

The changing role of European Union institutions in upholding the rule of law¹

Danuta Kabat-Rudnicka, *Krakow University of Economics*
(Cracow, Poland)

E-mail: kabatd@uek.krakow.pl

<https://orcid.org/0000-0003-4776-4481>

Abstract

As an international organisation founded upon its Member States, the European Union (EU) relies on a commitment to common values and principles, including the rule of law, any breach of which threatens its very foundations. To address this challenge, the EU has developed political instruments for areas beyond substantive EU law, judicial instruments where competence is conferred by the Treaties or secondary legislation, and financial instruments, when rule of law breaches endanger the effective management of EU finances. The article's aim is to examine the involvement of EU institutions across these procedural frameworks, with the research problem centred on the extent of institutional engagement. The author analyses the concept of the rule of law and the procedures under Article 7 TEU, the Conditionality Regulation, and proceedings before the CJEU. The research results demonstrate that the European Commission takes on the central role in safeguarding the rule of law, transcending its technocratic mandate to assume a political role. The study adopts an analytical, explanatory, and comparative approach.

Keywords: rule of law, Court of Justice, European Commission, Council of the European Union

Zmieniająca się rola instytucji Unii Europejskiej w umacnianiu praworządności

Streszczenie

Unia Europejska (UE), jako organizacja międzynarodowa i podmiot wtórny państw członkowskich, opiera się na zobowiązaniu do poszanowania wspólnych wartości i zasad, w tym praworządności, której najmniejsze naruszenie godzi w jej fundamenty. W celu sprostania temu wyzwaniu UE wypracowała instrumenty polityczne znajdujące zastosowanie w obszarach wykraczających poza

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materialne prawo unijne, instrumenty sądowe stosowane wówczas, gdy kompetencja wynika z prawa pierwotnego lub wtórnego, oraz mechanizmy finansowe uruchamiane w sytuacjach, gdy naruszenia praworządności zagrażają prawidłowemu zarządzaniu finansami Unii. Celem artykułu jest analiza roli instytucji unijnych w ramach przedmiotowych mechanizmów, natomiast problem badawczy koncentruje się na zakresie ich zaangażowania. Autorka przybliża pojęcie praworządności oraz analizuje procedury przewidziane w art. 7 TUE, rozporządzeniu w sprawie warunkowości, a także przed TSUE. Rozważania oraz poczynione ustalenia zmierzają do lepszego zrozumienia roli instytucji unijnych w umacnianiu praworządności, wskazując zarazem na Komisję Europejską jako wiodący podmiot w tym procesie, który wykracza poza technokratyczny mandat, przyjmując rolę polityczną. Badanie ma charakter analityczno-porównawczy i eksplanacyjny.

Słowa kluczowe: praworządność, Trybunał Sprawiedliwości, Komisja Europejska, Rada Unii Europejskiej

Setting the analytical framework

Although the rule of law has traditionally been grounded in democratic state governance, it is now increasingly being applied also by non-state actors. This development prompts a critical analysis to answer the following questions: If the rule of law is traditionally perceived as an inherent attribute of statehood – and more specifically, of state constitutional structures – what explains its growing importance in non-state actors? In particular, why do institutions of the European Union (hereinafter: EU) attach such importance to safeguarding the rule of law? Why does this principle – defined as a value in the EU context – occupy such a central position in an entity that is, *ex definitione*, not a state actor but a supranational organisation? And why is the imperative of ensuring compliance with the rule of law given such importance in the EU's legal and institutional discourse?

While the rule of law is an inherent feature of the states' constitutional structures, this principle is also enshrined in the founding instruments of some non-state entities, notably the EU. The rule of law is explicitly affirmed in Article 2 TEU, as introduced by the Lisbon Treaty, where it is accorded the status of a core Union's value. By contrast, the Maastricht Treaty recognised the rule of law as a principle underpinning Union's activities². And although the EU remains an international organisation, whose existence depends on its Member States, it exercises public power in a manner comparable to that of state actors. Accordingly, the effective functioning of this non-state entity relies on the sustained commitment of both the Member States and the Union institutions to uphold a common normative framework: shared values, principles, and legal rules, including the rule of law. To address this challenge, the EU has established a number of instruments (mechanisms and procedures) designed to ensure Member States' compliance with the rule of law. One such instrument is political in character, and it extends to areas lying beyond the substantive scope of EU law. Another is judicial, and it can be activated when Treaty's provisions and secondary law confirm the competence of the Union. The third

² The preamble to the TEU (Maastricht) provides: "CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law."

instrument is economic, and it allows for the suspension of EU funds, where breaches of the rule of law undermine the effective management of EU finances. Depending on the instrument employed, the procedure and the involvement of EU institutions may vary. In the political procedure, the Council of the EU (hereinafter: Council) has a central role, while judicial procedures underscore the pivotal function of the Court of Justice of the EU (hereinafter: CJEU/Court), and the conditionality mechanism procedure brings to the fore the role of the European Commission (hereinafter: EC/Commission).

Since Member States began to face serious challenges in adhering to the rule of law, many studies have emerged examining EU values in general and the rule of law in particular. Among the earliest comprehensive contributions is the volume edited by Carlos Closa and Dimitry Kochenov (2016), which addresses not only the concept of the rule of law itself, but also the critical role of EU institutions in safeguarding it. Of particular note is Christophe Hillion's chapter, which offers in-depth analysis of the European Commission's involvement in upholding the rule of law in the EU (Hillion 2016: p. 59–81). Further significant contributions include the joint work of Dimitry Kochenov and Laurent Pech, who likewise emphasise the Commission's role in this area (Kochenov, Pech 2015a,b). Scholars such as Kim Lane Scheppele, Dimitry Kochenov, and Barbara Grabowska-Moroz (2020) examine the procedures before the Commission and the CJEU, and their roles in enforcing rule-of-law standards. This focus on judicial enforcement is also advanced by Piotr Bogdanowicz and Matthias Schmidt (2018). Peter Oliver and Justine Stefanelli (2016) analyse the role – or, rather, the inaction – of the Council, while Judith Sargentini and Aleksejs Dimitrovs (2016), explore the European Parliament's (hereinafter: EP/Parliament) involvement in upholding the rule of law. Among the many Polish scholars analysing procedures and institutional roles in safeguarding the rule of law Jan Barcz (2019), Justyna Łacny (2018) and Artur Nowak-Far (2021) deserve particular mention.

The article's aim and methodology

The aim of the article is to demonstrate how the involvement of EU institutions varies according to the procedure employed. **The research problem** is centred on the extent of institutional engagement in different procedural frameworks. **The research questions** are as follows: how can the rule of law be effectively enforced, and what role do EU institutions play in specific procedures? **The subject matter of the article** encompasses EU procedures and institutions, while the spatial scope is limited to the EU, and the time range is extended from the Commission's communication of 2014³ up to the present.

The study begins with conceptual considerations regarding the rule of law, followed by an examination of the procedure set out in Article 7 TEU, the procedures involving the CJEU, and the procedure established under the Conditionality Regulation (see: Regulation 2020/2092). It then offers insights into the politicisation of EU institutions and concludes with some final observations.

³ *A new EU Framework to strengthen the Rule of Law*, COM(2014)158 final (see: European Commission 2014).

The **research hypothesis** verified in this analysis is the following: the EU's role is least prominent in case of the political instruments, whereas it becomes more pronounced and assertive when judicial and economic instruments are involved. The role of the EU is understood as an engagement of institutions acting in the Union's interest unlike those shaped primarily by the Member States' preferences.

This research draws upon both primary and secondary sources, including official documents such as Treaties, regulations, and judgments, alongside scholarly publications (books, journal articles), and – where appropriate – less formal sources such as websites. The basis for the considerations is a content-based examination of case law, legal acts, and academic literature, complemented by comparative analysis.

Methodologically, the study employs descriptive, interpretative, and comparative methods. The descriptive method serves to outline the various mechanisms, instruments, and procedures; the interpretative method is employed to present the evolving roles and significance of the institutions involved; and the comparative method is used to juxtapose the various procedures and institutional roles across different instruments.

Conceptualising the rule of law

The rule of law is both a fundamental principle and a core value of democratic societies⁴. While it is undoubtedly a politically charged concept, it is primarily legal in essence. Despite its normative prominence, the rule of law did not have a formal legal definition in the EU framework for a long time. The first such definition was introduced as part of the Conditionality Regulation, adopted by the Parliament and the Council, which specifies the following: "*the rule of law* refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. *The rule of law* shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU"⁵.

The principle of the rule of law found its way into the Maastricht Treaty (1992)⁶ and was subsequently reaffirmed in the Amsterdam and Nice Treaties⁷. It is now recognised

⁴ The discourse is frequently centred on the normative trinity of the EU: the rule of law, liberal democracy, and human rights, as articulated in Article 2 TEU (see: Raitio 2024: p. 2).

⁵ Article 2(a) of the Regulation (EU, Euratom) 2020/2092. The definition encompasses both formal elements – such as the principles of legality, legal certainty, the prohibition of arbitrariness, and effective judicial protection – and substantive components, including fundamental rights, separation of powers, non-discrimination, and equality before the law (see: Böttner, Schröder 2024: p. 217).

⁶ See Preamble to the TEU, Article J1 TEU (Maastricht), Article 130u TEC, and Article 173 TEC. It should be emphasised that although the Maastricht Treaty did not explicitly refer to the rule of law as a fundamental principle, it nevertheless incorporates the rule of law as a core value in several key areas, including the Common Foreign and Security Policy (under the TEU), development cooperation, and annulment proceedings before the Court of Justice (under the TEC).

⁷ See Article 6(1) TEU (Amsterdam and Nice). Indeed, it was in the Amsterdam Treaty that the rule of law was explicitly recognised as a fundamental principle of the Union.

as one of the EU's core values, which is declared in Article 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..."

It is noteworthy that the CJEU was the first EU institution to explicitly refer to the rule of law (Judgment of the Court 1986: par. 23). Moreover, the Court articulated and affirmed the fundamental components of the rule of law, including the principles of legality (Judgment of the Court 2007: par. 49–50), legal certainty (Judgment of the Court 2010: par. 100), protection of legitimate expectations (Judgment of the Court 2013: par. 44), separation of powers (Judgment of the Court 2016: par. 36), and the right to judicial protection before independent courts (Judgment of the Court 2021: par. 51).

As a fundamental value, the rule of law also constitutes a general principle of EU law and a constitutional principle (Pech 2010: p. 359–396) underpinning the Union's legal order. It requires not only that laws must be clear, transparent, and applied equally to everyone within *ex ante* defined limits, but also that they must be upheld by independent judiciary and effective law enforcement mechanisms. Moreover, the rule of law must be respected and adhered to by both the Member States and the Union itself. This means that all public authorities must operate within the limits prescribed by law, in other words, they are obligated to adhere to legal norms which are beyond their control (Schroeder 2021: p. 117). It further entails the subordination of arbitrary power to laws and imposes on those entrusted with the administration of justice a duty to serve the interests of the entire community (Sellers 2014: p. 4).

Upholding the rule of law in the EU legal order

There are at least three special instruments for safeguarding the rule of law within the EU, each reflecting a different legal, political, or economic approach to upholding this fundamental value.

The first instrument for overseeing compliance with the rule of law is a political one – the procedure set forth in Article 7 TEU. This procedure is characterised by a built-in intergovernmental component, which renders it complex, rigid, and difficult to activate. Moreover, it seeks to reconcile the imposition of sanctions with respect for sovereignty (Barcik 2019: p. 152)⁸. What further distinguishes this procedure is its multi-phased structure, reflecting both its gravity and complexity.

At the initial stage, pursuant to Article 7(1) TEU, the Council – acting on a reasoned proposal from 1/3 of the Member States, the EP, or the EC, and with the Parliament's consent – may determine, by a 4/5 majority, that "there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU". In the subsequent phase, under Article 7(2) TEU, the European Council – acting unanimously on a proposal from 1/3 of the Member States or the Commission, and with the Parliament's consent – may recognise "the existence of a serious and persistent breach" of those values. Once the "determination

⁸ It is argued that the current rule of law crisis is a manifestation of deeper tensions – a conflict – over sovereignty, authority, and power (see: Coman 2022: p. 8).

under paragraph 2 has been made", then pursuant to Article 7(3) TEU, the Council – acting by a qualified majority – may decide to suspend certain rights of the Member State in question under the Treaties, including its voting rights in the Council. Finally, under Article 7(4) TEU, the Council may – again acting by qualified majority – decide to modify or revoke those measures if the situation has led to their imposition change.

This procedure unfolds in two interrelated stages. At the first stage, the Council determines whether there exists a clear risk of a Member State seriously breaching the values enshrined in Article 2 TEU. At the second stage, the European Council establishes the existence of a serious and persistent breach of those values by the Member State. Accordingly, the initial phase – commonly referred to as the "preventive arm" – does not require an actual infringement; rather, the mere presence of a qualified threat to the Union's fundamental values is deemed sufficient. By contrast, the second phase – called as the suspensive or "reactive arm" – necessitates the existence of a serious breach, marked by systemic deficiencies, of the values enshrined in Article 2 TEU (Böttner, Schröder 2024: p. 208–209).

An examination of the Article 7 procedure leads to several observations. Firstly, the procedure is marked by considerable complexity, which – while it may be formally initiated, as has indeed been the case⁹ – renders its full implementation impossible¹⁰. Secondly, the key decision-making bodies are the Council and the European Council, which act by a four-fifths majority and by unanimity, respectively. Thirdly, despite their formal status as EU institutions, they are composed of representatives of the Member States and primarily reflect intergovernmental logic. Hence, the question: do these institutions serve the Union's collective interest, or are their decisions shaped by particularistic national interests? The inherently political character of the Article 7 procedure is further accentuated by the absence of any substantive judicial review by the Court, which ensures the institutions concerned a considerable degree of discretion (Böttner, Schröder 2024: p. 216).

In December 2017, the Commission initiated proceedings against Poland by submitting a reasoned request (proposal) pursuant to Article 7(1) TEU (see: European Commission 2017). The objective was to prompt the Council to determine whether there was a clear risk of committing a serious breach of the rule of law by Poland. However, due to the difficulties in applying the procedure in question¹¹, it proved necessary to pursue alternative ways. Two principal alternatives are judicial in nature. The CJEU can review compliance with the rule of law either through direct action (complaint) – namely infringement proceedings pursuant to Articles 258 and 259 TFEU – or indirectly (non-complaint proceedings), through preliminary questions (references) submitted by national courts

⁹ On 20 December 2017 the Commission triggered Article 7(1) TEU in relation to Poland.

¹⁰ On 29 May 2024 the Commission closed the procedure under Article 7(1) TEU against Poland by withdrawing the proposal.

¹¹ It is argued that, insofar as the Council and the European Council are merely empowered – but not obliged – to act, and given that par. 2 and 3 of Article 7 TEU have never been triggered, this article functions more as an ornamental provision than as an effective instrument for safeguarding compliance with the rule of law (see: Kováčiková 2023: p. 83).

under Article 267 TFEU. It was decided to resort to judicial avenues, all the more so given that the CJEU is the sole institution vested with jurisdiction to adjudicate disputes concerning the interpretation and application of EU law.

Before the landmark judgment in case *Associação Sindical* (Judgment of the Court 2018), there was considerable uncertainty as to whether the judicial avenue provided for in Article 258 TFEU could be invoked to uphold the rule of law, specifically with regard to judicial independence. The key question was whether Article 19(1) TEU, which obliges the Member States "to ensure effective legal protection in the fields covered by Union law", could serve as a standalone legal basis for infringement proceedings in cases, where no other EU law is alleged to have been breached. Following the Court's judgment in case *Associação Sindical*, it has been established that Article 258 TFEU can be invoked both alongside and independently of Article 7 TEU¹² to safeguard the independence of national courts and judges¹³. Thus, pursuant to Article 258 TFEU: if the Commission believes that a Member State has failed to fulfil an obligation under the Treaties, it shall issue a reasoned opinion on the matter, after providing the state with an opportunity to present its views. If the Member State fails to comply with the Commission's opinion within the prescribed timeframe, the Commission may then refer the matter to the Court¹⁴.

As regards the preliminary rulings under Article 267 TFEU, it is noteworthy that before 2018 this procedure had not been employed as a means of safeguarding the rule of law – especially in matters concerning judicial independence. This was primarily due to the fact that questions referred to the Court must pertain to the interpretation of EU law, which in turn obliges national courts to invoke a substantive provision thereof. Given that the organisation of the judiciary lies outside the competences conferred upon the EU, it could not be addressed through a preliminary ruling request. This approach has changed following the judgment in case *Associação Sindical*. Article 19(1) TEU has become a standalone legal basis for claims of failure to ensure effective judicial protection, including legal provisions covered by EU law (Barcik 2019: p. 173–176). As a result, issues pertaining to the administration of justice – particularly those concerning the indepen-

¹² It should be pointed out that Article 7 TEU plays a somewhat different role. According to the Court: "Article 7 TEU, however, plays a very specific role in the system of remedies provided for by the Treaties, since it exceptionally authorises the EU institutions to monitor compliance by the Member States with the fundamental values of the European Union in areas which fall within the exclusive competence of the Member States" (Judgment of the Court 2022: par. 96).

¹³ In case C-619/18 – the first direct action for an infringement under Article 258 TFEU concerning the compatibility of measures taken by a Member State regarding the organisation of the judicial system (Judgment of the Court 2019), Advocate General Tanchev in his opinion stated: "Article 19(1) TEU constitutes an autonomous standard for ensuring that national measures meet the requirements of effective judicial protection, including judicial independence" (Opinion 2019: par. 58; see also: Barcik 2019: p.169).

¹⁴ Article 258 TFEU outlines a three-step procedure. If the Commission believes that a Member State has failed to fulfil an obligation under the Treaties, it conducts an informal investigation. In case of Poland, the Commission initiated infringement proceedings on 2 July 2018, by sending a letter of formal notice regarding the law on the Supreme Court. As Poland's response did not satisfy the Commission, it proceeded to the second stage of the procedure. On 2 August 2018, the Commission initiated a formal investigation by sending a reasoned opinion to Poland concerning the law on the Supreme Court. Since Poland's response did not satisfy the Commission, it decided to refer Poland to the CJEU on 24 September 2018 (see: European Commission 2018).

dence of national courts and judges – can now be addressed within preliminary ruling proceedings. It is essential for effective judicial cooperation and the independence of national courts and judges. Thus, the Member States retain autonomy in shaping their judiciary – an area beyond the EU's competences, but this autonomy is constrained by the requirement to uphold judicial independence – an essential condition for ensuring mutual trust and effective judicial cooperation in the EU legal framework.

An examination of the procedure under Article 267 TFEU leads to some insights. Firstly, initiating the procedure is relatively straightforward, because a national judge can refer a question to the CJEU, while the case remains pending in a national court. However, difficulties often arise in the formulation of the question itself, because the referring judge must refer to a substantive provision of EU law – a requirement that may prove challenging, particularly with regard to the organisation of the judiciary, which is under national competence. This limitation was overcome by the Court's landmark judgment in the *Associação Sindical* case, in which the Court made Article 19(1) TEU a standalone legal basis for addressing deficiencies in the provision of effective judicial protection. Secondly, the decision to refer questions to the European judge rests solely with the national judge, who, while still a national judge, assumes a European judicial role. Thirdly, as a general observation, exclusive reliance on political avenues to uphold the rule of law risks undermining the effective safeguarding of the EU legal order by sidelining the Commission and the Court – both central to its maintenance and development – from its protection (Taborowski 2019: p. 430–431).

Initiating legal proceedings may be sometimes particularly challenging, especially when political considerations are taken into account, thereby prompting the search for alternative ways to address threats to the rule of law in the Member States. One such way includes the use of economic instruments, most notably the novel mechanism linking access to EU funds with adherence to the standards of the rule of law. This brings into focus Regulation 2020/2092 on the protection of the Union budget in the event of generalised deficiencies in the rule of law in the Member States. The significance of this mechanism is underscored in conclusions of the European Council, which stipulate: "The Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU. The European Council underlines the importance of the protection of the Union's financial interests. The European Council underlines the importance of the respect of the rule of law" (European Council 2020: point A24).

Under the Conditionality Regulation, remedial measures addressing breaches of the rule of law include the following: the suspension of payments and commitments, the cessation of disbursements or the requirement of the early repayment of loans, a reduction of funding under existing commitments, and the prohibition of new commitments or agreements relating to loans or other instruments guaranteed by the EU budget. Such breaches are related to the effective judicial review by independent courts of actions or omissions. Appropriate measures shall be taken "where it is established [...] that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting

the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way" (Regulation 2020/2092: art. 4)¹⁵.

With regard to the procedure in question, if the Commission – upon examining the Member State's observations submitted in response to the initial notification – determines that further action is warranted, it shall propose appropriate measures to the Council, after contacting the Member State concerned and informing the EP. The Council shall then decide, by way of a qualified majority, on the Commission's proposal – subject to possible amendments – within one month, a period which may be extended by up to two additional months in exceptional circumstances (Regulation 2020/2092: art. 6). Furthermore, the Council, acting on a proposal made by the Commission, can lift suspensive measures once the situation that necessitated their imposition has been sufficiently remedied (Regulation 2020/2092: art. 7). If concerns arise over compliance with the principles of objectivity, non-discrimination, and equal treatment of the Member States, the matter may be referred to the European Council (Regulation 2020/2092: recital 26). Finally, the Council's decision may be subject to judicial review by the CJEU.

Closer examination leads to several observations regarding the procedure. Firstly, the measures envisaged under the Regulation 2020/2092 can only be taken where breaches of the rule of law have a sufficiently direct impact on the financial management of the EU budget or on the EU's financial interests. As such, the Regulation does not address generalised deficiencies in the rule of law in a Member State (European Parliament 2023a). Secondly, the principal institutional actors are the Commission and the Council, with the latter assuming the role of a decision-making authority. Thirdly, it is by virtue of this decision-making role that the Council emerges as the key institution with a possible role envisaged for the European Council in circumstances where concerns arise regarding compliance with such principles as objectivity, non-discrimination, and the equal treatment of the Member States. Finally, whereas Article 7 TEU aims to sanction serious and persistent breaches of the values enshrined in Article 2, the Conditionality Regulation is designed to safeguard the integrity of the Union budget.

In addition to the aforementioned avenues for enforcing the rule of law, a dialogue can be initiated within the Rule of Law Framework and the Rule of Law Mechanism. In case of the former, in March 2014, the Commission issued a communication COM(2014)158 entitled: *A new EU framework to strengthen the rule of law*, primarily intended to address systemic threats to the rule of law in Member States. According to this communication, activation of the framework is warranted, where the following fundamental principles are placed in jeopardy: "The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the

¹⁵ Another instrument employed to strengthen the rule of law through financial leverage is the *Recovery and Resilience Facility*, introduced in response to the economic challenges posed by the pandemic (see: Symann 2024: p. 243).

lack of domestic redress. The Framework will be activated when national 'rule of law safeguards' do not seem capable of effectively addressing those threats" (European Commission 2014: point 4.1).

This instrument is intended for situations when a Member State's governing authorities undertake measures or tolerate situations that may systematically and adversely affect the integrity, stability, or effective functioning of institutions and mechanisms aimed at protecting the rule of law (European Commission 2014: point 4.1)¹⁶. The instrument is to be applied on a case-by-case basis. If a Member State fails to comply with the Commission's recommendations, activation of Article 7 TEU remains an available, albeit non-mandatory, course of action. In case of the latter, it is founded on an ongoing dialogue among EU institutions, the Member States, and stakeholders. This dialogue seeks to strengthen cooperation, identify threats, and provide recommendations (Kováčiková 2023: p. 86). Under this mechanism, the Commission annually publishes Rule of Law Reports (Grabowska-Moroz, Grogan 2024), accompanied by recommendations for each Member State. Failure to comply with these recommendations may likewise lead to the triggering of Article 7 TEU.

EU institutions: politicised or impartial?

EU institutions may broadly be classified into two categories: supranational and intergovernmental. The former encompasses common, independent, technocratic, and judicial bodies – such as the Commission and the Court, while the latter, exemplified by the Council and the European Council, are political, intergovernmental entities reliant on Member States. This difference is particularly evident in the context of the roles these institutions perform in procedures aimed at upholding the rule of law. As a general rule, integration processes entail the greater involvement of supranational institutions, while areas being in the domain of the Member States typically see greater engagement from institutions representing national interests.

Particular attention should be given to the Commission and its role in safeguarding the rule of law. The Commission remains firmly committed to ensuring that Member States uphold this fundamental value, even when faced with opposition. In contrast, the Council maintains that, under the Treaties, EU institutions have no competence to take action concerning Member States' compliance with the rule of law, except through the procedure established in Article 7 TEU. According to the Council, Article 7 provides the sole legal basis for Union-level supervision of the application of the rule of law in contexts not related to specific material competences or being outside their scope (Council of the European Union 2014: recital 17). The Council further argues that the Treaties do

¹⁶ The process comprises three stages: the Commission's assessment, the Commission's recommendation, and the follow-up to the recommendation, which takes the form of a reasoned proposal (request) pursuant to Article 7(1) TEU. It is argued that the *EU Rule of Law Framework* represents a paradigmatic change in the Union's approach to the prevention of breaches of its fundamental values as it avoids regular monitoring under Article 7(1) TEU and, moreover, operates outside the Article 7 mechanism (Hillion 2016: p. 78).

not confer on the institutions the power to establish new mechanisms for supervising Member States' compliance with the rule of law, nor to amend, modify or supplement the procedure set out in Article 7 TEU (Council of the European Union 2014: recital 24). Article 7 TEU establishes a deliberate and precise supervisory framework, high thresholds for initiating procedures, reinforced majorities in both the Council and the European Council, and procedural guarantees for the Member State concerned, including access to the Court (Council of the European Union 2014: recital 18).

A further point of contention is related to the conditionality mechanism, which has elicited similar reservations from the Council. The Council maintains that the only legitimate procedures for addressing a Member State's failure to fulfil its obligations under EU law are those expressly provided for in the Treaties – namely, infringement proceedings under Articles 258 and 259 TFEU and the procedure laid down in Article 7 TEU for ensuring compliance with the Union's fundamental values (Council of the European Union 2018: recital 10). On 17 June 2022 the Council approved the Polish Recovery and Resilience Plan, which included two “super milestones” related to the judiciary that should have been met before the first payment (European Parliament 2023b). Although Belgium, Finland, Germany, Hungary, Ireland, and Poland had demonstrated no performance progress by November 2023, grants were disbursed to Belgium, Finland, and Germany, but not to Poland (Kováčiková 2023: p. 94). This fact gives rise to a question of whose interests the Commission serves, taking into account that it is an institution entrusted with advancing the general interest of the EU – the common good – over the particular interests of the Member States.

Similar concerns have been raised with regard to both the CJEU and the EP. In case of the former, it is argued that the Court tends to interpret Treaty provisions too broadly, thereby engaging in *de facto* law-making that goes beyond the original intentions of the Member States – often referred to as the “masters of the Treaties”. Regarding the latter, the power and influence of political groups within the EP are seen as playing a significant role in shaping the institution's response to the rule of law crisis. Moreover, this development can be an opportunity to strengthen the Parliament's authority in the broader framework of European politics (Grosse 2022: p. 171).

It is also argued that EU institutions, by exceeding their Treaty-based competences, may themselves violate the rule of law. An often-cited example is the Commission's communication of 2014, which expanded the Commission's powers while simultaneously limiting those of the Member States, as it enabled the circumvention of Treaty provisions that require the unanimity of intergovernmental institutions in decisions regarding rule of law violations (Grosse 2022: p. 143)¹⁷. Moreover, through its active engagement in promoting European values, the Commission has been able to exert influence in all areas of EU law. As a consequence, in advancing its own objectives, the Commission has assumed a political role (Grosse 2022: p. 155). It may be argued that the communication, being

¹⁷ Cezary Mik adopts a similar stance. In his commentary on the communication of 2020, he asserts that the Commission by establishing the rule of law mechanism and conducting an annual assessment grounded in a self-created concept of the rule of law, has exceeded its competences (Mik 2021: p. 111).

a non-binding instrument, does not have any legal effects; however, this does not render it devoid of practical effects. Crucially, as the guardian of the Treaties, the Commission must be equipped with the tools to fulfil the tasks assigned to it – provided it remains within the limits of its competences. In this regard, the mechanism outlined in the communication serves a preventive function by addressing systemic threats to the rule of law. This makes it possible to assess a state's internal situation, facilitates dialogue with state authorities, and ultimately allows for the formulation of allegations that can lead to reasoned proposals under Article 7 TEU (Taborowski 2019: p. 104). Accordingly, the Commission's competence under Article 7 TEU, its role as the guardian of the Treaties and the corresponding need for appropriate tools to fulfil this role, and the fact that Article 2 TEU is an integral part of the Treaties, reinforce the argument that the Commission did not act *ultra vires* when adopting the communication. Even if one argued that the Commission encroached upon areas reserved to the Member States, such interference may still be justified. This is because the Member States, when exercising their national competences, are obliged to act in conformity with EU law. Therefore, interference in the autonomous sphere of a Member State may be warranted when that autonomy threatens to undermine the effectiveness of EU measures – i.e. measures adopted within the scope of the Union's competences (Taborowski 2019: p. 222).

While all EU institutions remain committed – albeit to differing degrees – to safeguarding the rule of law, the Council and the Court, by virtue of their respective decision-making and adjudicative powers, play pivotal roles in this regard. The Commission, however, notwithstanding its lack of formal decision-making powers, stands out as the most proactive institution, occupying a central position in both hard and soft law frameworks. By contrast, the European Parliament – despite its role as the representative of EU citizens – appears to be the least engaged in this domain.

Table 1: Key distinguishing features of the rule of law enforcement.

	Article 7 TEU	Article 258 and 259 TFEU	Conditionality Regulation
Instruments (mechanisms and procedures) to ensure compliance with the rule of law			
Political	+	–	–
Judicial	–	+	–
Economic	–	–	+
Main institutional actors			
European Council	+	–	–
Council of the EU	+	–	+
European Commission	–	–	+

Court of Justice	–	+	–
European Parliament	–	–	–
Other features			
Effectiveness	–	+	+
Timeframe	long	medium	short

Source: the author's own elaboration.

The evolution of the rule of law enforcement within the EU reflects a discernible change encompassing several dimensions: from the realm of high politics – characterised by predominantly political discourse – to that of low politics, grounded in practical and economic considerations; from the initial dominance of intergovernmental institutions representing national interests towards the growing centrality of supranational actors advocating the Union's collective interest; from non-legislative policy measures, through judicial adjudication, to executive measures grounded in financial conditionality; from reliance on largely declaratory and unenforceable instruments to the deployment of enforceable mechanisms endowed with tangible coercive potential; from protracted procedures to more expedited and impactful enforcement mechanisms; from soft law tools to binding, hard law instruments; and from largely ineffective measures to those capable of producing tangible and sustained compliance.

Findings, discussion and conclusions

The preservation of the rule of law – particularly the independence of courts and judges – is of paramount importance within the EU. In the decentralised system of law enforcement (Spieker 2023: p. 23), national judges, while embedded in domestic judiciaries, also function as European judges. Therefore, their independence is not merely a national concern, but a fundamental requirement for the effective and uniform application of EU law. A lack of judicial independence or public trust in these institutions undermines the legal coherence of the EU and calls into question the values and principles, upon which the European project is founded (Seierstad 2024: p. 24).

Among three institutions analysed in this study, the Commission emerges as the principal actor helping safeguard the rule of law in the EU. This is notwithstanding the fact that formal decision-making power under both Article 7 TEU and the Conditionality Regulation lies with the Council. Within the political mechanism established by Article 7 TEU, the Council and the European Council retain the decisive authority. However, insofar as the institutional dialogue between the EU and the Member States constitutes a political instrument, the Commission exercises a meaningful degree of influence. In the judicial realm, while the CJEU is, *ex definitione*, the final arbiter, the Commission holds the exclusive competence to initiate infringement proceedings under Article 258 TFEU. By contrast, proceedings under Article 267 TFEU are dependent on cooperation

between national courts and the CJEU. With respect to economic measures, although the Council is once again the decision-maker under the Conditionality Regulation, it is the Commission that not only oversees the EU budget, but also manages the allocation of funds under national recovery and resilience plans. While the Commission does not exercise decision-making power in these procedures, it nonetheless performs essential functions across all three domains: political (by triggering the Article 7 TEU procedure through the submission of a reasoned proposal to the Council), legal (by initiating infringement proceedings before the Court under Article 258 TFEU), and economic (by proposing to the Council the adoption of measures under the Conditionality Regulation). To sum up, the Commission's multifaceted role – initiating proceedings, monitoring compliance, and enforcing Union standards – is indispensable to the EU's safeguarding of the rule of law.

Referring to the hypothesis presented at the beginning of the article, it should be noted that the EU's role – manifested through its common and independent institutions – is least visible in the political sphere and most salient in the judicial and economic frameworks. Of all the EU institutions, the Commission warrants particular attention, as it is not only the most committed to upholding the rule of law but also occupies a central position across all procedures – political, legal, and economic. In fulfilling its functions, the Commission transcends its technocratic mandate and assumes a political role.

In contemporary discourse regarding the imperative of safeguarding the rule of law, political considerations often overshadow legal concerns – particularly in relation to the independence of courts and judges. This tendency can be partly attributed to the relatively recent communitarisation of judicial matters¹⁸, while the organisation of the judiciary continues to be within the competence of the Member States. On the other hand, however, national courts, while operating within their domestic legal systems, also function as European courts and are bound to uphold the standards of judicial independence and impartiality as mandated by EU law.

Danuta Kabat-Rudnicka – PhD, D.Sc., lawyer and political scientist, university professor at Krakow University of Economics. Research interests: federalism, constitutionalism, constitutional and international courts, international organisations, international law, European law, European Union politics, international relations and theory, ethics in international relations, political systems, international security. She is the author or co-author of the following monographs: *Zasada federalna a integracja ponadnarodowa. Unia Europejska między federalizmem dualistycznym a kooperatywnym* (Kraków, 2010); *Konstytucjonalizacja Unii Europejskiej a sądownictwo konstytucyjne – wielopoziomowa współpraca czy rywalizacja?* (Warszawa, 2016); *Problemy i wyzwania stojące przed Unią Europejską* (Warszawa, 2022); *Dylematy systemowe Unii Europejskiej u zarania trzeciej dekady XXI wieku* (Warszawa, 2023); and the editor of no. 22/2025 *Wolność i odpowiedzialność* of the academic journal „Edukacja Etyczna”.

¹⁸ The Lisbon Treaty established the Area of Freedom, Security and Justice (Title V TFEU).

Danuta Kabat-Rudnicka – doktor habilitowana, prawnik i politolog, profesor nadzwyczajna Uniwersytetu Ekonomicznego w Krakowie. Zainteresowania naukowo-badawcze: federalizm, konstytucjonalizm, sądownictwo konstytucyjne i międzynarodowe, organizacje międzynarodowe, prawo międzynarodowe, prawo europejskie, polityki Unii Europejskiej, międzynarodowe stosunki polityczne, teoria stosunków międzynarodowych, etyka w stosunkach międzynarodowych, systemy polityczne, bezpieczeństwo międzynarodowe. Jest autorką lub współautorką monografii: *Zasada federalna a integracja ponadnarodowa. Unia Europejska między federalizmem dualistycznym a kooperatywnym* (Kraków, 2010); *Konstytucjonalizacja Unii Europejskiej a sądownictwo konstytucyjne – wielopoziomowa współpraca czy rywalizacja?* (Warszawa, 2016); *Problemy i wyzwania stojące przed Unią Europejską* (Warszawa, 2022); *Dylematy systemowe Unii Europejskiej u zarania trzeciej dekady XXI wieku* (Warszawa, 2023); oraz redaktor naukowa numeru 22/2025 *Wolność i odpowiedzialność* czasopisma „Edukacja Etyczna”.

➔ References:

- BARCIK Jacek (2019), *Ochrona praworządności w Radzie Europy i Unii Europejskiej ze szczególnym uwzględnieniem niezależności sądów i niezawisłości sędziów*, Warszawa.
- BARCZ Jan (2019), *Unia Europejska wobec niepraworządnego państwa członkowskiego*, „Państwo i Prawo”, nr 1.
- BOGDANOWICZ Piotr, SCHMIDT Matthias (2018), *The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU*, “Common Market Law Review”, vol. 55, issue 4. DOI: 10.54648/cola2018093
- BÖTTNER Robert, BLANKE Hermann-Josef (eds) (2024), *The Rule of Law Under Threat. Eroding Institutions and European Remedies*, Cheltenham.
- BÖTTNER Robert, SCHRÖDER Nic (2024), *Article 7 TEU as 'Nuclear Option'? An Analysis of its Potential and its Shortcomings*, in: Robert Böttner, Hermann-Josef Blanke (eds), *The Rule of Law Under Threat. Eroding Institutions and European Remedies*, Cheltenham.
- CLOSA Carlos, KOCHENOV Dimitry (eds.) (2016), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge.
- COMAN Ramona (2022), *The Politics of the Rule of Law in the EU Polity. Actors, Tools and Challenges*, Cham.
- EUROPEAN COMMISSION (2014), *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, Brussels, 11.03.2014.
- COUNCIL OF THE EUROPEAN UNION (2014), *Opinion of the Legal Service: Commission's Communication on a new EU Framework to strengthen the Rule of Law – compatibility with the Treaties*, 10296/14, Brussels, 27.05.2014.
- COUNCIL OF THE EUROPEAN UNION (2018), *Opinion of the Legal Service: Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States – Compatibility with the EU Treaties*, 13593/18, Brussels, 25.10.2018.
- EUROPEAN COMMISSION (2017), *Proposal for a COUNCIL DECISION on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, COM (2017) 835 final, Brussels, 20.12.2017.

- EUROPEAN COMMISSION (2018), *Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court*, Press Release, Brussels, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5830 (24.09.2018).
- EUROPEAN COUNCIL (2020), *Conclusions – 17, 18, 19, 20 and 21 July 2020*, EUCO 10/20, Brussels, <https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf> (21.07.2020).
- EUROPEAN PARLIAMENT (2023a), *Economic and Budgetary Outlook for the European Union 2023*, Brussels, PE 739.313, January 2023, [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/739313/EPRS_STU\(2023\)739313_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/739313/EPRS_STU(2023)739313_EN.pdf) (30.01.2023).
- EUROPEAN PARLIAMENT (2023b), *Rule of law-related 'super milestones' in the recovery and resilience plans of Hungary and Poland*, Briefing, PE 741.581, January 2023, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI\(2023\)741581_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/741581/IPOL_BRI(2023)741581_EN.pdf) (30.01.2023).
- GRABOWSKA-MOROZ Barbara, GROGAN Joelle (eds) (2024), *Rule of Law beyond the EU Member States: Assessing the Union's Performance*, CEU Democracy Institute Rule of Law Clinic, Budapest, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5000511 (13.12.2024).
- GROSSE Tomasz (2022), *Suwerenność i polityczność. Studium integracji europejskiej*, Warszawa.
- HILLION Christophe (2016), *Overseeing the Rule of Law in the EU. Legal Mandate and Means*, in: Carlos Closa, Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge.
- JUDGMENT OF THE COURT (1986) of 23 April 1986, *Parti écologiste "Les Verts" v European Parliament*, case 294/83.
- JUDGMENT OF THE COURT (2007) of 3 May 2007, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, case C-303/05.
- JUDGMENT OF THE COURT (2010) of 14 September 2010, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, case C-550/07 P.
- JUDGMENT OF THE COURT (2013) of 12 December 2013, *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and Commissioners for Her Majesty's Revenue and Customs*, case C-362/12.
- JUDGMENT OF THE COURT (2016) of 10 November 2016, *Openbaar Ministerie v Ruslanas Kovalkovas*, case C-477/16 PPU.
- JUDGMENT OF THE COURT (2018) of 27 February 2018, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, case C-64/16.
- JUDGMENT OF THE COURT (2019) of 24 June 2019, *European Commission v Republic of Poland*, case C-619/18.
- JUDGMENT OF THE COURT (2021) of 20 April 2021, *Repubblika v Il-Prim Ministru*, case C-896/19.
- JUDGMENT OF THE COURT (2022) of 16 February 2022, *Republic of Poland v European Parliament and Council of the European Union*, case C-157/21.
- KOCHENOV Dimitry, PECH Laurent (2015a), *Upholding the rule of law in the EU: on the Commission's 'pre-article 7 procedure' as a timid step in the right direction*, "European Issues", no. 356, Policy Paper, Foundation Robert Schuman.
- KOCHENOV Dimitry, PECH Laurent (2015b), *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, "European Constitutional Law Review", vol. 11, issue 3.

- KOVÁČIKOVÁ Hana (2023), *Financial Tools – A Way to Approach the Rule of Law?*, "Nordic Journal of European Law", vol. 6, no. 4. DOI: 10.36969/njel.v6i4.25920
- ŁACNY Justyna (2018), *Zawieszenie wypłat funduszy UE przekazywanych państwom członkowskim naruszającym zasadę praworządności: nowy mechanizm warunkowości w prawie UE*, „Europejski Przegląd Sądowy”, no. 12(159).
- MIK Cezary (2021), *Opinia w sprawie komunikatu Komisji do Parlamentu Europejskiego, Rady, Europejskiego Komitetu Ekonomiczno-Społecznego i Komitetu Regionów: „Sprawozdanie na temat praworządności z 2020 r. Sytuacja w zakresie praworządności w Unii Europejskiej” (COM(2020) 580 final), łącznie z dokumentem roboczym służb Komisji: „Sprawozdanie na temat praworządności z 2020 r. Rozdział dotyczący sytuacji w zakresie praworządności w Polsce” (SWD(2020) 320 final), „Zeszyty Prawnicze BAS”, no. 1(69).*
- NOWAK-FAR Artur (2021), *The Rule of Law Framework in the European Union: Its Rationale, Origins, Role and International Ramifications*, in: Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski, Matthias Schmidt (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, Berlin.
- OLIVER Peter, STEFANELLI Justine (2016), *Strengthening the Rule of Law in the EU: The Council's Inaction*, "JCMS: Journal of Common Market Studies", vol. 54, issue 5. DOI: 10.1111/jcms.12402
- OPINION (2019) of Advocate General Tanchev delivered on 11 April 2019, *European Commission v Republic of Poland*, case C-619/18.
- PECH Laurent (2010), *'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, "European Constitutional Law Review", vol. 6, issue 3.
- RAITIO Juha (2024), *The Rule of Law as a Fundamental Value of the Council of Europe, the European Union and in the Constitutional Traditions Common on the Member States*, in: Robert Böttner, Hermann-Josef Blanke (eds), *The Rule of Law Under Threat. Eroding Institutions and European Remedies*, Cheltenham.
- REGULATION (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020.
- SARGENTINI Judith, DIMITROVS Aleksejs (2016), *The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?*, "JCMS: Journal of Common Market Studies", vol. 54, issue 5. DOI: 10.1111/jcms.12403
- SCHEPPELE Kim, KOCHENOV Dimitry, GRABOWSKA-MOROZ Barbara (2020), *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, "Yearbook of European Law", vol. 39.
- SCHROEDER Werner (2021), *The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?*, in: Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski, Matthias Schmidt (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions*, Berlin.
- SEIERSTAD Vette (2024), *The Obligation to Establish and Uphold Judicial Independence under Article 19(1) TEU*, "Nordic Journal of European Law", vol. 7, no. 1. DOI: 10.36969/njel.v7i1.25323
- SELLERS Mortimer (2014), *What Is the Rule of Law and Why Is It So Important*, in: James R. Silkenat, James E. Hickey Jr, Peter D. Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Cham.

SPIEKER Luke Dimitrios (2023), *EU Values Before the Court of Justice*, Oxford.

SYMANN Malte (2024), *Financial Sanctions as a Remedy to Enforce the Rule of Law in Poland and Hungary*, in: Robert Böttner, Hermann-Josef Blanke (eds), *The Rule of Law Under Threat. Eroding Institutions and European Remedies*, Cheltenham. DOI: 10.4337/9781035330690.00017

TABOROWSKI Maciej (2019), *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego*, Warszawa.

TEU, Treaty on European Union (consolidated version), OJ C 202, 07.06.2016.

TFEU, Treaty on the Functioning of the European Union (consolidated version), OJ C 202, 07.06.2016.

TREATY on European Union, signed at Maastricht on 7 February 1992, OJ C 191, 29.07.1992.

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