup> This mechanism would resemble the *Solange II* jurisprudence of the German Constitutional Court.<sup>240</sup> In the *Solange II* judgment, the Court decided that it would no longer exercise its jurisdiction over the applicability of European Union law, *as long as* an effective protection of fundamental rights that is substantially similar to the protections required by the German Basic Law was ensured at European level.<sup>241</sup> Applied to European fundamental rights, this means, according to the «Reverse Solange doctrine», that member states would remain generally autonomous, outside the scope of the Charter of Fundamental Rights of the European Union, *as long as* they ensure the essence of the fundamental rights enshrined in Art. 2 TEU. By fusing European fundamental rights and European Union citizenship, these fundamental rights are also protected as European fundamental values according to Art. 2 TEU and are part of the substance of the Union citizenship rights developed by CJEU jurisprudence.<sup>242</sup> If the presumption of the domestic protection of fundamental rights is refuted – for example, when a member state refuses to implement a judgment of the ECHR or when the courts dealing with a specific case are intimidated or their judgments disregarded – EU citizens could,

**238** Halberstam, Daniel, *Constitutional Heterarchy. The Centrality of Conflict in the European Union and the United States*, University of Michigan Public Law Working Paper No. 111, 2008.

**239** von Bogdandy, Armin, Kottmann, Matthias et al., «Ein Rettungsschirm für europäische Grundrechte», *72 ZaöRV*, 2012, pp. 45–78; «Debate on A Rescue Package for EU Fundamental Rights», *Verfassungsblog*, 2012, [www.verfassungsblog.de/category/schwerpunkte/rescue-english](http://www.verfassungsblog.de/category/schwerpunkte/rescue-english), accessed 27 April 2017.

**240** BVerfGE 73, 339 ff. (*Solange II*); For an explanation on this, see Calliess, Christian, *Staatsrecht III*, 2014, pp. 326 ff.

**241** Both the ECJ and the ECHR have used similar approaches, see e.g. ECHR, judgment of 30 June 2005, *Bosphorus/Ireland*, No. 45036/98; and ECHR, judgment of 3 September 2008, *Kadi and Al Barakat*, joined cases C-402/05 P and C-415/05 P, Case Reports 2008, I-6351.

**242** ECJ, judgment of 8 March 2011, Case C-34/09, *Zambrano*, Case Reports 2011, I-0000.

according to this model, seek redress for a violation of the «substance» of European fundamental rights before national courts with the backing of the ECJ.<sup>243</sup>

### c) Evaluation

Both the broadening of the scope of the existing infringement procedure and the broadening of the scope of application of fundamental rights delegate the problems caused by the lack of democratic safeguards to the ECJ. The advantage of this approach is that judicial procedure is generally less subject to allegations of bias and partisanship. At the same time, this strategy contains the risk of a further politicisation of the judiciary.<sup>244</sup> In both constellations, it is not clear *how* the ECJ would be able to address the underlying problems in such cases. Regarding the potential broadening of the infringement procedure, this is due to the fact that the correlation of various infringements does not become evident within a single infringement proceeding targeting one *individual* instance. Thus, a systemic infringement procedure could not claim the legitimacy that every single infringement proceeding has to generate for itself.<sup>245</sup> Furthermore, as shown above, the set of norms enshrined in Art. 2 TEU categorically goes beyond the scope of EU law and additionally, because of its lack of basic definitions, is not directly justiciable *per se*. In spite of this, Scheppele's proposal appears to be a feasible way of addressing broader developments in the member states. Judicial review will, however, turn out to be far more challenging than these proposals suggest. This is due to the requirement of testable standards in judicial proceedings: standards that cannot be found in current EU law. The involvement of the ECJ will not solve the problems, but it might resolve the conflict at hand.

The «Reverse Solange doctrine» seems, if anything, even less suited to capturing comprehensive structural developments in member states. It surely is capable of addressing individual violations of fundamental rights, but it is not capable of addressing general violations of the principles of democracy or of the rule of law. In addition, the approach relies on the cooperation of national courts, and thus it cannot function once these have been – as in the cases of Hungary and Poland – politically undermined. Institutionally speaking, moreover, there is a risk that other national constitutional courts might regard such a broadening of the jurisdiction of the European courts as an arrogation and as a potential weakening of their own national standards.

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**243** von Bogdandy Armin, Kottmann, Matthias et al., «Ein Rettungsschirm für europäische Grundrechte», 72 *ZaöRV*, 2012, pp. 45–78.

**244** Blauburger, Michael, «Europäischer Schutz gegen nationale Demokratiedefizite?», 44/2 *Leviathan*, 2016, pp. 280–302 (298).

**245** Möllers, Christoph, «Individuelle Legitimation: Wie rechtfertigen sich Gerichte?» in *Der Aufstieg der Legitimitätspolitik, Leviathan special edition 27* (eds. Geis, Anna, Nullmeier, Frank and Daase, Christopher), 2012, pp. 398–418.

## 2 Functionalist-administrative approaches

Functionalist-administrative models delegate the resolution of the conflict to an executive institution, in particular to a monitoring institution, in order to avoid the lengthy and inhibiting decision-making mechanisms in the member states. In addition to the mechanism of the Venice Commission at the level of the Council of Europe, a similar monitoring takes place at the EU level *before* a state becomes a member according to the previously described Copenhagen Criteria. After accession, the European Union Agency for Fundamental Rights monitors the observation of fundamental rights in the member states.<sup>246</sup>

### a) Monitoring institutions

One proposal refers to the involvement of independent monitoring institutions, in order to assess the developments in the member states. Independent agencies that could be considered for this task would be the European Union Agency for Fundamental Rights or some yet to be established monitoring committee with the Venice Commission playing an advisory role.<sup>247</sup> Jan-Werner Müller proposes the establishment of a «Copenhagen Commission», which would monitor compliance with the Copenhagen Criteria even after accession of the member state and which would have the authority to impose sanctions if necessary.<sup>248</sup> This commission, according to Müller, should be equipped with rights of investigation, in order to assess the legal situation, and it should be authorised to send clear messages to the member states in question. Upon receiving the recommendations of the «Copenhagen Commission», the European Commission would then be required to reduce funding or to impose financial penalties.

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**246** Dupré, Catherine, «The Unconstitutional Constitution: A Timely Concept», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnnevend, Pál), 2015, p. 363.

**247** On this, see Closa, Carlos, Kochenov, Dimitry and Weiler, Joseph H. H., «Reinforcing Rule of Law Oversight in the European Union», 2014/25 *EUI Working Paper RSCAS*, 2014, pp. 17 ff.

**248** Müller, Jan-Werner, «Safeguarding Democracy inside the EU: Brussels and the Future of the Liberal Order», *Transatlantic Academy Paper Series 2012–2013/3*, pp. 24 ff.; Müller, Jan-Werner, «Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission» in *Reinforcing Rule of Law Oversight in the European Union* (eds. Closa, Carlos and Kochenov, Dimitry), 2016, pp. 206 ff; for a critical view, see Franzius, Claudio, «Sinn und Unsinn einer Kopenhagen-Kommission», *Verfassungsblog*, 8 April 2013, <http://verfassungsblog.de/sinn-und-unsinn-einer-kopenhagen-kommission>, accessed 11 August 2017.

## b) EU Mechanism for Democracy, the Rule of Law and Fundamental Rights

In October 2016, the European Parliament requested the creation of a new EU Mechanism for Democracy, the Rule of Law and Fundamental Rights.<sup>249</sup> This mechanism was to be established on the basis of Art. 295 TFEU in the form of an inter-institutional agreement with the Commission. It would aim at monitoring compliance with core values and founding principles of the European Union – democracy, the rule of law and fundamental rights – both by the member states and by the institutions of the EU (Art. 1 of the Resolution). The European Parliament further proposed an annual report on the state of democracy, the rule of law and fundamental rights with country-specific recommendations, an annual inter-parliamentary debate<sup>250</sup> on the basis of this report, and a policy-cycle for democracy, the rule of law and fundamental rights within the EU institutions (Art. 2 of the Resolution).

According to the proposal, the European Report on the State of Democracy, the Rule of Law and Fundamental Rights in the Member States would be drawn up by the Commission, in consultation with an expert panel (Art. 4 of the Resolution). The latter would be composed of a nominee of the national parliament of each member state, as well as ten further experts nominated by the EP (Art. 8 of the Resolution). The panel would assess the situation in the member states, taking into account particular aspects, such as the separation of powers, pluralism of the media, and the existence of institutional checks and balances (Art. 7 of the Resolution), and it would draft country-specific recommendations (Art. 8 of the Resolution). The sources for the assessments would include, among other things, contributions by the member states' authorities, the European Union Agency for Fundamental Rights, the case-law of the ECJ and the ECtHR, and the opinions of the Venice Commission (Art. 6 of the Resolution). The Commission would set up a secretariat for the expert panel, to facilitate its efficient operation.

The European Report on the State of Democracy, the Rule of Law and of Fundamental Rights would then be adopted by the Commission and would form the basis of an inter-parliamentary debate in the EP and in the Council (Art. 10 of the Draft). On the basis of the report, the EP would adopt a resolution. Within the framework of the previously mentioned dialogue on the rule of law, the Council would hold an annual debate on the European Report. Subsequently, the council would adopt conclusions in which national parliaments would be encouraged to provide a response or proposals for action or reform based on the Report. On the basis of the outcome of the Report, the European Commission could then initiate a «systemic infringement» procedure. The Commission could also submit a proposal for an evaluation

<sup>249</sup> Resolution of the European Parliament of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights [2015/2254(INL)].

<sup>250</sup> The annual interparliamentary discussion in the European Parliament are part of a dialogue of several years between the European Parliament, the Council, the Commission and national Parliaments, in which the civil society, the EU Agency for Fundamental Rights, and the Council of Europe are also involved, Art. 10 para. 3 of the Resolution.

by the Council of the implementation of EU policies by the authorities of the member states in the areas of freedom, security and justice (Art. 70 TFEU).<sup>251</sup> The findings of the Report would form the basis for the initiation of either a dialogue with the member states or of an Art. 7 TEU procedure.

The EU Mechanism for Democracy, the Rule of Law and Fundamental Rights would also provide the expert panel with powers to monitor compliance with democracy, the rule of law and fundamental rights by the EP, the Council and the Commission (Art. 11 of the Draft). Furthermore, the Resolution proposed the creation of an inter-institutional task force to create a compliance culture in member states with regard to fundamental rights and the rule of law and to anticipate implementation challenges (Art. 12 of the Draft). The European Commission, however, rejected the proposal by the European Parliament for a number of reasons (see chap. IV.2.d).<sup>252</sup>

### c) Financial sanctions

If institutional or political solutions are exhausted, financial sanctions could come into consideration. Withholding or cutting EU funding can act as an incentive for member states to alter their behaviour.<sup>253</sup>

#### *Penalty payments within the framework of a systemic infringement procedure*

Within the framework of her proposed systemic infringement procedure, Kim Lane Scheppele has advocated the imposition of a penalty payments according to current procedural law (Art. 260 sect. 2 sub-sect. 2 TFEU), in the event that the member state does not undertake significant domestic changes. Since the conventional sanctioning procedure has been regularly impeded by delays on the part of the member states, the systemic infringement of the values referred to in Art. 2 TEU should, according to Scheppele, lead to the suspension of EU funding for as long as the infringement persists. In this case, the notoriously delayed payment of fines by the member states would not be an issue. Scheppele argues that Art. 260 TFEU must be interpreted broadly as not dictating *how* the penalty is to be enforced. Therefore, the procedure would not rule out the withholding of payments by the Commission.<sup>254</sup>

Scheppele correctly points out that sanctioning mechanisms are generally laid down in the Treaties for reasons of legal clarity and that changes to the Treaties cannot be considered as an option in the face of the current veto tendencies of some member states. It should be noted, however, that authority of the Commission to suspend EU funds could be provided through secondary legislation: i.e. EU

<sup>251</sup> On this, see Suhr, Oliver, «Art. 70 AEUV», in *EUV/AEUV* (Callies, Christian and Ruffert, Matthias eds.), 5th Edition, 2016, para. 1.

<sup>252</sup> Follow-up to the European Parliament resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, SP (2017)16, adopted by the Commission on 17 January 2017, p2 ff.

<sup>253</sup> See Lane Scheppele, Kim, *Enforcing the basic principles of EU law through systematic infringement procedures*, 2015, p. 19.

<sup>254</sup> *Ibid.*, pp. 18 ff, 22.

regulations and directives. Scheppele points out that mechanisms in which the payment of EU funds is linked to the fulfilment of specific criteria already exist within the framework of the Excessive Deficit Procedure of the European Economic and Monetary Union, which permits cutting EU funding for violation of common goals: in particular, stability and growth. A similar procedure could be introduced for systemic infringements of Art. 2 TEU, therefore cancelling the payment of certain EU funds that could otherwise be claimed by the member state in question.<sup>255</sup>

#### *Restructuring of EU Structural and Investment Funds*

Admittedly, the adoption of secondary legislation is too lengthy and difficult to address current problems. Hence, a starting point might be the restructuring or suspension of existing funding mechanisms within the framework of the European Structural and Investment Funds. The structural funds serve to reduce the economic and social disparities within the European Union. They include, among others, the European Regional Development Fund (ERDF), for the promotion of balanced development in the different regions of the EU, and the European Social Fund (ESF). The Cohesion Fund is aimed at the realisation of the structural-political goals of the Union: in particular, in the areas of environment and transport. Countries eligible for funding are the member states whose gross national income per inhabitant is less than 90 % of the EU average: for instance, for the period 2014 to 2020, Bulgaria, Hungary, Poland, Portugal, Romania, Slovenia and Slovakia.<sup>256</sup>

Most recently, the EU Budget Commissioner, Günther Oettinger (CDU/EPP), has proposed to restructure the EU Structural Funds starting in 2021 and to link the allocation of funding to, among other things, compliance with certain political conditions in member states.<sup>257</sup> This approach is supported by the German government.<sup>258</sup> Admittedly, after obtaining the consent of the European Parliament, the Council of Ministers is required *unanimously* to adopt the Multi-Annual Financial Framework, which also regulates the conditions for funding [Art. 312 (2) and (1) para. 2 TFEU]. But especially those member states that more heavily rely on this funding, including Poland and Hungary, might have a significant interest in the continuation of the payments and would, therefore, be more likely to enter into negotiations.

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<sup>255</sup> Ibid., pp. 22 ff.

<sup>256</sup> Commission Directive 2014/99/EU of 18 February 2014, Filing 2014 L 50; For a comprehensive account on the structural and investment funds, see Petzold, Wolfgang, «Art. 174 AEUV», in *Europäisches Unionsrecht* (von der Groeben, Hans, Schwarze, Jürgen and Hatje, Armin), 7th Edition, para. 1 ff.

<sup>257</sup> «Commission hints at political conditions for EU funds», EU Observer, 30 May 2017, [www.euobserver.com/institutional/138063](http://www.euobserver.com/institutional/138063), accessed 9 August 2017; agreeing with this, the Justice Commissioner Věra Jourová, «EU-Kommissarin droht Polen mit Entzug von Fördergeldern», *Die Zeit*, 19 July 2017, [www.zeit.de/politik/ausland/2017-07/umstrittene-justizreform-polen-eu-foerdergelder-vera-jourova](http://www.zeit.de/politik/ausland/2017-07/umstrittene-justizreform-polen-eu-foerdergelder-vera-jourova), accessed 9 August 2017.

<sup>258</sup> «Cut funds to EU members that violate rule of law: German proposal», *Reuters*, 30 May 2017, [www.reuters.com/article/us-germany-eu-cohesion-funds/cut-funds-to-eu-members-that-violate-rule-of-law-german-proposal-idUSKBN18Q28R?il=0](http://www.reuters.com/article/us-germany-eu-cohesion-funds/cut-funds-to-eu-members-that-violate-rule-of-law-german-proposal-idUSKBN18Q28R?il=0), accessed 9 August 2017.

*Suspension or reduction of funding within the framework of existing mechanisms of allocation*

Alongside the restructuring of the conditions for funding, a suspension and/or reduction of funding from existing mechanisms of allocation should also be considered. The Structural and Cohesion Funds of the Union serve the goal of strengthening economic, social and territorial cohesion, in order to promote the overall harmonious development of the European Union [Art. 174 (1) TFEU]. This presupposes compliance with the European values enshrined in Art. 2 TEU, which are fundamental to both all relationships between the Union and the member states and all relationships among member states.<sup>259</sup> If a member state disregards these requirements, the goals cannot be achieved anymore and thus the eligibility for funding is lost.

The reduction or withdrawal of funding would be subject to several preconditions, which can only be briefly outlined here. The regulation containing the common provisions on the Structural and Cohesion Funds<sup>260</sup> allows for the withdrawal of funding in the case of serious deficiencies in the effective functioning of the management and control systems of the operational programme, in case of irregularities in allocation and use of funds, and in the case of a failure to carry out mandatory reporting duties [Art. 144 (1) Reg. (EU) No. 1303/2013]. As compared to these variants, a suspension would be all the more conceivable if, despite repeated requests from the Union, a member state disregards the values referred to in Art. 2 TEU. For this to occur, all available EU mechanisms must have been exhausted without success. Only in this case, the payment of funds could then be cancelled or suspended by means of an implementing act by the Commission. Due to its gravity and its consequences, this decision would have to be made by a qualified majority and would need to respect the Union's principle of proportionality [see Art. 144 (1) and (2) Reg. (EU) No. 1303/2013]. A temporary withholding of funds would therefore be preferable to a partial or complete suspension. Along with the nature and severity of the infraction by the member state, the financial implications for the member state would also have to be considered [see Art. 144 sect. 2 Reg. (EU) No. 1303/2013], as would the measure's effects upon the rights and duties of natural and legal persons (see Art. 7 sect. 3 para. 2 TEU). Hence, financial sanctions and cuts in funding from the European Social Funds are not generally an option. The member state in question would have to be informed and given the chance to comment on the allegations, before any decision on a suspension or reduction of funding is made [see Art. 145 Reg. (EU) No. 1303/2013].

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**259** Hilf, Meinhard and Schorkopf, Frank, «Art. 2 EUV», in, *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 8 ff.

**260** Regulation (EU) No. 1303/2013 of the European Parliament and the Council of 17 December 2013.

## d) Evaluation

Monitoring models have an appellative function. In the best-case scenario, they provide the political process and public debate with reliable information and well-founded assessments on the basis of comprehensible criteria. They can neither make decisions nor solve problems. They support critical appraisal both within the member state in question and elsewhere. The creation of additional advisory instruments at the level of the European Union would either require Treaty amendments, which are at the moment difficult to imagine, or the lengthy and difficult process of adopting secondary legislation. Moreover, in the form of the Venice Commission, there is already a strong, historically-developed institution whose opinions are taken into account by the institutions of the European Union and are often regarded as authoritative or even sought out by representatives of criticised governments.

As an inter-institutional agreement (Art. 295 TFEU), the proposal by the EP for an EU Mechanism for Democracy, Rule of Law and Fundamental Rights could both be adopted without being tied to strict procedural and structural rules and, depending on the agreement between the institutions of the Union, still have binding character.<sup>261</sup> However, the European Commission rejected the proposal of the European Parliament for a number of reasons. The necessity and the feasibility of such an instrument is indeed questionable. In particular, the central role of the expert panel raises questions of legality, institutional legitimacy and accountability. For practical and political reasons, moreover, it seems unlikely that all the parties involved would arrive at a common evaluation of the situation in the member states. In order to avoid redundant measures, it makes more sense to focus on the consistent application of existing procedures: in particular, the EU Framework to Strengthen the Rule of Law.<sup>262</sup>

The broad interpretation of Art. 260 TFEU, according to which the latter covers not only the payment of lump sums or fines from the national budget, but also the reduction or withholding of EU funding, is not supported by the wording of the Treaty provision. Sanctioning procedures must have an unambiguous legal basis in the Treaties of Union for reasons of legal clarity. But creating this legal basis by amending the Treaties is not feasible, given the readiness of some member states to use their veto. The same goes for the introduction of secondary legislation, similar to the EU Excessive Deficit Procedure, which can be expected to be a lengthy process and ultimately to fail due to political opposition. The restructuring of the EU Structural and Investment Funds starting in 2021 seems more promising. Such a restructuring would require the finding of the right balance between, on the one hand, clear criteria and, on the other hand, sufficient room of manoeuvre for those

<sup>261</sup> Krajewski, Markus and Rösslein, Ulrich, «Art. 295 AEUV» in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 18 ff.

<sup>262</sup> Follow up to the European Parliament Resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, SP (2017)16, adopted by the Commission on 17 January 2017, pp. 2 ff.

member states that are in need of financial support by the EU. Otherwise, there is a risk that the member state requirements on which the funding depends would resemble a «budgetary rider»: i.e. an additional obligation that has little or no connection with the actual reasons for and subject-matter of the funds in question. This practice of adding unrelated requirements to legislative packages that have a budgetary relevance is well-known from other legal systems; but, in our opinion, it is highly problematic from the point of view of constitutional law. By making EU funding subject to compliance with certain criteria, the European Union could circumvent the distribution of competencies wherever it has funds to distribute, by introducing arbitrary requirements. The restructuring of the EU Structural and Investment Funds bears the risk therefore of itself becoming the starting point of new conflicts between the member states and the Union.

The suspension or reduction of funding is already possible within the existing framework of EU funding and would therefore have the advantage of not requiring the lengthy process of development and adoption of new procedures. Within this existing framework, the Commission, as «Guardian of the Treaties», would have the power to decide unilaterally on sanctioning measures. At the same time, in contrast to the procedure under Art. 7 TEU, EU courts could review the legality of cuts in funding, which would increase their legitimacy. Nonetheless, the effectiveness of such measures remains limited. Whether financial pressure by itself is sufficient to persuade a member state to change direction remains questionable.<sup>263</sup> Ultimately, reductions would play into the popular narrative of authoritarian regimes, according to which democratic member states are being held hostage by the European Union. Moreover, such measures contradict the idea of the Union itself.<sup>264</sup> EU funding should not be withheld from those member states that are in need of them and should not affect citizens who cannot be held accountable for the political developments in their country.<sup>265</sup>

**263** Bugarič, Bojan, «Protecting democracy inside the EU: on article 7 TEU and the Hungarian turn to authoritarianism», in *Reinforcing rule of law oversight in the European Union* (eds. Closa, Carlos and Kochenov, Dimitry), 2016, pp. 84 ff; Closa, Carlos, Kochenov, Dimitry and Weiler, Joseph H. H., «Reinforcing Rule of Law Oversight in the European Union», 2014/25 *EUI Working Paper RSCAS*, pp. 11 ff.

**264** Grzeszczak, Robert and Karolewski, Ireneusz Pawel, «Mind the Gap! Schwierigkeiten der Rechtsstaatlichkeit in der EU», *Verfassungsblog*, 26 September 2017, [www.verfassungsblog.de/mind-the-gap-schwierigkeiten-der-rechtsstaatlichkeit-in-der-eu](http://www.verfassungsblog.de/mind-the-gap-schwierigkeiten-der-rechtsstaatlichkeit-in-der-eu), accessed 2 October 2017.

**265** Closa, Carlos, Kochenov, Dimitry and Weiler, Joseph H. H., «Reinforcing Rule of Law Oversight in the European Union», 2014/25 *EUI Working Paper RSCAS*, 2014, p. 19.

### 3 Joint Art. 7 TEU procedures against several member states

The determination of the existence of a serious and persistent breach of the values referred to in Art. 2 TEU, which is a prerequisite for any decision on sanctions under Art. 7 (3) TEU, has until now been thwarted by the need for unanimity in the European Council and by the obstructive approach of some member states. Viktor Orbán has already announced that he would veto the initiation of proceedings against Poland.

Taking up this issue, Kim Lane Scheppele has proposed to circumvent this veto power by joining the Art. 7 TEU procedures against Hungary and Poland into one single procedure.<sup>266</sup> According to Art. 7 (5) TEU read in conjunction with Art. 354 (1) TFEU, states that are themselves subject to the procedure under Art. 7 TEU have no vote in the decisions pertaining to the procedure against them. Therefore, in the case of a joint procedure, neither of the states under investigation would be able to block the procedure.<sup>267</sup>

However, joining proceedings would have to be subject to strict conditions: firstly, to the existence of a close connection between the infringements of values in the two countries; and, secondly, to apparent collusion between the two states with the goal of blocking the Art. 7 TEU procedure.<sup>268</sup> Evidence that such collusion between member states took place will, however, be difficult to produce. Moreover, it cannot be foreseen whether only one state would threaten to exercise its veto or whether further states would block the initiation of an Art. 7 TEU procedure. Ultimately, notwithstanding the possibility of joining proceedings, the initiation of the procedure depends on political dynamics and sentiment within the Council.

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**266** Lane Scheppele, Kim, «Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too», *Verfassungsblog*, 24 October 2016, [www.verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too](http://www.verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too), accessed 9 August 2017; further clarified by Thiele, Alexander, «Art. 7 EUV im Quadrat? Zur Möglichkeit von Rechtsstaats-Verfahren gegen mehrere Mitgliedsstaaten», *Verfassungsblog*, 24 July 2017, [www.verfassungsblog.de/art-7-euv-im-quadrat-zur-moeglichkeit-von-Rechtsstaats-verfahren-gegen-mehrere-mitgliedsstaaten](http://www.verfassungsblog.de/art-7-euv-im-quadrat-zur-moeglichkeit-von-Rechtsstaats-verfahren-gegen-mehrere-mitgliedsstaaten), accessed 9 August 2017.

**267** On this proposal Lane Scheppele, Kim, «EU can still block Hungary's veto on Polish sanctions», *Verfassungsblog*, 11 January 2016, [www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions](http://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions), accessed 10 August 2016.

**268** As suggested by Thiele, Alexander, «Art. 7 EUV im Quadrat? Zur Möglichkeit von Rechtsstaats-Verfahren gegen mehrere Mitgliedsstaaten», *Verfassungsblog*, 24 July 2017, [www.verfassungsblog.de/art-7-euv-im-quadrat-zur-moeglichkeit-von-Rechtsstaats-verfahren-gegen-mehrere-mitgliedsstaaten](http://www.verfassungsblog.de/art-7-euv-im-quadrat-zur-moeglichkeit-von-Rechtsstaats-verfahren-gegen-mehrere-mitgliedsstaaten), accessed 9 August 2016.

## PART V:

# Commentary and Reform Approaches

Our reflections suggest grounds for caution when it comes to institutional approaches: to be implemented «top down» from the EU level onto the member states. In general, the historical experience of dramatic political upheavals in all large processes of federal integration teaches us to exercise caution. This caution is particularly necessary in the context of the EU. When systemic problems in member states are combined with political criticisms of European integration, interventions at the European level will often appear highly ambivalent and could lead to unintended and unforeseen consequences: in particular, such measures could impede rather than promote the work of the domestic opposition. In principle, in order to avoid such setbacks, all types of measures to protect democratic structures should take into account the role of the respective local opposition and should be discussed and coordinated with it. Against this backdrop, our recommendations will begin by addressing the following important – but hitherto underestimated – question: On the basis of what criteria, and under what material conditions, can it at all be permissible formally and vertically to address problems in a given member state (1)? We will then deal with possibilities and channels of informal influence (2). Finally, we will ask what consequences can be drawn from these considerations for the proper path of action of European institutions (3.).

## 1 Developing systematic criteria: protecting the democratic opposition

One of the dangers of an institutionalised protection of democracy in the European Union is confusing political unease regarding the development of a member state and structural deficits of democratic institutions – or allowing the one concern indistinctly to slide into the other. It is therefore of critical importance to clarify the criteria for the dissolution of democratic structures. This clarification fulfils a double function. Firstly, it legitimises the intervention into the political process of a member state: an intervention that is in dire need of justification. Secondly, it serves to provide assurance to the other parties involved that they are not pursuing their own political goals by way of a measure, but that the measure actually serves to protect the institution in question. Such a clarification requires a narrow and strict justification. It is precisely when everything is at stake that strict criteria are needed. The catalogue of Art. 2 TEU is unsuitable for this task, because it is formulated in terms

that are too general and malleable. Therefore, clarification is needed. In what follows, we suggest restricting measures to the safeguarding of democracy. We define the existence of a serious threat to democracy by reference to the state of the political opposition: i.e. according to the degree to which future majorities are protected in a given legal order. In this respect, it is important to see that the development of such criteria must in itself be the subject of a political process and debate. This process should, optimally, be informed by democratic theory; more importantly, however, it should be left open to it to define and develop its own conceptions of what constitutes a democracy. The following outline is to be understood bearing in mind this consideration.

### a) Systematic problems of Art. 2 TEU

The development of systematic criteria that reliably inform the political process whether there is an actual threat to democratic structures in a member state is a problem in several respects. Since the early days of the Community, all member states have been expected – first implicitly and then more and more explicitly – to maintain democratic structures. From the beginnings of the European project, the admission of new member states was supposed to be contingent upon adherence to the principle of democracy.<sup>269</sup>

It is not easy, however, to formulate this pre-condition explicitly in legal terms. The list of common «values» that was introduced by the Treaty of Maastricht has remained vague.<sup>270</sup> Today, Art. 2 TEU provides a systematically weak starting point for solving the problem. Frequent appeals to «values» in political discussions are unsatisfactory, for the simple reason that, while values do have a normative content, they cannot establish enforceable duties.<sup>271</sup> In a liberal legal system, one can choose not to adhere to certain values without – by virtue of that fact – violating any legal obligations. The concrete scope and content of duties deriving from a commitment to certain values remains unclear. This is especially true for the formulation of the second sentence of Art. 2 TEU. Although the reference to the common values of a particular «society» seems to extend the scope of the norm beyond the member states to other addressees, this expansion ultimately works to undermine further the normative import of the provision. This is because almost no one will claim that Art. 2 TEU creates any concrete duties for individuals. This, however, means that it remains nebulous which duties are supposed to follow for «societies» and/or the member state. That the societies of the member states are characterised by

<sup>269</sup> Hillion, Christophe, «The Copenhagen Criteria and their Progeny», in *EU Enlargement* (ed. Hillion, Christophe), 2004, pp. 2 ff.

<sup>270</sup> Hilf, Meinhard and Schorkopf, Frank, «Art. 2 EUV», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 2.

<sup>271</sup> Regrettably, this is insufficiently taken into account in the discussion, see e.g. Calliess, Christian, «Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht», 59/21 *JZ*, 2004, pp. 1033–1084.

their chosen values, as the second sentence suggests, is a factual assertion whose accuracy, in 2018, appears highly dubious. Furthermore, the values enshrined in Art. 2 TEU are over-inclusive.<sup>272</sup> They include wide-ranging notions, rather than being restricted to a comprehensible and applicable set of norms. Moreover, the value commitment declared in Art. 2 TEU disregards that there can be contradictions between these values: for example, between majority and minority rights, freedom and equality, or between democracy and the rule of law. Finally, it should be noted that this provision is not only to be read in conjunction with Art. 7 TEU, which, in spite of its vague formulation, systematically necessitates the clarification of Art. 2 TEU, but also in conjunction with Art. 4 (2) TEU, which protects the national identity of the member state.<sup>273</sup>

In its application, Art. 2 TEU encounters the practical difficulty that encroachments by member state upon their own democratic structures are often achieved through institutional means that would be unproblematic in other contexts. For example, when the Polish government dramatically impedes the functioning of the constitutional court, it must be kept in mind that there are some member states that do not even have a constitutional court, without this being seen as a problem for democracy and the rule of law. When the Hungarian government under Orbán passes numerous laws with a qualified (constitutional) majority, this is *prima facie* equally unproblematic. There is no principle to be derived from democracy or the rule of law that would preclude conferring constitutional status on certain legislative projects.<sup>274</sup> However, doing so can lead to the result that future majorities will be unable to change the rules that were constitutionally entrenched by the previous government. Scheppele has aptly dubbed these institutional arrangements «*Frankenstates*»:<sup>275</sup> legal structures that technically consist of familiar individual modules, but that in their specific combination have become institutional monsters. This problem too can only be addressed by a more specific and narrow reading of Art. 2 TEU: i.e., a reading that does not commit member states to a particular system of government, but, nonetheless, provides criteria for detecting and assessing the erosion of a democratic legal order.

## b) The importance of a contextualised assessment

In order to solve the «Frankenstate» problem, any assessment of the situation in member states must always be contextual. For example, the task is not to prescribe

<sup>272</sup> For a fundamental critique of the concepts of values, see Böckenförde, Ernst-Wolfgang, «Zur Kritik der Wertebegründung des Rechts», in *Recht, Staat, Freiheit* (ed. Böckenförde, Ernst-Wolfgang), 2nd Edition, 1992, pp. 67 ff.

<sup>273</sup> See e.g. Hanschmann, Felix, *Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft*, 2008.

<sup>274</sup> The standard reference work on this matter Waldhoff, Christian, *Der positive und der negative Verfassungsvorbehalt*, 2016.

<sup>275</sup> Lane Scheppele, Kim, «The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work», 26/4 *Governance*, 2013, pp. 559–562.

a particular type of judicial system, but rather to examine whether a given member state with established judicial institutions<sup>276</sup> respects their orderly functioning and independence. Similarly, the task is not to formulate a rule as to what kind of norms may enjoy constitutional status in a particular system; rather, it is to grasp early on when an established practice in a member state is being replaced by new procedures and to evaluate whether these new practices have to be regarded as violating the rights of future majorities. Thus, any assessment requires a detailed analysis of the relevant constitutional mechanisms that the safeguarding measures are aimed at preserving. Furthermore, the assessment cannot apply a general standard to different systems, but rather must be contextualised and tailored to the individual member state in question. The importance of the measures in question for the constitutional order of the member state must be examined in detail. In addition, the political direction of the institutional change must be determined. The judgment that particular reforms of a member state's own institutional apparatus amount to challenging its democratic structure presupposes an understanding of the reform measures' ultimate political purpose.

### **c) Preliminary considerations on the rule of law and democracy**

It is beyond the scope of this study to develop our thoughts on the rule of law and democracy in a comprehensive way. For what follows, however, it is important to emphasise one key point: in the operation of any constitutional system, conflicts will arise from time to time that could be understood as clashes between the commitments to the rule of law and to democracy – in particular, when courts and political actors take up opposing positions to each other. However, this potential for conflicts between these two foundational principles does not exist on the fundamental level in which we are interested. Empirically, there are no functioning democracies without the protections of the rule of law; and, vice versa, there are no states upholding the rule of law that cannot also be considered as democracies. Singapore has occasionally been cited as an example of a state that upholds the rule of law state without being a democracy, but this is questionable.

There are systematic reasons for this correlation between democracy and the rule of law.<sup>277</sup> Even a narrow definition of democracy as «majority rule» presumes formal legal mechanisms: membership in the political community, decision-making rules, and the organisation and protection of discussion in the public sphere. There is no democracy without a formal legal system. Procedures in which all votes are equal only have a chance of realisation in the context of a culture of impartiality in which results are not predetermined – such as we associate it with structures based

<sup>276</sup> Thus, the Rule of Law Checklist of the Venice Commission does not demand a particular kind of jurisdiction, but rather the fulfilling of general standards, Study No. 711 / 2013, CDL-AD (2016)007, March 2016, pp. 20 ff.

<sup>277</sup> What follows, is based on Habermas, Jürgen, «Über den internen Zusammenhang von Rechtsstaat und Demokratie», in *Zum Begriff der Verfassung: die Ordnung des Politischen*, (ed. Preuß, Ulrich K.), 1994, pp. 83 ff; Möllers, Christoph, *Die drei Gewalten*, 2008, Chap. 2.

on the rule of law. The equitable transparency of voting procedures and the equitable transparency of court proceedings are not antagonistic structures, but build upon similar social, cultural and intellectual bases.

Therefore, the emphasis on the rule of law in the discussion (as well as in the designation of the relevant procedures/frameworks by the Commission) poses a problem in itself. Firstly, political developments that entail the dissolution of the foundations of a democratic order upholding the rule of law must be distinguished from other problems: notably, from a mere lack of resources to safeguard the legality of member states' actions.<sup>278</sup> Secondly, on a fundamental level, there is, as we have shown above, an intrinsic link between democracy and the rule of law. Thirdly, by merely focusing on the rule of law, the EU level leaves the (often legitimising) recourse to the democratic principle to the member states: allowing them to turn against the European Union and against their own citizens in the name of democratic self-determination. Hence, we require an approach to the problem that attempts to integrate democracy and the rule of law.

#### **d) Principal criterion: the protection of future majorities**

In order to develop a democracy-specific criterion from the abundance of vague guidelines contained in Art. 2 TEU,<sup>279</sup> we present the following proposal: the democratic core requirement of the EU constitutional system should be to *protect* potential future majorities. This to say that the institutional arrangements under a given constitution must safeguard the realistic possibility for the current political opposition to become a majority in future. This idea – which can be traced back to Hans Kelsen<sup>280</sup> – has several advantages. Firstly, it is open to various types of democracy. It is only concerned with their core: the possibility of a change of government through an orderly political process. Secondly, this idea addresses systematic deficiencies of the democratic order, not individual infringements. Any system of measures to safeguard democracy cannot be preoccupied with individual violations of rules or fundamental rights, no matter how serious these may be; instead, such measures must aim at the protection of the system as a whole. Hence, democracy safeguards may only be applied once the actions of a member state, within their overarching context, compel the conclusion that a member state government is attempting to consolidate its power beyond the limits of its actual democratic mandate. This does not cover all possible problems that could be caused by a member state. In particular – as illustrated above – the over-inclusive catalogue of Art. 2 TEU is by no means exhausted by this proposal. But this is not the objective. The aim is to address one

<sup>278</sup> See also above, chap I. 1. c).

<sup>279</sup> We formulate limits to our question above, in chap. I. 1.

<sup>280</sup> Jestaedt, Matthias and Lepsius, Oliver (eds.), *Verteidigung der Demokratie: Aufsätze zur Demokratietheorie*, 2006.; for a precise reconstruction of Kelsen's thinking on reversibility, see Vašek, Markus, «Relativität und Revisibilität. Zur Begrenzung der Mehrheitsregel in der Demokratietheorie Hans Kelsens», 41/4 *Rechtstheorie*, 2010, pp. 512 ff; see also Ley, Isabelle, *Opposition im Völkerrecht*, 2015, Chap. 2.

specific and serious problem: the risk that a democratic order is gradually transformed into an authoritarian one. At least indirectly, however, this also serves other values mentioned in Art. 2 TEU. As we have seen, experience shows that open democratic orders are relatively more inclined to respect not only the political opposition, but also other minorities, and to protect other forms of institutionalised checks and balances: such as the independence of the judiciary (see the next section).

Thirdly, the proposed criterion, despite its limited field of application, promises to be sufficiently open and flexible as to be able adequately to capture multiple varieties of authoritarian transformations. For example, the protection of the opposition concerns institutional electoral and parliamentary law, particular fundamental rights such as freedom of expression and of association, and has strong implications for the law regulating the media. The criterion, moreover, allows us – when there are signs of anti-democratic developments – to capture the systematic connection between various seemingly unrelated measures, which, taken individually, might be unproblematic. In spite of its democratic origins, the criterion also covers institutional precautions that are considered integral to the rule of law (at least according to the German tradition). This holds especially true for judicial authority. The integrity of a political process and of democratic elections can only be safeguarded when both are protected and monitored by politically independent institutions.

In their analysis of the principle of the rule of law in the European Union, Closa, Kochenow and Weiler developed the criteria of constitutional capture, the undermining of the liberal democratic state and systemic corruption, in order to spell out the normative content of the principle.<sup>281</sup> Our criterion emphasises another aspect. According to our view, an infringement would be identified whenever the respect for democratic freedoms, political pluralism and the freedom of expression is no longer ensured – in particular, by the democratic institution of the judiciary and the constitutional courts, the recognition of the rights of the opposition, and elections that realistically permit a change of government.<sup>282</sup> Much in the same vein, in its statement on the membership applications of Eastern European states, the European Commission fleshed out the principle of democracy by stipulating a list of «political criteria». These included the demand that the constitutions of candidate countries, in theory and in practice, must guarantee political pluralism, as well as free and fair elections, and must recognise the role of the opposition.<sup>283</sup>

In practice, this criterion, which is inherent to democracy, can be spelled out in three particular dimensions. The first area concerns the legal design and

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**281** Closa, Carlos, Kochenow, Dimitry and Weiler, Joseph H. H., «Reinforcing Rule of Law Oversight in the European Union», 2014/25 *EUI Working Paper RSCAS*, p. 4.

**282** The Commission had previously developed these criteria in the framework of the accession process of Eastern European states, COM (97) 2000 final, pp. 46 ff.; on the effective implementation of democratic principles see also Communication of the Commission to the Council and the European Parliament (Partnership between the EU and ACP States), COM (1998) 146 final.

**283** Hilf, Meinhard and Schorkopf, Frank, «Art. 2 EUV», in *Das Recht der Europäischen Union: EUV/AEUV*, Supplement 61 (eds. Grabitz, Eberhard, Hilf, Meinhard and Nettesheim, Martin), 2017, para. 29 ff.

implementation of democratic elections. The degree of representativeness of a member state's electoral system – in particular, its ability to represent changing majorities – is a decisive requirement for the realisation of the above-mentioned criterion. This, however, is not an easy task, since every electoral system inevitably suffers from certain specific deficits. Furthermore, election law is a question on which EU law is mostly silent. If this problem is to be taken seriously, more meaningful standards must be developed. Moreover, consideration should be given to sending election observation missions to all member states on a routine basis: either autonomously or within the framework of other international institutions. The findings of such missions could then be considered and commented upon by the EU institutions in procedures that have still to be created to this end. The European Union must have the institutional means to assess the state of democracy in its member states in a formalised and thus relatively open-ended fashion.

The second area, preceding the first both temporally and systematically, concerns the constitution of the media in member states. The control of public media is often among the first political goals of authoritarian regimes. Here as well, EU law provides insufficient guidance, since EU media law is mostly concerned with creating and upholding a non-discriminatory market for media services. A key task would again be to develop standards for independent media based on Art. 2 TEU. This would be no straightforward matter: among other reasons, because the exertion of political influence on the media seems to be a common practice even in functioning democracies. Hence, a line has to be drawn between the sporadic weakening or violation of democratic standards and the dismantling of the democratic order as such.

The third crucial dimension for the application of our democracy-immanent criterion concerns judicial independence. Recently, judicial decisions in various countries, both within and outside the European Union, have been the subject of sharp criticism on the basis of their perceived opposition to the will of the democratic majority. Sometimes, as in the case of the USA, this criticism has even come from public officials. Such criticism does not, however, give expression to any real contradiction between majority rule and legal restraints imposed by the judiciary, but it is founded rather on a fundamental misunderstanding of democratic self-rule. The judiciary, by virtue of being bound by the laws of the land, is required to respect majority decisions; it is free, however, from political sanction and threat when it comes to applying these laws. Criticising this status of the courts is precisely anti-democratic, because it calls into question the independent application of the laws that is a prerequisite to any democratic order.

### **e) The threshold of danger**

One of the fundamental problems of safeguarding democracy is the appropriate timing of interventions. If measures are taken too early, they do not seem justified; if they are taken too late, they achieve nothing. Recently, this issue featured prominently in the debate in German constitutional law about the procedures for prohibiting political parties. The German Constitutional Court based its decision not

to prohibit the extreme-right National-Democratic Party of Germany (NPD) on a very similar consideration: although prohibiting a political party does not presuppose that there is a concrete risk to the liberal democratic order and hence does not require an immediate risk, there must at least be a theoretical possibility that the party in question could one day acquire political power.<sup>284</sup>

In the context of the European Union, the same systematic problem is presented in an institutionally different way. This is because what is to be assessed are the actions of a member state government that already holds power. Nonetheless – as illustrated by the Austrian Affair – a decision can be made too soon. One might argue that the Freedom Party of Austria (FPÖ) of Jörg Haider did not have a party platform in accordance with the values of Art. 2 TEU. It is undeniable, however, that the Republic of Austria, under the government in which the FPÖ participated, did not slide into authoritarianism and that a grave deterioration of this kind was not likely at any point. In this respect, it is clear that measures such as those foreseen under Art. 7 TEU can only become permissible once the member state government in question has actually taken up its work. The mere election of a new democratic government cannot endanger the democratic order in any relevant sense. A danger to the democratic structures of a state requires actions that are attributable to the member state government. The standard for the evaluation of such actions is, in turn, the degree to which they pose a serious threat to potential future majorities. This is because minorities' realistic hope of becoming majorities in the future is the core requirement by which any democratic constitutional order must abide. It is the responsibility of the political process in each member state to ensure that this remains a realistic option. Any further legal formalisation of the risk criterion is, however, to be avoided. In short, we suggest that Art. 2 TEU should be interpreted in more concrete terms. While member states are not required to adopt a particular system of government, criteria for evaluating the degradation of a democratic order must be established. This requires an analysis of the constitutional mechanisms and institutions of the member state concerned.

## 2 Informal means of influence

Apart from the European institutions, both other EU member states and civil society have considerable political significance for the domestic development of a member state. The potential of these actors will be examined in the following.

### a) Stronger positioning of other member states

The member states of the European Union exert considerable influence on each other, both within and outside the framework of the European Union. European integration has formalised and channelled this exchange and, in certain cases, also led to its reduction. Classic neighbourhood policies have been transferred to the

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<sup>284</sup> BVerfG, judgment of 17 January 2017, 2 BvB 1/13 (*NPD Prohibition*), para. 585 ff.

formal structures of EU institutions and committees. It has become clear that this is not only beneficial. In Hungary, for example, it was striking that, at the beginning of Orbán's new term of office, the opposition waited for critical comments from other member state governments, in particular from the German government, but these failed to materialise. The USA was the only nation to take an unequivocal stand.<sup>285</sup> In future, this intergovernmental restraint should be reconsidered in well-founded individual cases. If a concrete analysis comes to the conclusion that public political statements are important, they should not be suppressed: neither due to diplomatic courtesy, nor to the priority of EU political channels. As we shall see, a similar reticence characterises the European Council (Compare Chap. V. 3. a). A culture of involvement and of position-taking by neighbouring states in the European Union would be desirable and, in light of the political developments, appropriate.

Some have proposed that this could go so far as to include the temporary suspension of sincere cooperation (Art. 4 (3) TFEU) among member states, since it could be claimed that a member state that has turned its back on the values of Art. 2 TEU no longer fulfils the substantive requirements for sincere cooperation. The other states could, for example, refuse to carry out European Arrest Warrants and European Enforcement Orders,<sup>286</sup> leading to a legal situation that could subsequently be examined by the ECJ. But this kind of bilateral sanctioning mechanism of one member state against another member state<sup>287</sup> seems inappropriate to us, even for serious infringements of the fundamental values of Art. 2 TEU. The federal system of the European Union specifically requires a centralised and controlled procedure, rather than solo efforts.<sup>288</sup> However, if the proposal of a systemic infringement procedure is taken up, other member states would have the option to initiate infringement proceedings regarding a systematic breach by another member state of fundamental values of the Union. This is because, per Art. 259 TFEU, every member state has the power to bring a matter before the ECJ, when it considers that another member state has failed to fulfil an obligation under the Treaties.

In addition, the behaviour of a member state always has considerable informal effects on other member states, which are sometimes, but not always, conveyed via EU law. Judgments of the ECJ, as well as opinions of the Venice Commission, regularly impact other member states by prompting them to adapt their domestic legal situation accordingly. Even if such pressure on the member states is not always

**285** See Nergelius, Joakim, «The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania», in *Constitutional Crisis in the European Constitutional Area* (eds. von Bogdandy, Armin and Sonnevend, Pál), 2015, p. 294.

**286** See e.g. the proposal of the chairman of the German Judges' Association Gnisa, Jens, «Rechtliche Zusammenarbeit mit Polen in Gefahr», *Frankfurter Allgemeine Zeitung*, 24 July 2017, [www.faz.net/aktuell/politik/deutscher-richterbund-rechtliche-zusammenarbeit-mit-polen-in-gefahr-15119302.html](http://www.faz.net/aktuell/politik/deutscher-richterbund-rechtliche-zusammenarbeit-mit-polen-in-gefahr-15119302.html), accessed 11 August 2017.

**287** Proposed by Canor, Iris, «Solange horizontal – Der Schutz der EU-Grundrechte zwischen Mitgliedstaaten», 73 *ZaöRV*, 2013, pp. 249–324; Canor, Iris, ««My Brothers Keeper?» Horizontal Solange: An Ever Closer Distrust Among the Peoples of Europe», 50/2 *CMLRev*, 2013, pp. 383–421.

**288** Closa, Carlos, Kochenov, Dimitry and Weiler, Joseph H. H., «Reinforcing Rule of Law Oversight in the European Union», 2014/25 *EUI Working Paper RSCAS*, 2014, p. 19.

effective, it should not be disregarded.<sup>289</sup> Especially in light of the development of authoritarian tendencies in Romania and in Bulgaria, this effect suggests that the Commission should make full use its powers under the ongoing EU rule of law procedures.

## **b) Further initiatives and involvement in civil society**

It would seem that the influence of civil society is even more important than the above-mentioned informal-political or formalised-legal attempts at transnationally exerting influence on member states. As long as it remains possible, the European Union should therefore promote the self-organising capacities of civil society groups in the member states. Admittedly, such efforts cannot be organised in a centralised way. Supporting like-minded and equally professionally-informed people is, however, of crucial importance to the constitutive elements of democratic order: such as freedom of expression and freedom of political activity. This is, among other reasons, the case, because restrictions on foreign NGOs form part of the standard practice in states heading towards authoritarianism. Therefore, European networks of trade unions, journalists' associations, and organisations of teachers, university professors and lecturers are important in exercising political influence. This is also and especially true for contacts between political parties. One can certainly assume that competent political participation in developments in other member states is a necessary condition for the protection of democratic order in all member states. A European political consciousness that regards developments in other member states as its own political problem is perhaps the most important and most difficult desideratum of European democratisation.

A first precondition for this strengthening of a pluralist civil society would be simplifying access to EU funding: for instance, through the «Europe for Citizens» programme, the EuropeAid programme of the Commission or projects of the Education, Audiovisual and Culture Executive Agency (EACEA). Decentralised structures, which are independent of the government or other state authorities, are needed. As long as the granting and administration of funds is in the hands of national authorities, organisations close to those governments will most likely receive preferential treatment. Furthermore, the threshold for support should be lowered and the requirements should be simplified. This is particularly relevant for smaller national initiatives, whose proponents have neither routine knowledge of funding opportunities, nor the capacity to overcome the bureaucratic hurdles or language barriers involved in EU procedures. Moreover, one should try to focus on the level of the information of the population concerned. This means that the «Strategic Communications Task Force» of the European Union should be strengthened, in order

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289 Ibid.

to counter propaganda hostile to the EU in the neighbouring Eastern European countries.<sup>290</sup>

What is more important, however, is that such support take place horizontally among the member states and at the societal level: i.e. without the participation of public authorities. Cooperation between civic associations, professional and trade associations, schools and universities, without any directly political aim, can help to promote a trans-European dialogue among the societies of the member states and thus render nationalist political platforms less appealing.

### 3 Institutional approaches: possible actions of EU institutions

There is no reason to believe that the current crisis will soon be resolved. On the contrary, it is easily imaginable that still other member states could move towards de-democratisation. The era of *institutional engineering*, in which a yet to be discovered «instrument» or «mechanism» solves problems, is over. The historical examples show how long it can take to overcome such a crisis. This is not meant to sound fatalistic, but rather to express scepticism about administrative and legal approaches. The re-democratisation of all states is a long-term and primarily political project, although it admittedly needs administrative and legal support.

#### a) The expressive function of formal instruments

Even if the formal instruments of the Council and the Commission are designed in such a way that they frequently do not even lead to a decision, they still have an expressive value that should not be underestimated. Even if individual states in the Council prevent the initiation of an Art. 7 TEU procedure that is, nonetheless, supported by the overwhelming majority of member state governments or if the Commission rigorously applies its rule of law instrument – as well as its power to bring cases before the ECJ – such procedures are tied to a judgment about the member state in question that carries considerable political weight and also gives expression to the fact that the EU institutions regard the problem as a serious one. Thus, it would be wrong to initiate the relevant procedures, only if they have a clear chance of success. The Austrian Affair has shown that it is possible for the European level to act too soon. Therefore, it is important to agree on substantive criteria. On the other hand, however, it is crucial that the existing procedures, no matter how imperfect they are, be applied. Otherwise, the principles that they are intended to protect would be relativized.

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**290** European Parliament – Press release, *Parlament warnt vor Anti-EU-Propaganda aus Russland und von Islamisten*, 23 November 2016, [www.europarl.europa.eu/news/de/news-room/20161118IPR51718/parlament-warnt-vor-anti-eu-propaganda-aus-russland-und-von-islamisten](http://www.europarl.europa.eu/news/de/news-room/20161118IPR51718/parlament-warnt-vor-anti-eu-propaganda-aus-russland-und-von-islamisten), accessed 15 August 2017.

## b) The end of diplomatic restraint within the European Council

The political conflict underlying the weakening of democratic standards in individual states must, on our view, be solved principally by political means. Therefore, it seems important to conduct a political debate: especially among the member states. Changes in the member states concerned are, of course, only achievable through electoral losses in democratic elections, and these are, obviously, determined by the domestic political landscape, i.e. political and personnel alternatives on the member state level, and not chosen by the European Union. The Union and, in this instance, especially the European Council can, nonetheless, have an influence on these elections by appealing to the common values of Art. 2 TEU and by not acting like a distant technocratic regime in Brussels. This has rarely occurred. Insofar as one can tell from the admittedly anecdotal evidence about the customs of (in particular) the European Council, it is still unusual for it to address domestic constitutional affairs. It is precisely for this reason that crucial discussions on the developments in Poland and Hungary, as well as in Romania and other member states, have never taken place in the European Council. This culture of restraint is also the reason why the Council criticised the EU Framework to Strengthen the Rule of Law developed by the Commission.<sup>291</sup> This diplomatic attitude is a relic of the international law of sovereignty, which has long been superseded by EU law. As we have seen, Art. 2 TEU relativizes the distinction between internal and external affairs, just as Art. 7 TEU explicitly assigns to the Council of Ministers and the European Council the task of ensuring compliance with fundamental standards. Apart from this practice of restraint, another reason for the paralysis of the Council is that governments that felt drawn to Orbán's methods feared that initiating a procedure against another member state could pave the way for proceedings against themselves. Others simply believed that the procedure would be counterproductive and ultimately unsuccessful.<sup>292</sup>

Therefore, it is important that the heads of state or government develop a practice of open dialogue and start to make domestic constitutional structures a subject of discussion, in order to fulfil their duties as established in the Treaties. The development of a culture of dialogue among the heads of state or government cannot be formally decreed. It can, however, become the subject of an institutional political debate, as a result of which the highest representatives of the member states might finally come to realise that the fate of their institutions depends in fact on the institutional arrangements in other member states. Only a political culture prepared to confront constitutional problems will make it possible for the institutional discussions at

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**291** Council of the European Union, Opinion of the legal service, Opinion 10296 /14 (May 2014), p.7 ff.; for a critical view, see Oliver, Peter and Stefanelli, Justine (2016) «Strengthening the Rule of Law in the EU: The Council's Inaction», 54/4 *JCMS*, 2015, pp. 1075–1084; Hummer, Waldemar, «Ungarn erneut am Prüfstand der Rechtsstaatlichkeit und Demokratie. Wird Ungarn dieses Mal zum Anlassfall des neu konzipierten «Vor Artikel 7 EUV»-Verfahrens?», 2015/5 *EuR*, 2015, pp. 625 ff.

**292** Oliver, Peter and Stefanelli, Justine, «Strengthening the Rule of Law in the EU: The Council's Inaction», 54/5 *JCMS*, p. 1081.

the level of the European Union to attain a level of importance that can impress the member states concerned. The Dialogue on the State of the Rule of Law set up by the General Affairs Council of the Council of Ministers could, for example, provide a forum to address developments in the member states (going beyond the migrant and refugee crises). Furthermore, the need for a more Europeanised party system is also relevant here.

### c) Europeanisation of the party system

Since the use of measures to safeguard democracy cannot be achieved through the simple application of a rule, a political debate on the issue is unavoidable. One subject of such debate needs to be the Europeanisation of the party system.<sup>293</sup> The role of European parties has proven to be ambivalent, as the partisan support for Fidesz and the PiS by European parties and European Parliament groups has shown. At the same time, the European Parliament has also proven to be the forum in which anti-democratic developments in the member states are most likely to be addressed. This applies not only for the comprehensive Tavares Report on the state of the rule of law in Hungary,<sup>294</sup> but also for the debates on the situations in Hungary and Poland or the May 2017 resolution of the European Parliament to initiate an Art. 7 (1) TEU procedure against Hungary.<sup>295</sup>

A more distinct European stamp of the parties, both within and outside of the European Parliament, might not only have repercussions on the culture of debate in the European Council; it could also facilitate the development of a political consciousness that considers threats to democratic structures in a member state as a common European problem. Parties, however, are organisations of civil society. The question of whether they are transnationally organised, form common lists and genuinely define their programmes in European terms cannot be answered by law. At best, legal systems can provide guidance,<sup>296</sup> and – along with financial support – may monitor political activities with regard to their compliance with the fundamental values of Art. 2 TEU. The European Party Statute already establishes such a procedure.<sup>297</sup>

In this context it should be kept in mind that this more politicised framing of the problem as a common European one would not *per se* simplify actions by the

<sup>293</sup> See also Grimm, Dieter, *Europa ja – aber welches?*, 2016, pp. 44 and 140 ff.

<sup>294</sup> Resolution of the European Parliament of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, 2012/2130(INI) (the so-called Tavares Report).

<sup>295</sup> Resolution of the European Parliament of 17 May 2017 on the situation in Hungary [2017/2656(RSP)].

<sup>296</sup> This could be facilitated through a reform of election law, as suggested by Grimm, Dieter, «Die Parteien als Akteure einer europäischen Öffentlichkeit», in *Parteienwissenschaften: Schriften zum Parteienrecht und zur Parteienforschung*, Volume 50 (eds. Krüper, Julian et al.), 2015, pp. 303 ff.

<sup>297</sup> Art. 3 of Regulation (EU, Euratom) No. 1141/2014 of the European Parliament and the Council of 22 October 2014 on the statutes and the financing of European political parties and European political foundations.

Union against a member state. This is illustrated by the previously mentioned loyalty of European parties to deviant member parties. However, even if it seems that this loyalty is not well-founded, this will not change the fact that a sustainable solution to the problem can only be achieved through an open political debate, in which the European camps have to take a position on particular member states. The behaviour of the Hungarian prime minister on the occasion of the re-election of the current President of the European Council in March 2017 further shows the positive side of this politicisation. The Hungarian government did not join forces with Poland's single opposing vote, expressly because Tusk was seen as the candidate of the EPP. This case, however, concerns a decision on European institutional matters and is explicitly not about internal matters of a member state; it is thus of limited significance. Nonetheless, it is an indication that the practice of party politics at the European level is capable of affecting a state's behaviour.

#### **d) Empowering the ECJ?**

Judicial approaches delegate the solution to the problems caused by the erosion of democratic structures in member states to the ECJ. But involving the ECJ strikes us as at least problematic. It would impose an immense burden on the court with regard to its legitimacy and could do damage to its reputation among the national or functional public, or fragments thereof, in a similar way to what has happened with the ECB. If we were to consider taking this path at all, this would need to be accompanied by a significant reform of the substantive criteria of Art. 2 TEU, which in our opinion would need to be developed into more specific protections for democracy.

If anti-democratic developments in the member states do not come to an end, despite both vertical and horizontal pressure from the European Union, the question of expanding the competencies of the ECJ, as proposed in the literature (see above, V. 1.), should come into consideration. This would have the advantage that no treaty revision procedure, such as is susceptible to being blocked by a member state, would be necessary. Admittedly, this would be a revolutionary and, therefore, problematic development (both from the point of view of democratic theory and from a domestic-constitutional perspective). It would test the legitimacy of the ECJ similarly to the ground-breaking decisions of the 1960s. It could also fail due to resistance of the courts in those states with functioning democratic systems. The expansion of the scope of the infringement procedure to cover systematic deficiencies in member states would – under the pressure of a requirement to pay a lump sum or a periodic financial penalty – provide a forum to discuss certain conflicts between the Union and its member states, although, admittedly, this would not solve the problems. But at least political deadlock would be avoided.

# Conclusion

The present study examined mechanisms for safeguarding democracy in the European Union in the light of current political crises in certain member states. It placed these mechanisms in a political and historical context and analysed proposals for their further development. We explicitly distinguish between threats to the rule of law from a lack of resources or corruption and dangers provoked by the systematic and politically deliberate erosion of liberal democratic structures in member states. Only the second type of development is addressed by our study, which comes to the following particular conclusions.

In the current political situation, there are political movements in all member states that are directed against the model of a liberal democratic state upholding the rule of law – and frequently, at the same time, against the institutions of the European Union. The link between these two political objectives, which has made possible significant electoral successes throughout Europe, requires us to give careful consideration to the manner and legitimacy of interventions at the European level. Not only do such interventions, in any case, require a clear justification. It also seems possible – as was the case in the Austrian Affair – that measures to safeguard democracy will have the opposite effect on the political process in the member states concerned: leading to a rise of solidarity against the European level.

The dramatic character of the current problems should not obscure the fact that such conflicts are part of the history of most federations, whose consolidation, as illustrated by the examples of Germany, Switzerland and the United States, has always been marked by difficult political conflicts – often even involving war – extending over long periods of time. This historical background calls for patience: European integration has proceeded in rapid steps since the Single European Act of 1986 and has been accompanied by a massive enlargement of the Union. It was to be expected that institutional crises would arise. Historical experience therefore gives us reason to doubt that the current problems can or should be solved through rapid institutional reforms. If there is any meaning to the concept of Europe «growing together», then it lies in the fact that the process of integration continually resists a planned organisational structure.

The disintegration of democratic legitimacy in a member state or the lack thereof is not simply a domestic affair. Given the network of institutional interconnections in the European Union, it instead represents a serious constitutional problem for both the other member states and for the European level as such. In a vertical sense, the democracies of the member states necessarily contribute to the legitimacy of

the Union. The EU is only democratically legitimate because its member states project that legitimacy. In a horizontal sense, acts of one member state regularly have direct effects on other member states through the application of European law. If one member state is lacking political legitimacy, the lack thereof also has a bearing on the structures of legitimacy in the others. The European Union has reacted to this developing disintegration of democratic structures in member states in different ways. Experiences in Austria, Hungary and Poland illustrate the multifaceted difficulties of the institutionalised safeguarding of democracy. The confrontation with Austria was neither legally nor politically justified. The member states undertook measures on insufficient grounds and for which they lacked jurisdiction. In contrast, the genuinely serious developments in Hungary and Poland have left the Union powerless in important respects. The procedure introduced to provide a mechanism for dealing with authoritarian political developments per Art. 7 TEU has not been put into practice due to the possible use of the veto power of individual states. The Commission's newly developed Rule of Law Framework lacks possibilities for applying sanction. The ECJ, as the European Union's key court for upholding the law, has not been able to solve the conflict through its decisions, since it is only able to intervene on specific points and cannot remedy nationwide political developments.

In view of the weaknesses of these existing procedures, new problem-solving mechanisms have been proposed: these include the expansion of the infringement procedure, the broadening of the scope of EU fundamental rights, the creation of new monitoring institutions, the creation of an EU Mechanism for Democracy, Fundamental Rights and the Rule of Law, financial sanctions, and an extension of the Art. 7 TEU procedure.

It is doubtful whether the weaknesses of existing procedures can be remedied by institutional reforms. It is unlikely that the necessary consensus among the member states can be found for changes of this nature to the European Treaties. At the same time, broadening the competencies of the Commission and the ECJ would stretch the basis of the legitimacy of these institutions to its limits. Therefore, it strikes us as important to find any potential approach on existing mechanisms. Firstly, one has to emphasise the significant political-symbolic value of these approaches. They document a strong and carefully reasoned political disapproval of a particular political practice, even if such actions fail due to resistance by one or more states. This is why the existing mechanisms, such as the procedure under Art. 7 TEU or the instruments of the Commission, should be used, even if they have no clear prospect of success. Under these premises, one could also consider the introduction of new monitoring institutions, which would assess and evaluate the developments in the member states. It should be noted, however, that, in the form of the Venice Commission of the Council of Europe, a highly recognised institution is already available to this end. It has performed this function very well up to now and, as a non-EU institution, it has an institutional distance from the Union that vouches for its neutrality.

The existing procedures could, moreover, also be applied against renewed anti-democratic tendencies in the member states. In this respect, developing conditions for a joint Art. 7 TEU procedure against several member states seems to us

at least worth considering, as does expanding the infringement procedure to cover systematic domestic flaws and restructuring the conditions of funding through the EU Structural and Investment Funds. In particular, linking the distribution of European funding via the EU Structural Funds to a member state's compliance with particular political conditions could be used to apply pressure on those member states that depend on such support, including Poland and Hungary, thus bringing a halt to their consistent ignoring of European fundamental values. Nevertheless, the new orientation and design of these procedures would need to define precise criteria, to be sufficiently contextualised, and to leave sufficient room for manoeuvre to the member states concerned.

With regard to future developments, however, it was more important for us to analyse and assess the role of the European institutions in the conflicts to date. Our impression is that these problems have not even been addressed in the Council bodies composed of representatives of the member states. Beyond the question of institutional reform, this tradition of diplomatic reticence should be abandoned and all member states should recognise that such problems cannot be treated as internal affairs under the existing Treaties. Communication at the interior of the Council and of the European Council must change.

For the European Commission, it is important that it use the instruments at its disposal, including the right to initiate infringement proceedings, in a consistent and systematic fashion. It should neither exercise friendly discretion nor convey the – currently prevailing – impression that a course of action against a member state could form part of a negotiating package. The fundamental principles of the European Union must mark the limit of the supranational culture of negotiation.

The European Parliament has used its function as a political forum in previous conflicts and was the venue in which anti-democratic developments were debated and documented. Its role is, however, restricted in two respects. Firstly, national authoritarian parties are themselves parts of larger political groups. That being said, it is precisely in this context that the Parliament has the opportunity to form the key framework for political debate with authoritarian tendencies. Secondly, its mechanisms for institutional influence are limited to adopting resolutions and the right of initiative to trigger the Article 7 (1) TEU procedure. It is doubtful whether there is a proper function for the European Parliament beyond the holding of intra-parliamentary debates.

The Court of Justice of the European Union (ECJ) has up to this point been involved in the infringement procedure regarding the developments in Hungary. The Commission is seeking to initiate another Court procedure with regard to the developments in Poland. However, its judgments have mostly remained ineffective. This cannot be blamed on the Court, however, but is rather a consequence of the selective nature of judicial dispute resolution. We are sceptical about any suggestions to extend the limited jurisdiction of the Court. The criteria of Art. 2 TEU could be made justiciable through an, admittedly unlikely, change to the Treaty. But this would present an immense challenge to the legitimacy of the Court. The same applies to broadening the scope of the Court's oversight of fundamental rights vis-à-vis

member states' actions, which could also lead to conflicts with the national courts of the member states. Furthermore, the ECJ itself is increasingly confronted with fundamental problems regarding the implementation of its judgments: in particular, the threat of non-compliance. For example, the Polish government has announced that it intends to ignore the temporary order<sup>298</sup> by which the Court required an immediate cessation of tree clearance in the Bialowieza Wood, one of the last areas of primeval forest in Europe and part of a nature reserve.<sup>299</sup> Similarly, Hungary has announced that it would not accept the judgment of the Court<sup>300</sup> that confirmed the requirement of member states to accept refugees within the framework of the refugee crisis.<sup>301</sup>

The EU's limited means to react to domestic, anti-democratic developments in the member states have made it clear that there is a need for other approaches to assessment and specification. Democracy and the rule of law cannot be played off against each other at the level of constitutional law and constitutional politics. Empirically, moreover, democracies are only ever to be found together with structures of the rule of law that safeguard an open, egalitarian political debate. Even the principle of majority rule requires an institutional inventory in which every vote is equal. Against this background, it is unfortunate that the protection of core constitutional components in the member states is equated with the protection of the rule of law by European institutions: for instance, in the EU Framework to Strengthen the Rule of Law or the Dialogue on the Condition of the Rule of Law established in the General Affairs Council. By making such an equation, the claim to a democratic mandate is left to authoritarian political projects and the systematic connection between the rule of law and democracy is ruptured.

The difficulty of evaluating developments in the member states also has its basis in the central material norm of EU primary law protecting the integrity of the constitutional orders of member states (Art. 2 TEU). The norm lists an uncritical potpourri of European values, which is hardly suitable for providing a framework for the protection of democracy and the rule of law. As against such a list, it appears necessary to develop more narrowly-defined and precise criteria. In this study, we propose that such criteria should be based on the standard of the protection of political opposition. A structure remains democratic insofar as it permits the minority to become the majority. It follows from this criterion that there are three areas which require special attention: freedom of expression and of the media; the institutions of electoral law and of the regulatory framework for political parties; and the independence of the judiciary – all as institutional guarantors of fair political competition.

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**298** «Polen rodet letzten Urwald Europas», *Der Spiegel*, 31 July 2017, [www.spiegel.de/wissenschaft/natur/bialowieza-urwald-polen-laesst-trotz-eugh-verbot-baeume-faellen-a-1160753.html](http://www.spiegel.de/wissenschaft/natur/bialowieza-urwald-polen-laesst-trotz-eugh-verbot-baeume-faellen-a-1160753.html), accessed 2 October 2017.

**299** ECJ, judgment of 27 July 2017, Case C-441/17 R, *Commission/Poland*.

**300** ECJ, judgment of 6 September 2017, joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary/Council*.

**301** Becker, Markus, «Ungarn rüttelt an Europas Fundament», *Der Spiegel*, 6 September 2017, [www.spiegel.de/politik/ausland/Ungarn-lehnt-eugh-urteil-ab-juristen-sehen-eu-recht-in-gefahr-a-1166403.html](http://www.spiegel.de/politik/ausland/Ungarn-lehnt-eugh-urteil-ab-juristen-sehen-eu-recht-in-gefahr-a-1166403.html), accessed 2 October 2017.

Any reform that aims at the safeguarding of democracy at the European level should focus on these areas.

Ultimately, the protection of democracy in member states is not a task that can be left to the institutions of the European Union alone. The national governments of member states should, when the seriousness of the situation requires, make direct comment on political developments and should not hide behind the institutions of the Union. Above all, we must recognise that we are dealing with a pan-European, society-wide responsibility, which cannot simply be delegated to the EU institutions. Trade unions, universities, associations and other organisations have to Europeanise themselves and thereby cultivate contacts precisely with those member states whose democratic order is in question.





## **Safeguarding Democracy in the European Union** A Study on a European Responsibility

Liberal democracies are under pressure, both worldwide and in Europe. Populist forces of various persuasions promise protection and security through isolation and a strong, authoritarian state. The European Union is not immune to these developments. For example, in Hungary and Poland, far-right nationalist to nationalistic parties of different forms and with different historical backgrounds are in government. Both propagate an «illiberal» democracy, by which they understand majority rule, which turns its back on a pluralist social order characterised by critical public debate and the guaranteeing of minority rights.

The dismantling of democracy in an EU member state is not a national problem – it is a European one. If the rule of law is impeded in one member state, this affects the community at its core and threatens the basis of cooperation within it.

But how should the EU react to the dismantling of democracy within its ranks? How can it prevent this and protect the democratic state upholding the rule of law? This is the subject matter of the present study. The study makes clear the dilemma in which the EU finds itself and what possibilities for action are available to it.

ISBN 978-3-86928-191-9