

Poisoned heritage for the new Commission: The rule of law question

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Executive summary

The rule of law question will most likely become a central EU issue during the mandate of the new European Commission. Member states are increasingly beginning to question, attack and/or ignore previously agreed common policies, political priorities or common principles. These challenges are usually more political – sometimes even ideological – than legal, thus the Commission’s legalistic reactions are not necessarily adequate.

The Commission’s attempt to monitor and evaluate domestic situations with its own rule of law mechanism has two faults: the mechanism is not formally shared across EU institutions; and when it comes to its endgame of launching the Article 7 procedure, it is weakened by its hybrid nature. In other words, the mechanism is based on legal starting points, but the follow-up largely takes place on political and thus to some extent subjective grounds. When the original Commission mechanism was created, all of the possible consequences were not fully taken into account. In reality, it has alienated the targeted countries without achieving any real change in their conduct. Furthermore, while the Commission sought to place member states that supposedly breached certain commonly agreed principles and values under public pressure, it was the College that was forced to follow a predetermined path in the end. This did not serve the Commission’s interests nor achieve its original goal, since triggering the so-called nuclear option (i.e. Article 7) became unavoidable.

No rule of law mechanism can function effectively on legal grounds alone as long as the existing Treaty foundations are too ambiguous for this purpose and the final decision is taken at the political level where the Guardian of the Treaties is not the decisive player. The Treaty gave the Commission the right of notification and initiation, while judgement and decision are left solely to the member states. In theory, either the legal foundations in rule of law cases should be detailed enough so that they are sufficient for any final legal judgement, or the political nature of the question should be declared openly to invite all political players to

contribute to the debate. Neither of these two options can materialise alone.

The Commission should avoid pretending that the College is the key to solving national challenges to the rule of law, given that it is not the decisive political player. This does not mean that the rule of law question should be put aside. Nevertheless, it is essential to respect the bounds of the Commission’s competence when handling cases of this kind and act accordingly. The Commission should also ensure that it does not serve just one part of the Community if it wishes to cooperate with all member states. The argument of the criticised member(s) also has its own logic and represents real interests and public support. Perhaps their conviction seems a of different world, but as long as that world is also formally part of the Community, it merits attention and analysis. Otherwise, any dialogue among Community members is bound to fail. **The warning system itself should be improved, and the role of the Council updated.** Considering sanctions, it may be wiser to stick to procedures that can be implemented to produce concrete results.

If the root of the rule of law question is primarily political, then one must face the reality that political disagreement is to be answered by political means – if at all. The new Commission will be confronted with a difficult choice: it can either try to **live with all of those who are formally part of the Union mediating between them** while continuing to defend the rules and values it is entrusted with as the Guardian of the Treaty. Alternatively, it can **lead an open political fight against those who appear to weaken the previously agreed interpretation of fundamental European rules and principles.** The first option gives preference to unity, while the second openly declares a split within the Community. However, there is also a third option: while not giving up on unity, **likeminded and willing EU countries can intensify their level of integration while leaving others out of this closer cooperation**, while all parties formally remain within the framework of a larger (and looser) Community.

The rule of law question in a politicised EU

When Ursula von der Leyen presented her priorities to the European Parliament’s plenary in mid-July 2019 as a candidate for the European Commission presidency, one of her promises was to pay close attention to the respect of the rule of law in the EU.¹ A majority of the Parliament understood this to be a strong commitment to defend the rule of law in all member states and join the recent efforts of the outgoing Commission to enforce the related mechanism. Strangely enough, after this declaration, Members of the European Parliament (MEPs) from the

Polish and Hungarian governing parties were ready to vote for her, despite the fact that their countries have been the primary targets of said mechanism. This shows that the future Commission President’s remarks could be – and indeed have been – understood in different ways. Furthermore, it shows that the interpretation of the rule of law and its possible handling vary. If von der Leyen seeks achievements in this field, she must balance the instruments available to the Commission against the political will of the member states, avoiding an

overstretching of the Commission's competence while still influencing the procedure within its clout.

The challenge will be unavoidable. The rule of law question will most likely become a central issue for the EU institutions and (some) member states during the tenure of the von der Leyen Commission. However, this central topic stems from reasons other than generally envisaged. The issue is far from the simplistic conceptualisation of an 'Orbán question' or 'Kaczyński question'. The gist of the topic is different: the once 'technical' EU has become largely politicised, and the rule of law question turns out to be one of the central elements of this transformation.

The issue is far from the simplistic conceptualisation of an 'Orbán question' or 'Kaczyński question'. The gist of the topic is different.

For decades, cases of breaches of EU Treaties usually related to the circumstance that individual member states did not (fully) adhere to Community law, so the Commission – referring to the EU *acquis* – launched legal infringement procedures against them. In recent years, we have witnessed a new development: **member states are increasingly questioning, attacking and/or ignoring previously agreed common policies, political priorities or even principles.**

This can already complicate the implementation – or approval – of common political projects of the EU, as is the case with migration policy, where member states have not been able to bridge their substantial differences. Furthermore, the EU enters a total grey zone

An incomplete and overrated mechanism

The rule of law question appears in this context. Some argue that it is purely in the competence of member states to decide how to change and/or amend their national constitution, how their judiciary system should look and function, and what communication methods the government uses at home. Others disagree, recalling that being part of a community of law – including, among others, a strictly regulated internal market – means that no one plays on their lonesome. One's steps can trample on others' feet, and the common playing field more generally.

One thing is certain: **different member states' interpretations of the rule of law can have multiple consequences.** If a decision breaches the *acquis*, it

when the debate concerns internal changes within the member states related to media law, judiciary reform or constitutional amendments. These territories are regulated a priori by national constitutions, which certainly cannot contradict EU laws and fundamental principles enshrined in the EU Treaties. However, the possible degree of deviations from the latter is not really specified, either.

Those who dispute the concrete interpretation of the rule of law sail in uncharted waters: there is no clear guidance given by the *acquis* for them, only vaguely defined legal provisions or mechanisms. **The challenge is clearly political – sometimes even ideological – and not 'only' legal**, so the involved players must improvise political arguments, create political coalitions and impose political will.

Jarosław Kaczyński, Viktor Orbán or Matteo Salvini (while he had the power to do so) clearly understood that the EU had hardly any effective instrument or sanction mechanism to stop them from contradicting common political directions, and even less to hamper their internal agendas aimed at changing their countries' political and institutional landscapes.

This is not new. The EU has been coping with different kinds of political 'noise' for decades, ever since Eurosceptic parties found their way into the European Parliament. MEPs from the French National Front (renamed National Rally), the Dutch Party for Freedom or the British UK Independence Party have been ready to criticise 'mainstream EU' harshly from within the Union for a long time.

What is new is that these **voices are finally speaking and operating at the EU's highest political level**; from around the European Council table, where a radically different position could be a sovereign member state's argument and not merely the opinion of a small political fraction.

can illicit a reaction from the European Commission, as in the case of Hungarian media law whereby they identified three concrete and questionable points. It can also lead to political reactions from the European Parliament, based on party solidarity or simple personal convictions, as it was exemplified in different internal changes in Poland, Hungary and Romania. Or it can provoke disputes between member states, especially if a government fears that, for example, illiberal policies will affect domestic political developments negatively. Take the case of France, where President Emmanuel Macron keeps an eye on National Rally's Marine Le Pen and her supporters when commenting on and reacting to Hungary's internal developments.

Different interpretations of the rule of law can also create ideological discrepancies among players. The Hungarian prime minister advocates illiberalism, his Polish colleague praises the central role of the Church and Christian faith, while Marine Le Pen described the former Italian government's priorities as building blocks for the "Europe of tomorrow".² These are open ideological challenges to the positions and principles advocated by the so-called European mainstream.

The Commission's rule of law mechanism is not formally shared across the other EU institutions, and when it comes to its endgame of launching Article 7 of the TEU, it has a hybrid nature.

These challenges can hardly be answered by legal procedures solely. As for domestic changes (to constitutions or internal institutional settings), the Commission's rule of law mechanism attempts to monitor and evaluate domestic situations, forming an official opinion if it sees discrepancies, and issuing formal warnings and launching legal procedures when necessary. However, **the mechanism has two faults:** it is not formally shared across the other EU institutions, and when it comes to its endgame of launching Article 7 of the TEU, it has a hybrid nature. When it refers to Article 2 of the Preamble of the TEU and acts according to Article 7, the mechanism is based on legal starting points – but the follow-up largely takes place on political and thus to some extent subjective ground. Its possible completion in practice also rests on a political decision, which then produces legal consequences. This can even include the suspension of voting rights in the Council in extreme cases.

This is precisely what has occurred in the two Article 7 TEU procedures against Poland and Hungary respectively, and which are both now stuck in a deadend. The former was formally launched by the Commission on 20 December 2017.³ The latter was initiated by the European Parliament on 12 September 2018, when the plenary voted on Dutch MEP Judith Sargentini's report on the situation of the rule of law in Hungary.⁴ The Parliament asked the member states to determine whether Hungary is at risk of breaching the Union's founding values.

Both initiatives were sent to the European Council long before the latter started dealing with them, but even then, **the member states have refrained from taking any decision to date.** Their reluctance makes clear that they are hesitant to go all the way, recognising that beyond a certain point, **this is based on political opinions and the will of the political majority rather**

than clear-cut common rules. Governments are also wary of creating a precedent of this kind of procedure, fearing that another political majority might use similar mechanisms against them in the future. And last but not least, there are those in the Council who are opposed to the whole procedure, like the current Polish and Hungarian governments.

The inability to reach any formal decision speaks for itself, especially in the Polish case which started almost two years ago. This failure demonstrates that the present rule of law mechanism has been designed superficially. Those who created it did not really take all of the possible consequences into account. It has alienated the targeted countries without achieving any real change in their conduct. Conversely, the procedure has produced an uneasy situation for a European Council that does not want to take sole responsibility for the reasons mentioned above, and yet must in order to not lose face.

The present rule of law mechanism has been designed superficially. Those who created it did not really take all of the possible consequences into account. It has alienated the targeted countries without achieving any real change in their conduct.

When the rule of law mechanism was announced in March 2014,⁵ the European Commission's underlying intention was to create something in between the so-called nuclear option under Article 7 TEU and a simple notification of some irregularity in a given member state. Yet in reality, despite the Commission's claims, **the mechanism was everything but new and far from an 'overall' instrument for the EU institutions. The Commission has simply labelled impressive titles to each of its steps,** which it takes in any case as logical phases of a working procedure. As the Guardian of the Treaties, the Commission is always bound to monitor, evaluate, question and warn member states before initiating legal remedies and infringement procedures.

In other words, former Commissioner Viviane Reding (and her then-boss, former President José Manuel Barroso) presented a mechanism in early 2014 under which each step of a rule of law issue – usually simple working phases of a routine procedure – was identified meaningfully. Asking for information to put public pressure on a 'suspect' of a rule of law breach early on became known as the 'rule of law inquiry'. The Commission's opinion was called the 'rule of law evaluation'. The demand for a change in the member state's conduct was named the 'rule of law proposal', and so on. And voilà, the rule of law mechanism was born.

It was as much a communications bluff on the Commission side as it was a misleading political show played by the Polish government to call the Commission's mechanism unlawful in 2016, claiming that it does not have Treaty-based legal foundation and thus does not exist in reality. This was an obvious misinterpretation of the fact that the Commission just dressed up the steps fancifully. Politically disturbing perhaps, but legally not forbidden. The College does have the Treaty-based mandate to monitor, evaluate, warn and even start a legal procedure if they deem it necessary to defend the content and spirit of the Treaty.

By creating this mechanism, the Commission sought to place the countries it viewed as breaching certain commonly agreed principles and values under public pressure. However, it has fallen into its own trap.

Originally, by creating this mechanism, the Commission sought to place the countries it viewed as breaching certain commonly agreed principles and values under public pressure. However, it has fallen into its own trap, as it could not retreat any further by using such strong labels. And if the targeted country did not react to the rule of law evaluation (let alone the proposal) – as the Polish government was sometimes reluctant to do – then the Commission was bound to move one step further to not lose credibility.

As a result, **in the end, it was the College and not the member states that was following a predetermined path.** This did not serve the Commission's interests and also missed its original goal of failing to influence the targeted country at an early stage and avoiding triggering the so-called nuclear option.

Still, one must give some credit to Reding and Barroso, given that their proposal for the original mechanism would have relied on several bodies and not just the Commission. All of the relevant Community institutions were to be treated as equally important participants. A majority in the European Parliament were keen to join, but the Council rejected the (original) proposal. So, at the end of the day, the 'new' instrument – which is clearly the old one with new rhetoric enforced – formally remained a Commission mechanism solely.

Reaching the end of its mandate, the Barroso Commission did not have the time to test out the mechanism itself. Under growing pressure from the Parliament, former Commission President Jean-Claude Juncker's College could not avoid doing so. They hoped that thanks to a strong alliance with the Parliament and

public backing, the 'new' mechanism would succeed with flying colours. Unfortunately, their calculations were completely off: it soon became clear that any pressure from Swedish, Dutch or even German audiences would not impress the Polish government as long as the majority of its public supported it. A substantial part of Polish society feels that their living standard has improved and appreciates the government's effort to 'defend Poland against Brussels', as it was said by many of those who voted for the present government during the latest parliamentary election.

In this sense, the Commission has failed: (sporadic) public support may occasionally impress political players while they are forging their decision, but it cannot replace missing legal bases. And the 'Barroso mechanism' – which the Juncker Commission inherited – did not have any enhanced legal base that would enable it to be considered a complete EU rule of law mechanism.

Two points became immediately evident: it would be the next Commission's task to consolidate and implement the new ideas; while it must expect strong resistance from several member states.

The Juncker Commission made substantial efforts to refine the mechanism throughout its mandate, adding new elements to it. In its communication presented in July 2019, the Commission proposed several new additions, including annual rule of law reports on all member states, possible sanctions against those who breach the common norms, and yearly conferences dedicated to the issue in order to "enforce the rule of law" all over the Union.⁶ The long-floated idea of establishing a potential link between rule of law performance and the right to access the Community's financial support has also been confirmed as a possible instrument within the proposal for the upcoming Multiannual Financial Framework (MFF), published by the European Commission in May 2018.⁷

Two points became immediately evident: it would be the next Commission's task to consolidate and implement the new ideas; while it must expect strong resistance from several member states, and certainly including those that are currently subject to the ongoing rule of law procedures. Hungary's Minister of Justice Judit Varga, who is also responsible for EU affairs, clearly stated in July 2019, after the Commission presented its proposal, that the initiative lacked any legal base. She continued to argue that it could become a dangerous political instrument in the future. According to the Minister, national and constitutional traditions and specifics should be considered first and foremost, and

existing mechanisms and instruments should be used more efficiently instead of fabricating new ones.⁸

In this respect, the Polish position is identical to the Hungarian one.

Balancing between legal basis and political will

The principal lesson that one can learn from this situation is that no rule of law mechanism can function effectively on legal grounds alone as long as the existing Treaty foundations remain ambiguous and the final decision is taken at the political level, where the Guardian of the Treaties is not the decisive player. The Treaty gave the Commission the right of notification and initiation, while judgement and decision are left solely to the member states. The former acts according to the general provisions of the Treaty. National governments usually consider the legal foundations, too, but follow their own political priorities and interests mostly.

In fact, in rule of law cases, **member states revert to the creation of the Common Market and decide according to their national preferences.** For the founding member states – and later for those who joined afterwards – it seemed evident that the community should only be comprised of countries that shared a common vision, for example on the market economy or the liberal interpretation of the rule of law model. That was their ground when they refused the approach of Franco's Spain or Salazar's Portugal, and it was from this same ground that they were ready to open their doors once the necessary political changes were completed. **Both were clearly political decisions.**

The principal lesson that one can learn from this situation is that no rule of law mechanism can function effectively on legal grounds alone as long as the existing Treaty foundations remain ambiguous and the final decision is taken at the political level.

For the same reason, **when certain member states declare today that democracies should not be liberal in a 'traditional' sense but rather illiberal, Christian-national or the like, it represents a conflicting political view.** Or a different approach to the common project rather than a direct breach of the legal *acquis* – even if the *acquis* originally aimed to guarantee formerly agreed political values through legal means. Nevertheless, given that the founding members did not wish to become a common statehood with a common constitutional setting, **the legal specification remained superficial,**

offering only a relatively fragile basis for the legal denial of altering interpretations.

Either the legal foundations for any final legal judgement should be sufficiently detailed in rule of law cases; or the political nature of the question should be openly declared, thereby inviting all political players to participate, draw conclusions and decide according to their respective political priorities.

This is from where the legal uncertainty stems. The most frequently cited paragraph of the Preamble of the TEU declares that only the rule of law should prevail – but it does not offer any concrete way to achieve this.⁹ In other words, it is clear what the preferred values and its intentions are, but the same cannot be said for how to defend them. Ever since the Charter of Fundamental Rights become part of the Treaty, there is a more detailed list of basic rights – nevertheless, it still does not offer an elaborated description of their implementation.

All of this leaves plenty of room for interpretation by the member states. For example, to defend the reform of their judicial system, Hungarian politicians recently pointed to the Finnish justice system which has no independent constitutional court. Its functions are to a large extent carried out by the Legal Affairs Committee of the Finnish Parliament, and the president of the state nominates judges based on proposals by the justice minister and a nominating body. According to the Hungarian argument, if the 'Finnish interpretation' of Article 2 can assure the primacy of the rule of law in the eyes of many, then why not the Hungarian? The Polish and Hungarian governments maintain their argument that their legal systems are duly guaranteeing the primacy of the rule of law, albeit in a way that is in line with their specific constitutional settings and national traditions. They tend to refer to Article 4 of the Preamble of the TEU,¹⁰ which underlines the need for the Union to respect the member states' constitutions.¹¹

In light of this situation, the solution looks simple in theory but is actually difficult in practice. In theory, either the legal foundations for any final legal judgement

should be sufficiently detailed in rule of law cases; or the political nature of the question should be openly declared, thereby inviting all political players to participate, draw conclusions and decide according to their respective political priorities.

In reality, neither of these two options can materialise alone. Hypothetically, one might be able to create some universal constitutional frame for sovereign national states – forcing a one-size-fits-all institutional setting and a legally binding unique interpretation of the basic laws on to them – but only if and when the EU becomes a single federal entity that is based on a single constitution, complete with all of its legal and institutional consequences.

The other extreme would be even less realistic: one state's political judgement on another's national politics without

a mutually agreed legal base would be seen as an insult and interference in domestic affairs. Which, within a short period, would escalate harsh political feuds among member states, thus fatally eroding the common ground for further cooperation.

Taking all of this into account, **in principle, the present dual** (i.e. partly legal, partly political) **system offers a quite realistic framework as it represents the hybrid nature of the Union.** This means that it is simultaneously a community with a legally operational and enforceable common rule book, and an intergovernmental entity of sovereign states where decisions are to a large extent based on the political readiness and priorities of its constituent elements (i.e. the member states represented by national governments in the Council).

A narrow path to follow for the new Commission

Given these circumstances, what can President Ursula von der Leyen and her Commission do if they wish to enforce the primacy of the rule of law further across the Union? The most important step is to find a new balance between the legal and political sides of the procedure, correctly judging the internal position the Commission is to take. A new balance that does not abandon the basic aim of protecting the rule of law offers more flexibility and draws all of the participants into the game.

The most important step is to find a new balance between the legal and political sides of the procedure, correctly judging the internal position the Commission is to take.

To move into this direction, the following steps should be taken:

- Facing the mentioned hybrid system, President von der Leyen should **resist pretending that her College is the key to solving national challenges to the rule of law.** This is impossible given that the Commission is not the decisive political player. The von der Leyen Commission should be more humble, warn member states whenever it identifies threats to the rule of law in individual member states, and even launch infringement procedures on concrete matters if the case is within the scope of the College. It should *not* pretend that it can judge and sanction

the guilty party of general rule of law cases. This is why Poland and Hungary became so hostile against the Juncker Commission during their procedures. The new Commission must be more diplomatic to not burn bridges between Brussels and certain parts of the Union. Von der Leyen's first gestures clearly showed that she understands this and is ready to overcome the existing stalemates, which is important if she intends to influence the dynamism and direction of the member states' participation – and their interaction – in the process.

- The Commission's situation is special. It is formally the Guardian of the Treaties, thus its basic mandate is strongly anchored in protecting the Treaty. Nevertheless, if it wishes to cooperate with all member states, then **it cannot just serve one part of the Community**, even if it believes that certain member states are more in line with the letter and spirit of the Treaty than others. Again, this is why the Polish and Hungarian governments were so upset with the Juncker Commission: in their view and wording, Brussels served the 'old-fashioned' and 'outdated' part of the Union – meaning the 'liberal minded Old West' – and not the whole Community.

The argument of the criticised member(s) also has its own logic and represents real interests and public support. Furthermore, the present cases have substantial public support, too. Perhaps their conviction seems of a different world, but as long as that world is also formally part of the Community, their reasoning merits attention, analysis and understanding (though not necessarily approval). **If they are ignored and/or refused automatically, then the chance of any dialogue occurring between Community members is bound to disappear, and only the opposing camps' fighting relationship will remain for all of time.**

- **The warning system itself could be improved.**
As mentioned earlier, the Juncker Commission did initiate a more sophisticated monitoring and warning system. The new Commission has declared to be ready to continue this process, even though the mechanism would always be subject to certain limitations. These improvements should also target the role of the Council. The Commission could propose a reform of the current instrument by targeting a more detailed procedural scheme to the Council, elaborating the implementation of Article 7 procedure further and setting deadlines (e.g. for the consecutive phases). This kind of change could add pressure on the Council and provide the Commission with the legal pretext to turn to the European Court of Justice if the procedure evolves too slowly on the Council side.

The Commission could propose a reform of the current instrument by targeting a more detailed procedural scheme to the Council, elaborating the implementation of Article 7 procedure further and setting deadlines.

- The desire to ‘sanction’ member states which seemingly breach an important aspect of the rule of law is understandable – but it must also be realistic. In this respect, **it may be wiser to stick to procedures that can be implemented in reality to ensure concrete results.**

For example, the idea of introducing a general ‘rule of law conditionality’ for the use of EU funds in the next MFF may look attractive in the eyes of many, but would it actually pass? Hardly, as the MFF is to be agreed by consensus and will never be approved by the targeted countries (regardless of whether the conditionality is within the framework of the future MFF or is a parallel mechanism). Is it worth spending so much time and political capital to force this conditionality? Especially considering how even if it were somehow finally introduced, it could easily backfire due to the public of the target country denouncing Brussels for ‘taking our money’. **An alternative might be to consider positive financial stimuli**, where additional sources and instruments are made available to those who are ready to follow a certain common scheme.

- The final aim should be decided in advance. Should it be to defend values or make a member state change its conduct? In an optimal case, it would be both. It may be useful, however, to remember that the present Article 7 procedures generally have not weakened but actually *strengthened* the targeted governments’

position on their domestic field. For example, during the recent parliamentary election in Poland, the governing Law and Justice party won easily.

Forcing Article 7 under premature circumstances – which includes the absence of Council support – could serve as a political demonstration, but can also compromise the credibility of the instrument itself.

It is advisable also to remember that, in the end, it is up to the member states to decide. And in the eyes of the Council, sanctioning a sovereign state by depriving it of its voting right is serious as it alienates the overwhelming majority, so the reason behind such a move must be very specific and convincing. If it is not the case then any meaningful step is improbable at the European Council level. Not to mention that the final decision could be easily blocked by forging some counter-alliance. For instance, it is common knowledge that Hungary will never vote against Poland, and vice versa. Forcing Article 7 under premature circumstances – which includes the absence of Council support – could serve as a political demonstration, but can also compromise the credibility of the instrument itself if there are no substantial consequences.

- **If the root of the rule of law question is primarily political**, then one must face the fact that **political disagreement is to be answered by political means** – if at all. Certainly, those who decide to follow this road must be prepared for a less predictable world, where the common rule counts less and the political more. The political decision of the pro-EU parties in the new European Parliament to establish a ‘cordon sanitaire’ around the EU-sceptic and extremist parties – voting out their candidates from any committee chair contest – was for example political. This kind of action is a doubtlessly radical and sometimes dangerous instrument, as it can fatally erode the foundation of the common rules and initiate endless feuds between opposing parties.

An alternative, especially for when political differences increase (e.g. regarding the speed and direction of further integration, the interpretation of the rule of law, the preferred form of democracy) could be **to accelerate the deepening of cooperation among like-minded and willing member states**, leaving behind those who increasingly seem to be mere stumbling blocks and uneasy bullies. Such increased levels of cooperation

among groups of EU countries could create different forms of differentiated integration (e.g. launching ‘enhanced Schengen cooperation’ in relation to migration policy). Some say that this is highly improbable at present as there are even many conflicting issues among the like-minded member states, which could result in divergence instead of closer cooperation. Indeed, **the present conflictive situation** (i.e. the MFF debate) **is hardly the basis for any proactive acceleration. Nevertheless, the reflex itself can also be defensive.**

The founding member states – the original six plus Ireland, Spain, Portugal and even Scandinavia – have special relations with the Common Market and the ongoing EU integration. They have invested heavily in the project for decades through several generations. For them, the EU means interrelated institutional networks, interdependent business relations, mutual economic ties, common security and strategic interests, which translate into all kinds of trade or financial cooperation for firms, free movement for

employers and passport-free travel for all. In other words, they have a lot to lose if the EU project fails, or if the political and social model evaporates from below their feet. The original project was built on the grounds of rules-based open societies, open markets, open international relations and so on. In order to avoid this, the like-minded group could feel obliged to deepen and accelerate cooperation at a certain moment, as they did during the euro crisis.

The founding member states have a lot to lose if the EU project fails, or if the political and social model evaporates from below their feet.

Conclusion

One thing is sure: **the rule of law question will not disappear**, if only because the diverging interpretations outlined are bound to persist. The Polish and Hungarian governments will remain in power for years. Czech, Croat and some Romanian leaders seem impressed and ready to follow the paths Kaczyński and Orbán have paved, and who knows who else will join this group. Italy might not have seen the last of Matteo Salvini, for example.

The new Commission will be confronted with a difficult choice: it can either try to live with all of the formal members of the Union, listening to and mediating between them, while continuing to defend the rules and values that were trusted to it as the Guardian of the Treaty. Alternatively, it can lead an open political fight against those who seem to weaken the previously agreed interpretation of fundamental European rules and principles, which are still shared by many but reinterpreted by others.

The first option gives preference to unity, attempts to heal wounds and assures a common playing ground for everyone while maintaining principles and doing what its mandate allows it to do. **The second option is a declaration of a division within the Community**, with the College also taking a side.

However, in theory, there is also a **third option**. While not giving up on unity, **likeminded and willing EU countries could intensify their level of cooperation by leaving others behind**, while formally retaining all parties within the framework of a larger (and looser) Community.

In any case, the determining factor is the path the majority of member states choose to follow. The rule of law debate is bound to continue, and the name of the game remains the future shape of the European Union.

- 1 "The Rule of Law is our best tool to defend these freedoms and to protect the most vulnerable in our Union. This is why there can be no compromise when it comes to respecting the Rule of Law. There never will be. I will ensure that we use our full and comprehensive toolbox at European level. In addition, I fully support an EU-wide Rule of Law Mechanism." von der Leyen, Ursula, [Opening Statement in the European Parliamentary Session, Candidate for the President of the European Commission](#), European Parliament, 16 July 2019, p.3.
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- 6 European Commission (2019), [Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Strengthening the rule of law within the Union: A blueprint for action](#), COM(2019) 343 final, Brussels, p.5.
- 7 European Commission (2018), [Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. A Modern Budget for a Union that Protects, Empowers and Defends: The Multiannual Financial Framework for 2021-2027](#), COM(2018) 321 final, Brussels, p.4.
- 8 "She [...] dismissed a proposal from the outgoing Commission that would introduce a regular rule of law review akin to the one Brussels already runs for member states' national budgets, saying it was completely contrary to the treaties: [...] Varga said member states had varying constitutional histories that required 'a comparative vision [...] when it comes to the rule of law.'" Than, Krisztina, "[Hungary rejects rule-of-law criteria for EU funding – minister](#)", *Reuters*, 24 July 2019.
- 9 "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." [The Treaty on European Union](#), Preamble, Common Provisions, Art.2, p.17.
- 10 "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." *Ibid.*, Art.4(2), p.18.
- 11 "[...] the plan by the outgoing Commission to introduce a regular rule of law review runs completely contrary to the Treaties. Primary responsibility rests with Member States and national institutions. Article 4 of the Treaty specifically says that the Union shall respect the national identities of the Member States, inherent in their constitutional structures." Varga, Judit, "[Judit Varga: Facts you always wanted to know about rule of law but never dared to ask](#)", *Euronews*, 11 November 2019.

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