

# **The Rhetoric of Inaction: Failing to Fail Forward in the EU's Rule of Law Crisis**

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Cassandra Emmons  
Postdoctoral Fellow  
Weatherhead Center for International Affairs  
Harvard University  
[cemmons@fas.harvard.edu](mailto:cemmons@fas.harvard.edu)  
<http://cvemmons.wixsite.com/website>

Tommaso Pavone (corresponding author)  
Postdoctoral Fellow  
PluriCourts Centre  
University of Oslo  
[tommaso.pavone@jus.uio.no](mailto:tommaso.pavone@jus.uio.no)  
<https://www.tommasopavone.com/>

**Abstract:** In the European Union (EU), political crises often serve as catalysts for policymaking. Yet as an alarming breakdown of the rule of law has swept some EU member states, EU institutions have failed to act effectively to safeguard Europe's legal order. We argue that this outcome is of a piece with the ways that political elites strategically mobilize rhetorical frames to oppose transnational policymaking. Drawing on theories of rhetorical action and Albert Hirschman's work, we identify what we call 'rhetorics of inaction' and the conditions under which they are most likely to legitimate passivity in the face of crisis. We illustrate the theory's explanatory purchase through an in-depth case study of the EU's (non-)responses to the constitutional breakdowns of Hungary and Poland. By process tracing internal communications between EU institutions and Hungarian and Polish officials, we show how the latter's fiery public attacks on the EU conceal far more credible and effective argumentative strategies behind the scenes. We conclude that the politics of rhetoric are central to the transnational politics of rule of law enforcement.

**Keywords:** rule of law, democratic backsliding, European Union, rhetoric, failing forward

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*To us in Hungary, democracy and freedom are not political questions, but moral questions. You now seek to pass moral judgement and stigmatise a country and a people on the basis of a numerical majority... If we truly want unity in diversity, then our differences cannot be cause for the stigmatisation of any country, or for excluding it from the opportunity of engaging in joint decision-making. We would never sink so low as to silence those with whom we disagree.*

--Viktor Orbán speech to the European Parliament, September 11, 2018<sup>1</sup>

*What better way to show him up as half foolish and half criminal than to prove that he is achieving the exact opposite of what he is proclaiming as his objective? What better argument, moreover, against a policy one abhors, but whose announced aim one does not care to attack head-on?*

--Albert Hirschman, *The Rhetoric of Reaction*, p. 19

## **I. Introduction: Rhetorical Affronts to ‘Failing Forward’**

The European Union (EU) has long been understood as a polity built through crises. When political and economic turmoil erupts, member states embrace ad hoc lowest common denominator solutions to overcome what was either a dearth of foresight, a prior inability to compromise, or incompatibility of preferences. These institutional patches then interact with subsequent economic or political shocks to spark further opportunities for transnational policymaking. In its most recent and sophisticated iteration, Jones et al. (2016) theorize this dynamic as ‘failing forward.’

Yet not all crises catalyze policymaking and institutional change. Since 2010, the EU has faced an alarming constitutional breakdown in Hungary and Poland, including the dismantling of judicial independence and press freedom, harassment of NGOs, criminalization of dissent, and undermining of fair elections (Scheppele, 2018; Sadurski, 2019; OSCE, 2018). Yet even as these developments threaten the legal and democratic values enshrined in Article 2 of the Treaty on EU (TEU), European institutions seem to ‘never miss an opportunity to miss an opportunity’ to act (Scheppele et al., 2018). Why? What has frustrated a transnational response to the rule of law crisis, given that ‘it poses by far the greatest risk – arguably the only truly existential risk’ to the EU as a ‘community based on the rule of law’<sup>2</sup> (Kelemen, 2019, p. 247)?

Recent studies have attributed this outcome to partisan preferences (Hobson & Puetter, 2019; Kelemen, 2020), intergovernmental deadlock (Closa, 2018), and the EU's limited enforcement capacity (Jakab & Kochenov, 2017). Without challenging these accounts, we argue that they have neglected a crucial component of policymaking: rhetorical action. In many institutional contexts, ‘actors need to give reasons why they prefer certain courses of [in-]action and or why their interests are justified’ (Risse, 2000, p. 8). This is especially true in legalistic polities like the EU (Kelemen, 2011; Vauchez, 2015), whose claims to legitimacy invoke proceduralism and reason-giving. In these settings, rhetorical action is the ‘intervening mechanism’ whereby ‘egotistic preferences and relative bargaining power’ are converted into policy (non-)outcomes. Political elites who cannot ‘justify their interests on the grounds of the community's [legalistic] standard of legitimacy’ risk losing influence over transnational policymaking (Schimmelfennig, 2001, p. 48).

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<sup>1</sup> See Transparency Appendix (Trax) A.3.

<sup>2</sup> C-294/83, *Les Verts v. European Parliament* [1986] ECR 1339, at par. 23.

This article argues that the EU's 'failure to fail forward' in the rule of law crisis can be traced to how political elites strategically mobilize rhetorical frames to resist policymaking. Leveraging studies demonstrating the power of pro-integration rhetoric as a springboard (Schimmelfennig, 2001, 2006) and drawing on Albert Hirschman (1991), we trace how recalcitrant member state governments and begrudging EU officials mobilize what we call 'rhetorics of inaction'<sup>3</sup> to legitimate stasis and recast it as a virtue. This repertoire prophesizes that transnational efforts to defend the values enshrined in Article 2 of the Treaty on EU should be opposed, because they will either backfire (the 'perversity thesis'), put another hard-won common policy at risk (the 'jeopardy thesis'), or prove useless (the 'futility thesis'). Taking Hirschman one step further, we identify the conditions under which rhetorics of inaction are most likely to succeed: When they bear sufficient empirical plausibility to be deemed credible by progressive yet risk-averse policymakers, and when they exploit, rather than challenge, entrenched institutional norms and logics of appropriateness for action.

We demonstrate the strategic use and impact of these rhetorics by process tracing (Bennett & Checkel, 2015) the interactions between the EU and the Hungarian and Polish governments since 2010, integrating secondary and primary sources. We place particular evidentiary weight upon internal records of deliberations within EU institutions over how to respond to the breakdown of constitutional democracy in Poland and Hungary. To promote data and analytic transparency, we follow Moravcsik (2014) and compile these materials into a transparency appendix (Trax) that can be consulted to assess contestable evidence-based claims. In so doing, we show how the Hungarian and Polish governments' frontal public attacks on the EU conceal far more sophisticated and effective argumentative strategies in their internal communications with European officials.

The rest of this article is comprised of four parts. Part II engages the failing forward framework through the prism of the rule of law crisis and theorizes the role of 'rhetorics of inaction.' Part III traces how Hungarian and Polish officials weaponized these rhetorics, and how they have been bolstered by some EU officials. Part IV proposes what the EU's rule of law crisis can teach us about when rhetorics of inaction are most likely to thwart policymaking. Finally, Part V concludes by underscoring the perils of passivity in the EU's rule of law crisis and the need for a counter-rhetoric of *action*.

## **II. Rhetorics of Inaction in the EU's Rule of Law Crisis**

The severity and persistence of the EU's rule of law crisis calls for revisiting longstanding debates on the nature of crisis bargaining and functional policymaking in the EU. Jones et al. (2016)'s theoretical synthesis of these debates posits that political and economic crises caused by institutional incompleteness at an earlier stage prompt intergovernmental bargains and lowest-common denominator policy solutions, while functional spillovers provide momentum linking one crisis to the next. What is intriguing about the rule of law crisis is that it simultaneously constitutes a 'most likely' and a 'deviant' case for this narrative of institutional change.

The EU's rule of law crisis is a most likely case for the 'failing forward' framework in two respects. First, the EU's incomplete architecture for rule of law enforcement was born out of lowest-common denominator intergovernmental bargaining. Member states debated how much and what

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<sup>3</sup> We justify using this language over Hirschman's 'rhetoric of reaction' in the next section.

type of authority to delegate to the EU over rule of law enforcement during the Amsterdam Treaty conferences, producing a sole provision that serious breaches of the values enshrined in Article 2 TEU could trigger the suspension of membership rights via a unanimous vote in the intergovernmental European Council – an onerous threshold mandated by Article 7 TEU (Gormley, 1999; Sadurski, 2010). Second, Hungary and Poland's subsequent constitutional breakdowns constitute a serious crisis for the EU, posing an existential threat to the integrity of the EU legal order, underscoring the EU's limited capacity to enforce Article 2 TEU, and exacerbating what some have labeled 'Europe's justice deficit' (Kelemen, 2019; Kochenov et al., 2015). If 'Europe is nowhere so real as in the field of law' and the EU is a community based on the rule of law (Vauchez, 2015, p. 1; Kelemen & Pavone, 2018), then the rule of law crisis should have prompted European officials to swiftly act against recalcitrant governments.

This is precisely where the political trajectory of the rule of law crises deviates from the expectations of the 'failing forward' framework. As we will show, since 2010 the EU has often debated the constitutional breakdowns of Hungary and Poland, yet it has neither employed Article 7 to enforce the rule of law nor effectively remedied its incomplete enforcement capacity. A chorus of frustrated observers routinely lament how 'the European Union and the Member States seem to be doing as little as they can to resolve this situation' (Kochenov, 2017, p. 9). This inability to act constitutes a glaring deviation from the transnational policy responses to other crises, including the Euro-crisis analyzed by Jones et al. (2016). Such 'deviant cases' are uniquely suited for placing scope conditions on existing theories by tracing 'why observed outcomes do not fit the theory' (Levy, 2007, p. 8).

We contend that the EU's failure to fail forward in the rule of law crisis is explained in part by a rhetorical politics meant to legitimate stasis and capitalize on the risk-aversion of EU officials. Whereas existing studies have demonstrated how EU actors can mobilize pro-integration rhetoric to catalyze policy change (Schimmelfennig, 2001, 2006), our goal is to demonstrate that rhetorical action can also be weaponized to frustrate transnational policymaking. We thus draw inspiration from the influential work of Albert Hirschman (1991), reconfiguring what he called 'rhetorics of reaction' in domestic politics and extending his analytic framework to the transnational politics of the EU.

Hirschman's work responded to T.H. Marshall's (1965) sweeping history of the extension of citizenship policies from the 18<sup>th</sup> to 20<sup>th</sup> centuries. Captivated by Marshall's 'Whig interpretation of history,' Hirschman was troubled:

Is it not true that not just the last but each and every one of Marshall's three progressive thrusts have been followed by ideological counterthrusts of extraordinary force? And have not these counterthrusts been at the origin of convulsive social and political struggles often leading to setbacks for the intended progressive programs as well as to much human suffering and misery? (Hirschman, 1991, pp. 1-3).

Hirschman's (1991, pp. 85-96) retort 'serve[d] as a corrective of Marshall's optimism' by placing 'scope conditions' (Falleti & Lynch, 2009) upon his history of citizenship. We engage the 'failing forward' theory in the same constructive spirit. Like Marshall, 'failing forward' articulates a stepwise theory of political development and, like Hirschman, our goal is to isolate the ideological counterthrusts that may frustrate this progress.

In our analysis of the rule of law crisis, we reconfigure Hirschman's (1991) framework in three ways. First, Hirschman's examples of rhetorical action comprise ex-post responses to thrusts in progressive policymaking – hence his language of rhetorics of *reaction*. Yet the 21<sup>st</sup> century protagonists of the EU rule of law crisis have proven remarkably skilled at *pre-empting* and *stalling* transnational policymaking. We thus prefer the terminology of ‘rhetorics of inaction,’ since our goal is not to explain policy *roll-backs*, but *why such transnational policy interventions fail to emerge* in the first place. Second, Hirschman set his analytic gaze upon rhetorics promoted by a coherent set of domestic actors: conservative intellectuals with access to state policymakers. Yet in the domain of transnational politics, we show that rhetorics of inaction tend to be employed by *a less coherent and even contradictory set of actors across levels of government*. Finally, Hirschman's focus was limited to constructing a genealogy of conservative rhetoric. Conversely, we draw on theories of rhetorical action to probe *the conditions under which rhetorics of inaction are most likely to prove successful*.

### III. Hirschman in Budapest and Warsaw: Perversity, Jeopardy, Futility

Existing accounts of the rhetoric of Hungarian Prime Minister and Fidesz party head Viktor Orbán and Polish Law and Justice (PiS) party leader Jarosław Kaczyński usually focus on caustic public outbursts. In March 2012, for instance, Orbán stood before a cheering mass at the doorstep of the Hungarian Parliament and compared the EU to the Soviet Union, adding: ‘Hungary will not be a colony!’ (Eddy, 2012). Speaking at a PiS convention in September 2018, Kaczyński similarly warned that Poland was being ‘infected by social diseases’ and ‘attacked’ by the EU, whose ‘aim [is] to demean... Poland’ (Sobczak, 2018). While captivating, such grandstanding is ill-suited to obstruct transnational policymaking, because it fails to justify inaction by appealing to EU norms and standards of legitimacy (Schimmelfennig, 2001, p. 48).

Crucially, Hungary and Poland's official and less public interactions with EU institutions showcase a different strategy. In these settings, Fidesz and PiS officials have weaponized a rhetorical repertoire tapping entrenched ‘logics of appropriateness’ for EU policymaking (March & Olsen, 1998, pp. 951-952). As Hirschman (1991) recognized, since ‘reactionaries live in a hostile world,’ their efforts to stall policymaking are most likely to succeed when they avoid an ‘all-out attack’ and instead ‘endorse [a policy or norm]... but then attempt to demonstrate that the action proposed or undertaken is ill conceived’ (p. 11). By purporting to defend salient EU norms, appealing to the interests of fellow member states, and emphasizing strict adherence to established practice, this more nuanced rhetorical repertoire has undermined a transnational response to the rule of law crisis.

#### *Perversity*

Political opponents of proposed policies often mount their resistance by arguing that “‘progressive’ or ‘well-intentioned’” actions will actually produce the opposite effect (Hirschman, 1991, p. 12). Transposed to the domain of the EU rule of law crisis, this perversity thesis takes a distinct form: *EU efforts to protect democracy and the rule of law will undermine both, since they (a) infringe upon the democratic mandate of the targeted governments and (b) violate the EU's legal framework along the way*.

By cloaking themselves in the people's will – despite their status as hybrid or competitive authoritarian regimes (see Bozoki & Hegedus, 2018; Levitsky & Ziblatt, 2018, p. 188; Freedom House,

2020) – and capitalizing on longstanding critiques of the EU's own democratic pedigree (Follesdal & Hix, 2006; Mueller, 2016), the Hungarian and Polish governments thus delegitimized EU proposals to act in defense of constitutional democracy. In December 2015, the European Commission initiated a dialogue with the Polish government under the 2014 Rule of Law Framework after national legislation gave the PiS-controlled Parliament, President, and Department of Justice full power to dismiss judges at the Constitutional Tribunal. Poland's Minister of Justice, Zbigniew Ziobro, quickly shot back. In his letter to Commission Vice President Frans Timmermans, Ziobro weaponized the perversity thesis, alleging that the Commission was ‘attempt[ing] to exert pressure upon the democratically elected Parliament and Government of the sovereign Republic of Poland.’ Far from undermining judicial independence, PiS ‘enjoys an *undisputed democratic mandate*’ and had merely taken ‘remedial actions to reinstate pluralism in the Constitutional Court’ (Trax A.1). It would take two more years for the Commission to invoke Article 7(1) of the Treaty on EU against Poland, referring it to the Council to assess the risk of a serious breach of the rule of law (Trax A.22).

With respect to Hungary, it was the European Parliament that activated Article 7(1) in September 2018 (Trax A.21). Arriving ceremoniously late and addressing the Parliament just a few minutes before the vote, Orbán delivered a speech alleging to defend ‘the Hungarian people’ from ‘an affront.’ Mirroring the rhetorical tactics of Polish officials, he argued that ‘Hungary's decisions are made by the voters in parliamentary elections. What you are claiming is no less than saying that the Hungarian people are not sufficiently capable of being trusted to judge what is in their own interests’ (Trax A.3). Orbán bolstered these claims by alleging that EU intervention would not only undermine democracy, but in attempting to safeguard the rule of law, the EU would actually throw it under the bus. Specifically, if Parliament triggered Article 7(1), it would ‘overste[p] the limits on spheres of competence, and the method of its adoption is a treaty violation’ (Trax A.3). Indeed, after the Parliament adopted the report by 488 votes to 197, the Hungarian delegation argued ‘[t]he European Parliament has breached Article 354 (4) TFEU, as well as Article 178 (3) of its own Rules of Procedure by excluding abstentions when calculating the votes cast’ (Trax A.4). In a subsequent Council hearing, Hungary reiterated that ‘the procedure pursuant to Article 7(1) lacked a legal basis’ (Trax A.20). And when in 2019 Finland assumed the rotating Council presidency and promised to place the rule of law to the top of the agenda, Hungary rebutted that ‘the [agenda] modificatio[n] proposed by the Finnish Presidency...is not in line with the content and legal constraints of the Semester’ (Trax A.5).

Taken together, the Hungarian and Polish governments' rhetorical strategy is thus clear: To cast efforts to defend Article 2 TEU as having the contrary effect, thus encroaching national democracy and undermining the very principles of legality that the EU claims to defend.

### *Jeopardy*

Transnational policymaking can also be obstructed when recalcitrant states pay homage to international cooperation and allege that it would be put at risk by proposed policies. In the EU rule of law crisis, this jeopardy thesis takes the following form: *EU actions to enforce the rule of law would discriminate against single member states, thus undermining EU norms and hard-won policies reliant on intergovernmental cooperation.*

Hungary and Poland have repeatedly claimed that they are being singled out<sup>4</sup> for adopting common policies. For instance, since some EU states lack constitutional courts, establish an early judicial retirement age, or have separate administrative court systems, Hungary and Poland had plenty of comparative precedents for asserting greater political control over their judiciaries (Scheppele, 2018). Scheppele (2013) labels this defense the ‘Frankenstate’ strategy: emphasizing the borrowing of individually reasonable constitutional reforms to distract from ‘the horrible way those pieces interact when stitched together’ (p. 560).

Alleging that EU rule of law enforcement would be discriminatory enabled the Hungarian and Polish governments to charge that it would jeopardize trust-based and cooperative EU policies. In a July 2019 speech delivered as Finland assumed the rotating Presidency of the Council, Orbán warned his counterparts:

Imagine the condition of the rule of law in Hungary if we simply announced the dissolution of the Constitutional Court... This is more or less the situation in Finland... Or just consider the state of the rule of law in Finland, where judges are appointed by the President of the Republic ... Therefore we need a nervous system... when our Finnish friends ask us about and delve into the rule of law in Hungary (Trax A.7).

In subsequent weeks, Orbán's spokesperson reiterated concerns that Finland ‘doesn't have a constitutional court, independent judiciary or press freedom, it also shows signs of other serious problems as well’ (Trax A.8). In internal deliberations in the Council, Hungary argued that its judicial, media, and academic freedom reforms were ‘no more stringent than in other Member States’ (Trax A.20) yet ‘no Member State has been subject to such thorough scrutiny’ (Trax A.4). Likewise, Poland rebutted scrutiny of its reform of the National Council of the Judiciary in a December 2018 Council hearing by emphasizing that ‘the model chosen in Poland complied with European standards and was similar to existing models in other member states’ (Trax A.19).

Both Hungary and Poland used allegations of hypocrisy to warn that a dangerous ‘precedent’ was being set (Trax A.4, Trax A.18). In particular, they emphasized that a European intervention in Hungary and Poland would undermine the EU itself. In a November 2018 hearing within the Council, the Hungarian delegation made this link explicit:

...by making unfounded allegations against a Member State/Member States or by referring to the breach of the values of the Union merely due to political/ideological motivation, the unity of the European Union is severely undermined and the confidence among Member States or between Member States and the European institutions is seriously damaged... it is the responsibility of the Council to demonstrate that... it provides the equality of the Member States, still focusing on unity and on mutual respect while being in line with the Treaties (Trax A.4).

This rhetoric – charging that escalating the Article 7 process ‘d[oes] not contribute to the unity of the Union’ (Trax A.20) – purports to defend several cornerstones the EU legal order, like equality amongst member states (Manners, 2008), mutual trust (Efrat, 2019), sincere cooperation (Klamert, 2014, pp.

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<sup>4</sup> Orbán has made blanket accusations of hypocrisy as early as 2013. See: Debate on the Situation of Fundamental Rights: Standards and Practices in Hungary of 2 July 2013, Strasbourg (statement in Hungarian).

11-19), and respect for diverse constitutional traditions (Mancini & Keeling, 1994). Orbán thus chastised the Parliament's vote to trigger Article 7(1) as 'striking a blow against both the European Union and the principle of constructive dialogue' (Trax A.3.) In so doing, the jeopardy thesis flips the script: the good Europeans – those committed to the EU's motto of fostering unity in diversity – are in Budapest and Warsaw, whereas the bad Europeans – those undermining said unity through ill-conceived crusades – are in Brussels and Strasbourg.

The PiS government has also frequently employed the jeopardy thesis. In a 2019 memo to national delegations in the Council, Poland implied that the EU was undermining the principle of sincere cooperation: 'We reckon that our concrete actions and positive attitude towards the dialogue have not been met with a symmetric reaction from some of our partners' (Trax A.2). Poland then lamented how specific EU policy achievements would collapse if Brussels escalated rule of law enforcement: it argued that the Commission's claim that the Polish judiciary was being systematically undermined contradicted the European Court of Justice's (ECJ) case law and jeopardized the most famous EU policy based on mutual trust: The European Arrest Warrant. Selectively citing the ECJ's 2018 *Celmer* decision,<sup>5</sup> the Polish delegation argued that 'general doubts about a justice system did not justify non-implementation of European Arrest Warrants (EAWs). Otherwise, it might put an end to the EAW since a lack of proper protection in the Member State's judicial system concerned at least 30 other cases too' (Trax A.6).

The jeopardy thesis enabled Poland and Hungary to wage a Europeanist argument for inaction. For not only would EU intervention allegedly undermine mutual trust, but it would destroy policies like the EAW and risk any state becoming the next victim of the EU's capricious sanctioning power.

### *Futility*

Hirschman (1991) perceptively noted that perversity and jeopardy arguments are usually wielded by the 'ardent militant' – a fitting label for illiberal democrats like Kaczyński and Orbán. Patrons of the futility thesis, however, are described by Hirschman (1991) as 'cool' rather than 'hot' – an apt descriptor for appeasing EU officials (p. 43). What is indeed noteworthy is that the futility thesis is introduced into the EU rule of law crisis by supranational 'progressives.' By their logic, *the EU lacks the competences and appropriate tools to effectively intervene in Hungary and Poland to safeguard the rule of law*.

Futility arguments rarely claim that the EU has *no* tools for rule of law enforcement, for this rhetorical strategy would lack face validity (ex., Hillion, 2016; Jakab & Kochenov, 2017). Rather, they claim that the EU's tools are *ill-suited* for the task at hand, thus rendering them 'all but unusable' (Mueller, 2013, p. 146). This argument was pioneered by European Commission President José Manuel Barroso in his 2012 State of the Union address. The constitutional breakdown of Hungary, Barroso argued, 'revealed limits of our institutional arrangements. We need a better developed set of instruments – not just the alternative between the "soft power" of political persuasion and the "nuclear option" of article 7 of the Treaty' (Trax A.9). Barroso's conflation of Article 7 with nuclear weapons became commonplace, internalized by those in EU circles habituated to favoring scalpels over clubs: 'The claims that little to nothing can be done under the current legal framework... are heard with remarkable regularity,' laments Kochenov (2017, p. 2). Indeed, the Commission legal service reiterated

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<sup>5</sup> Minister for Justice and Equality v. Celmer (No.1), [2018] IEHC 119.



Barroso's claim that 'a systemic threat to the rule of law in Member States cannot, in all circumstances, be effectively addressed by the instruments currently existing at the level of the Union' (Trax A.10). Allegedly, the EU could neither rely on informal pressure (for it is too weak), nor on Article 7 (for it is too strong).

Since Barroso's speech, the EU has performatively worked to upgrade its rule of law enforcement toolkit, yet by doing so it inadvertently delayed and undermined the Article 7 process. The Commission developed a new Rule of Law Framework in 2014 intended to foster dialogue before Article 7(1) would ever be triggered. Shortly thereafter the Parliament contributed its own proposal for a system to monitor rule of law compliance within the member states (Kelemen & Scheppele, 2018). It was only three years later in December 2017, once Kaczyński acted upon his promise to establish 'Budapest in Warsaw,' that the Commission reckoned that it had no choice but to trigger Article 7(1) (Sadurski, 2019, p. 3). Dispiritingly, the process has since stalled in the Council, whose hearings have provided a forum for Hungary and Poland to promote their rhetorics of inaction. In fact, when the Commission began considering the possibility of withholding EU funds to Poland and Hungary in late 2018, the Council's legal service circulated a (non-public) opinion contending that this option was 'not compatible with the Treaties' (Halmai, 2018; Trax A.12).

Nearly a decade into the EU's rule of law crisis, the Council's 2018 'opinion was clear... the Commission was powerless to prevent the basic values of the EU from being subverted' (Trax A.12). The futility thesis remains alive and well.

#### **IV. Explaining the Conditional Impact of Rhetorics of Inaction**

The rise and appeal of rhetorics of inaction in the EU rule of law crisis seems puzzling at first glance. After all, a common refrain in EU circles is to never let a crisis go to waste in the quest to advance European integration. What can the rule of law crisis teach us about the 'permissive conditions' (Soifer, 2012) that enable this logic to be flipped on its head? That is, under what conditions can rhetorics of inaction play a significant role in thwarting EU action? We propose three answers focusing on when this rhetorical repertoire is most likely (a) to be mobilized and (b) to disrupt progressive policymaking.

First, *rhetorics of inaction are unlikely to be mobilized when crises are perceived to be endogenous to the EU architecture and when they threaten the survival of domestic political elites*. In these crises, rhetorical politics tend to focus on the *form* of intervention rather than whether or not EU action is required in the first place. Even recalcitrant state governments may thus advocate for EU action to insure against worst-case scenarios and, in then-Commission President Barroso's words, 'nationalise success and Europeanize failure' (Trax A.23).

The Euro-crisis analyzed by Jones et al. (2016) provides a good contrasting example. Unlike the rule of law crisis, the Euro-crisis was endogenous to an incomplete economic union, and member state governments perceived its EU-level resolution to be vital to their domestic interests. For instance, when integrated international markets lost confidence in Ireland's ability to meet its huge debts in 2010, the Irish government publicly 'conceded, for the first time, that it could not tackle its ailing banking system without international help' (McDonald & Treanor, 2010). While the joint IMF-EU rescue package required painful austerity measures that were extensively criticized, these critiques focused on the *content* of EU response while conceding that EU action was warranted (Thorhallsson

& Kirby, 2012, pp. 802-804). Simultaneously in Greece, Finance Minister Giorgos Papakonstantinou articulated the same logic: 'The only way to avoid bankruptcy and a halt on payments is to get this money from our European partners and the IMF' (Featherstone, 2011, p. 203). The fact that Greece required some kind of EU intervention to safeguard its place in the Eurozone was hardly questioned by Greek policymakers. As member state governments perceived the survival of the Euro to be 'vital to their economic and geostrategic interests' (Jones et al., 2016, p. 1016), there was little political room left for rhetorics of inaction. Critical rhetorics during the Euro-crisis tended to contest the *substance* – not the *desirability* – of EU policymaking.

Second, *rhetorics of inaction are more likely to disrupt policymaking when they bear sufficient empirical plausibility to be deemed credible by key progressive policymakers*. Had Orbán and Kaczyński been the sole mobilizers of these rhetorics, their arguments would have borne substantially less influence. But these rhetorics appealed to a broader array of actors with diverse interests. Rather predictably, they appealed to EU officials with a partisan interest not to act, such as EPP President Manfred Weber (Trax A.24; Kelemen, 2020). But more crucially, by tapping into historical precedents and exploiting uncertainty, they also appealed to progressive yet risk-averse actors with sincere concerns about their own legitimacy (Schimmelfennig, 2001, p. 48). Since the credibility of arguments is conditioned by 'the credibility and truthfulness of speakers' (Ulbert & Risse, 2005, p. 359), progressive policymakers who traffic in rhetorics of inaction bolster their persuasiveness and legitimate them as inconvenient truths.

For instance, the perversity thesis appealed to some liberal democrats who worried that 'an approach [that is] too "punitive"...may even make things worse and seriously inhibit the process of democracy-building in Hungary' (Bugarcic, 2014, p. 3). Scholars of EU law with particular influence amongst European policymakers conceded the Polish government's 'powerful arguments' that 'any attempt to force an elected government under a common constitution can easily result in explosive conflicts' since such actions would 'lack... a clear democratic mandate' (Von Bogdandy, 2019, p. 6). Joseph Weiler (2016) went so far as to endorse the perversity thesis, reasoning that since Orbán 'gives perfect expression to the wishes of a majority of Hungarian citizens,' any action by EU institutions 'was raised as a kind of check on democratic majoritarian decisions...[which] sowed the seeds of its own self-destruction' (p. 314). Even the Polish and Hungarian opposition sometimes echoed these warnings: In 2013, former Hungarian Prime Minister and center-left opposition leader Gordon Bajnai argued that Orbán should 'only be brought down by the Hungarian voters and not by any external influence' (Trax A.13).

At the supranational level, in 2015 Commission Vice-President Timmermans expressed the same worry by citing the 'Haider affair' as harbinger of a perverse effect. During that 2000 controversy, EU member states suspended bilateral diplomatic relations with Austria after the far-right Freedom Party came to power in coalition. While these sanctions were imposed *outside* the EU treaty framework, the ensuing popular backlash 'reveal[ed] the fragility of the EU as a "Community of Values"' (Leconte, 2005). In Timmermans' words:

...the case of Austria... weakened the EU's capacity to react in such a case. It was a political response which completely backfired... and since then Member States have been reluctant to take issue with other Member States on this basis. That is one of the challenges I personally will have to face in the coming years. (Trax A.14).

The lasting impact of Timmerman's frank acknowledgement is evident.

Even as the rule of law crisis spread from Hungary to Poland in 2016, some EU diplomats continued to advocate dialogue over coordinated policy action, believing that ‘we shouldn't use any tough method which would turn the Polish population against Europe... we can't be counterproductive’ (Trax A.15).<sup>6</sup> This idea has certainly ‘haunted’ the Commission, whose officials believed that ‘[s]anctions... would be counterproductive when dialogue could work’ (Scheppelle & Pech, 2018). EU leaders also seemed to take seriously Hungary and Poland's jeopardy claims that all member states could be threatened by the breakdown of mutual trust and the turn to nuclear options. This jeopardy logic was channeled by Ursula von der Leyen shortly after being elected President of the European Commission and meeting with Orbán in July 2019: ‘If we guide debates as sharply as we have done, it contributes to countries and peoples believing that they are being targeted... full rule of law is always our goal, but nobody's perfect’ (Trax A.17). Former MEP Rui Tavares explained that a stubborn commitment to dialogue and sincere cooperation belied reluctance to jeopardize a “‘gentlemen's club” agreement... [where] if you don't talk about my case, I don't talk about your case’ (Trax A.16). Prominent EU legal scholars also supported the jeopardy thesis in their writings, which may have contributed to the EU's reluctance. For instance, Weiler (2016) has suggested that more vigorous EU intervention in Hungary and Poland would be akin throwing stones when ‘living in a glass house,’ and Von Bogdandy (2019, p. 7) has warned that an ‘enormous proof of power’ in the name of rule of law enforcement might ‘endanger the Union.’

Finally, *rhetorics of inaction are most likely to succeed when they exploit, rather than directly challenge, the EU's proceduralism and identity as a polity grounded in the rule of law.* By demanding that EU decision-making be a model of legal proceduralism, Orbán and Kaczyński tapped into the intuitive logic that the EU had to meticulously abide by rule of law principles for any supranational intervention to be perceived as legitimate. But they also tipped the temporal scales in their favor, tying EU policymakers into knots wrought by their own rules while expediting Hungary and Poland's constitutional breakdowns.

As we have seen, Hungarian and Polish officials often reiterated their commitment to the values of Article 2 TEU. Under the presumption of member state ‘benevolence’ (Kochenov, 2019, pp. 8-9), respect for constitutional diversity, and the jeopardy logic that ‘nobody is perfect’ (Trax A.17), the Hungarian and Polish governments thus cast their infringements as routine non-compliance rather than systemic threats. In Hungary's 2018 memo to the Council, it wrote: ‘Simply having different rules as regards our constitutional order, does not justify questioning each other's position on the basis of the values of the European Union’ (Trax A.4). In a September 2018 hearing before the Council, the Polish delegation similarly underscored that ‘the EU respected the different legal systems and constitutional traditions of the Member States’ (Trax A.6). A rhetorical commitment to Article 2 values under the prism of constitutional diversity problematized the EU's ability to build the legal case that Hungary and Poland deliberately and systemically violated said values.

A complementary strategy is to demand a ‘fact-based’ dialogue that is up-to date on all developments before any legal action is undertaken. Having eliminated most checks on their

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<sup>6</sup> Despite the fact that EU popularity among Hungarian and Polish citizens remains among the highest in all Europe (Scheppelle & Halmai, 2019).

policymaking powers, Orbán and Kaczyński could thus pass and amend legislation at will, flooding European policymakers with novel ‘facts’ and stalling decision-making as EU institutions struggled to keep up. Between 2010 and 2013, for instance, the Fidesz parliamentary supermajority in Hungary scrapped its constitution and passed over 400 laws; often, these were promulgated overnight without deliberation (Scheppele, 2014, p. 5). Many such laws were tailored to enable what Orbán referred to as the ‘dance of the peacock:’ embedding extreme provisions within legislation ‘designed to be jettisoned’ and framed as evolving ‘compromises’ with the EU (Zerofsky, 2019). This strategy can be used to exalt the virtues of soft dialogue while delegitimizing more forceful EU action as premised on ‘old facts.’ For instance, when the European Parliament debated Article 7(1), the Hungarian delegation deplored the ‘limited possibility to the Hungarian Government to provide full information,’ charging that the resolution’s factual claims ‘have become obsolete’ (Trax A.4). And in his letter to Commission Vice-President Timmermans in December 2015, Poland’s Justice Minister lamented ‘Timmermans’ lack of knowledge about the factual developments related to the Constitutional Court. You had a possibility to receive from me competent information regarding this issue... I deplore the fact that you decided not to do so’ (Trax A.1).

This rhetorical strategy can buy the recalcitrant state more time. When Poland passed laws augmenting PiS’s political control of the judiciary, the Polish delegation in the Council repeatedly implored that the reforms ‘had only been implemented in the last few months and more time and experience was needed to assess their performance’ (Trax A.6). Thus ‘any definite assessment at this stage would be premature’ (Trax A.18). Since 2018, the Hungarian delegation in the Council has been updating a 130-page document articulating its own positive spin on Fidesz’s continuously evolving judicial reforms, requesting that the Council provide thorough responses before any action is undertaken (Trax A.4). The arguments invoked by Polish and Hungarian officials thus weaponized EU decision-making and rule of law norms against the EU itself. In so doing, they ground transnational policymaking to a halt by shifting scrutiny from Budapest and Warsaw to Brussels.

## **V. Conclusion: A Counter-Rhetoric for Action**

Journalists’ disproportionate focus on Orbán and Kaczyński’s public outbursts and scholarly accounts of the EU’s rule of law crisis have concealed the key role that rhetorics of inaction play. Even EU officials publicly committed to ‘failing forward’ in rule of law enforcement have found these rhetorics sufficiently persuasive to abate their will to act – or sufficiently useful to legitimate their partisan interest not to act.

In so doing, European officials have failed to recognize the contradictions of the perversity, jeopardy, and futility theses, as well as the mounting costs of inaction in the face of crisis. First, as Hirschman (1991) recognized, it is ‘difficult to argue at one and the same time that a certain movement for social change will be sharply counterproductive [as in the perversity and jeopardy theses]...and that it will have no effect at all, in line with the futility thesis’ (p. 45). That the futility thesis has been wielded by EU officials whereas the perversity and jeopardy theses have been weaponized by the Hungarian and Polish governments hardly reconciles these contradictions. One of the EU’s best defenses may be to develop counter-rhetorics that exploit these internal tensions: Arguing that the

perversity, jeopardy, and futility arguments are irreconcilable and cancel each other out is a good place to start.

Second, the EU's rule of law crisis highlights some conditions under which incomplete policies fail to be 'completed' in response to subsequent crises. While crisis-propelled transnational policymaking is no panacea, as Jones et al. (2016) recognize, *failing* to fail forward can prove far more damaging. Inaction can allow a crisis to metastasize: Orbán and Kaczyński's ability to construct competitive autocracies in plain sight of the EU has emboldened other aspiring autocrats to follow their playbook (Scheppele, 2018). EU membership has consistently been supported by Polish and Hungarian citizens who view(ed) it as an insurance policy against the return of autocracy (Mueller, 2013; Scheppele & Halmai, 2019). For how much longer can this popular support last, given the EU's dereliction of duty in the rule of law crisis? Scholars who consider Europe to be more than just a common market have long mobilized essential epistemic support for greater European unity (Rasmussen & Martinsen, 2019). Yet the EU's rule of law crisis has prompted a growing number of academics to question the very 'raison d'être of the project of European integration' (Nicola & Davies, 2017, p. 5). The EU has consistently exercised its soft power to promote the rule of law abroad. But 'the internal integrity of democratic and rule of law conditions within the Union is intimately linked to the EU's external ability to credibly co-operate with others on the subject' (Magen, 2016, p. 1056). In Frans Timmermans' words, 'the rule of law... [is] a principle that guides both our internal and external actions' (Magen, 2016, p. 1057). For how much longer can this aspiration remain credible?

There will always be risks in EU efforts to enforce democracy and legality. The path towards an ever-closer union of constitutional democracies is plagued by uncertainty. But when it comes to the battle over Europe's very identity in the rule of law crisis, arguably the greatest peril is passivity. If the EU is to remain a community based on the rule of law, then European officials have a duty to see past these rhetorics of inaction.

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## TRANSPARENCY APPENDIX (Trax)

### Appendix A.1

In December 2015, the European Commission initiated a dialogue with the Polish government under the 2014 Rule of Law Framework after national legislation gave the PiS-controlled Parliament, President, and Department of Justice full power to dismiss judges at the Polish Constitutional Tribunal. Poland's Minister of Justice, Zbigniew Ziobro criticized the decision to Commission Vice President Frans Timmermans, arguing that the decision was not undergirded on facts and constituted an attempt to infringe upon Polish democracy:

*"Honorable President,*

*I was astonished to read your letter kindly addressed to me with respect to the Constitutional Court in Poland. The contents of the letter indicate a lack of knowledge about the factual developments related to the Constitutional Court. You had a possibility to receive from me competent information regarding this issue, e.g. by using routine working contacts between the Ministry and the European Commission. I deplore the fact that you decided not to do so. Thus, I first found out about your unjustified accusations and unfair conclusions from the media and later from the official correspondence. Those are the reasons, why I regarded your letter as an attempt to exert pressure upon the democratically elected Parliament and Government of the sovereign Republic of Poland...*

*...Law and Justice (PiS), which is the first political party in Polish history to win a majority in the parliamentary elections and therefore enjoys an undisputed democratic mandate, took remedial actions to reinstate pluralism in the Constitutional Court...*

*...Honorable President,*

*Today, the Polish Government is engaged in efforts to reinstate legal order and to ensure proper functioning of the Constitutional Court and, in particular, the Court's pluralism. This approach reflects the Government's profound commitment to the principles of democratic rule of law. I trust that, owing to the information that I now pass on to you, we stand together as allies in an effort to achieve these objectives.*

*Poland is a sovereign and democratic state. Therefore, may I ask you to exercise more restraint in instructing and cautioning the Parliament and the Government of a sovereign and democratic state in the future, despite ideological differences that may exist between us, with you being of a left-wing persuasion.*

*It would be my great pleasure to host you in Poland and answer any other questions that you may have.*

*Yours faithfully,*

*Zbigniew Ziobro"*

**Source:** Letter from Polish Ministry of Justice to EU Commission VP Timmermans, January 11, 2016. Available at:

<https://static1.squarespace.com/static/5abb53e6372b9691939ac577/t/5c78e3437817f7e6d9954860/1551426388869/2016Jan11+Poland+Letter+to+Timmermans+4p+copy.pdf>

## Appendix A.2

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When the Commission invoked the Article 7(1) procedure against Poland in December 2017, the Polish government resuscitated its claim that foreign meddling was not grounded in fact, politically motivated, and destined for a democratic backlash. Addressing member state governments in the European Council, the PiS government argued that:

*"In 2015 the Polish competent authorities (President of the Republic, Parliament, and Government) initiated actions aimed at increasing efficiency of the judiciary and restoring public trust in its functioning. An independent and effective judiciary system is a crucial and indispensable element of every democratic state. The organization of judicial proceedings should create appropriate conditions for resolving legal disputes brought before the courts. At the same time, the system of nominating judges and regulating their professional responsibility should be a cornerstone of the entire judicial branch that ensures its proper functioning, safeguards its independence and preserves it from any undue, external influence.*

*All actions undertaken by the Polish authorities in the process of the reform were driven by the abovementioned principles. We bear in mind that due to the complexity of the discussed issues, our EU partners may still raise questions with regard to some of the introduced changes. This is why we reiterate our full readiness for dialogue and to provide further clarifications. Nevertheless, it is hard for us to accept allegations that the reform creates a risk of a serious breach of the rule of law as they have not been borne out in reality. We decided to amend some parts of the reform or return to previous solutions in order to address concerns of our EU counterparts and provide time for additional reflection. We reckon that our concrete actions and positive attitude towards the dialogue have not been met with a symmetric reaction from some of our partners...*

*...Taking into account the aforementioned facts we strongly believe that the procedure based on article 7 of the Treaty of the European Union no longer contributes to achieving proper understanding of the content of the reform. Quite the contrary – it started to serve as a tool of exerting political pressure instead of aiming at achieving a constructive and tangible solution.*

*We are aware that some of our partners may wish to receive additional explanations with regard to the problems presented herein. Once more we reiterate our full readiness to answer all your questions. We prefer having a detailed discussion on the substance of the reform instead of addressing general, political statements..."* [pgs. 1, 9.]

**Source:** "Summary of actions undertaken by Poland in order to address European Commission's recommendations concerning the reform of the Polish judiciary." Internal message from the Polish Government to the European Council, January 28, 2019. Available at: <https://oko.press/rzad-do-rady-europejskiej-komisji-i-panstw-ue-arogancka-samoobrona-ujawniamy-dokument/>

## Appendix A.3

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Immediately prior to the European Parliament's vote on triggering Article 7(1) against Hungary in September 2018, Prime Minister Viktor Orbán delivered a speech in the European Parliament that would lay the groundwork for subsequent interactions with the Council, wherein the Article 7 process has since stalled. Weaponizing the perversity thesis, Orbán claimed to defend Hungarian democracy

from politically motivated encroachments, and to be upholding the EU's true spirit of constitutional diversity and international cooperation:

*"Honourable Members,*

*I stand here now and defend my homeland, because to Hungarians freedom, democracy, independence and Europe are matters of honour. This is why I say that the report before you is an affront to the honour of Hungary and the Hungarian people. Hungary's decisions are made by the voters in parliamentary elections. What you are claiming is no less than saying that the Hungarian people are not sufficiently capable of being trusted to judge what is in their own interests. You think that you know the needs of the Hungarian people better than the Hungarian people themselves. Therefore I must say to you that this report does not show respect for the Hungarian people. This report applies double standards, it is an abuse of power, it oversteps the limits on spheres of competence, and the method of its adoption is a treaty violation.*

*Honourable Members,*

*To us in Hungary, democracy and freedom are not political questions, but moral questions. You now seek to pass moral judgement and stigmatise a country and a people on the basis of a numerical majority. You are assuming a grave responsibility when – for the first time in the history of the European Union – you seek to exclude a people from decision-making in Europe. You would strip Hungary of its right to represent its own interests within the European family that it is a member of. We have – and will continue to have – disputes: we think differently about Europe's Christian character, and the role of nations and national cultures; we interpret the essence and mission of the family in different ways; and we have diametrically opposed views on migration. If we truly want unity in diversity, then our differences cannot be cause for the stigmatisation of any country, or for excluding it from the opportunity of engaging in joint decision-making. We would never sink so low as to silence those with whom we disagree.*

*Honourable President,*

*You also want to exclude a country that made clear decisions in previous elections to the European Parliament: in 2009 a 56 per cent majority voted for us, and in 2014 that majority was 52 percent.*

*Honourable Members, Ladies and Gentlemen,*

*We are the most successful party in the European Parliament. Our socialist and liberal opponents are understandably unhappy with our success, but to take revenge on the Hungarians for not voting for them is unfair and un-European. Furthermore, this report was written by people who are not even aware of basic facts. The report admits that it failed to send a delegation to Hungary, meaning you will be voting without there having been an adequate examination of the facts. The report includes thirty-seven major factual errors; in relation to these, yesterday every MEP received a 108-page document.*

*Honourable Members,*

*Our union is held together by the fact that disputes are resolved within a regulated framework. On behalf of Hungary I, too, have made compromises and concluded agreements with the Commission on the Media Act, on the justice system, and even on certain passages in the Constitution. This report disregards agreements that were concluded years ago. But if you are free to do this and can disregard agreements at will, then what is the*

*point of coming to an agreement with any European institution in the first place? What you are doing strikes a blow against both the European Union and the principle of constructive dialogue."*

**Source:** Address by Prime Minister Viktor Orbán in the debate on the so-called "Sargentini Report." September 11, 2018. Available at: <https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/address-by-prime-minister-viktor-orban-in-the-debate-on-the-so-called-sargentini-report>

#### **Appendix A.4**

After Prime Minister Viktor Orbán's speech in the European Parliament in September 2018, the Parliament voted by 488 votes to 197 to trigger Article 7(1) and refer the matter to the Council, where the procedure has since stalled. The Hungarian delegation to the European Council consequently drafted a memo reiterating the illegality of the Parliament vote. The memo pledged allegiance to the European project while delegitimizing the Parliament's action on the basis of it being premised on outdated facts, asking the Council to commit an *ultra vires* act, and running roughshod over the constitutional diversity and member state equality protected by EU law:

*"As regards the procedural aspects of the Resolution of the European Parliament, the Hungarian Government's position is that the method of calculating the votes on the Resolution constitutes a manifest breach of the essential procedural rules and it is deemed to be legally non-existent and void. Therefore, the Hungarian Government has brought a legal procedure to the Court of Justice of the European Union seeking for the annulment of the Resolution. Thus, the validity of the Resolution is to be decided by the Court of Justice of the European Union. In its action Hungary pleads that the European Parliament has breached Article 354 (4) TFEU, as well as Article 178 (3) of its own Rules of Procedure by excluding abstentions when calculating the votes cast. If abstentions had been counted as votes cast, the Resolution would not have been adopted.*

*Irrespective of the validity of the Resolution, it contains severe and serious allegations against Hungary which the Hungarian Government rejects. The procedure and the decision of the European Parliament were politically motivated. Instead of perceptions, emotions and subjective assessments, the Council should base its decision on facts, precise legal provisions and objective analysis. This puts an enormous responsibility on the Council to re-establish confidence, fact based approach, exclude double standards, provide equality of Member States and give an appropriate application of the Treaty rules. It should also be carefully considered that by making unfounded allegations against a Member State/Member States or by referring to the breach of the values of the Union merely due to political / ideological motivation, the unity of the European Union is severely undermined and the confidence among Member States or between Member States and the European institutions is seriously damaged.*

*As regards the findings of the Resolution, the Hungarian Government is of the view that they are unjustified. They lack and deny basic facts, they are misleading and give false interpretation of the situation in Hungary. As a result, the Resolution draws unfounded conclusions by declaring that there is a clear risk of a serious breach by Hungary of the values of the Union.*

*The motivation of the European Parliament was deeply political and should be considered in the context of party politics and ideological divisions between different European political forces as to the future of Europe and diverging answers to the migration challenges less than one year before the May 2019 European Parliamentary*

*elections. The procedure in the Council, under Article 7(1) TEU, has a clear legal nature and should follow the facts, rules and the principles of the Treaties...*

*... We believe that it is important for all of you to know that the European Parliament adopted its Resolution on Hungary offering limited possibility to the Hungarian Government to provide full information and to make clear its position on the issues raised during the preparatory process...*

*...In fact, the European Parliament scrutinised the developments only from 2010 onwards. One cannot disregard the political motivation behind this. In the reasoned proposal the European Parliament lists all kinds of critical voices over the last eight years against Hungary regardless of the fact that most of them have become obsolete as these cases have been solved or closed in the meantime. In addition, the European Parliament does not provide any justification or explanation on how the different questions raised represent a clear risk of a serious breach by Hungary of the values of the Union. It is more like a compilation of concerns, allegations and perceptions by other European or international fora edited by the European Parliament – however it is not a reasoned proposal at all. Article 7 TEU is a serious procedure, therefore it should not be used in an arbitrary way but strictly in compliance with the Treaties...*

*...The present procedure is applied to Hungary. However, as this is the first such case upon the Resolution of the European Parliament, the modalities and the approach to be applied now set a precedent for the future. In this context, it is crucial and lies in the interest of the Union as a whole to clearly declare that any procedure related to the rule of law must be strictly based on the principles of the rule of law...*

*...Since 2010, in-depth structural reforms have been introduced in Hungary often having an effect on political and economic interests both domestically and abroad. These legislative changes have always been in the focus of attention in general and also of the European institutions, in particular that of the European Commission. No Member State has ever been subject to such a thorough scrutiny by the European Commission as Hungary was during the last eight years... Rule of law is the basis of our democracies, our societies, therefore, we must use with great caution any allegation undermining its respect by any of our Member States... Equality of Member States also means that the same regulation should be assessed against the same criteria.*

*Besides the equality of Member States, other basic principles provided for by the Treaties shall also be strictly respected as enshrined in the well-established case law of the Court of Justice of the European Union. According to Article 4(2) TEU, the Union must respect essential State functions, which undoubtedly include what might be defined as the State's internal self-organisation. Furthermore, the principle of conferral of powers laid down in Article 5(1) and (2) TEU has not conferred on the Union the power to intervene in the internal organisation of its Member States.*

*We all belong to the same Union, but we have different constitutional traditions. Therefore, simply having different rules as regards our constitutional order, does not justify questioning each other's position on the basis of the values of the European Union. On the contrary, the Treaty itself calls for the respect of the Member States' constitutional traditions...*

*...Under such circumstances, it is important to follow the principles agreed with consensus by the Council in its conclusions from December 2014. Non-discrimination; equality of Member States; evidence-based and non-partisan approach must serve as guiding principles in this and all other similar procedures. Double standards must be excluded in order to avoid undermining public confidence in our common institutions. All concerns may be raised, but opportunity should be given to clarify allegations, including the possibility to convince the Members of the Council in a fair and transparent procedure...*

*...Finally, the general public in Hungary and in other Member States closely follows the process. It is essential to maintain public support, as well as confidence in public institutions and in Member States' relations. Therefore, it is the responsibility of the Council to demonstrate that the Article 7 procedure is objective, transparent, that it provides the equality of the Member States, still focusing on unity and on mutual respect while being in line with the Treaties.*

*Hungary deems its accession to the European Union as a historical success. Therefore it is appalling that existing and legitimate political debates are framed as rule of law issues..." [pgs.1-3, 5-6.]*

**Source:** "Information on the Resolution on the situation in Hungary adopted by the European Parliament on 12 September 2018." November 13, 2018 memo by the Hungarian delegation to the European Council Available at:

<https://static1.squarespace.com/static/5abb53e6372b9691939ac577/t/5c564791ee6eb0443f6f47e4/1549158302887/HUN+2018+Nov+misinformation+note+submitted+to+and+shared+by+Council+INITIALLY+CONFIDENTIAL+but+successful+FoI.pdf>

## **Appendix A.5**

In 2019, Finland assumed the rotating Council presidency and promised to place the rule of law to the top of the agenda for the European Semester. Hungary released a statement arguing that the agenda modification was politically motivated and a breach of competence:

*"The statements on the Hungarian judicial system are politically motivated, biased and do not reflect the reality as the relevant legislative environment has not changed in the reporting period. In addition, the text fails to establish the direct relevance of the highlighted issues for the objectives of the European semester, thus undermining the credibility of the process.*

*Consequently the recommendations related to judicial independence and access to information are unjustified, unsubstantiated and therefore unacceptable. They cannot serve as the basis of a meaningful economic policy dialogue and are not conducive to genuine political ownership.*

*Such recommendations do not serve the purposes of the semester process and must be avoided in the future.*

*The modifications proposed by the Finnish Presidency fail to remedy the fundamental shortcomings of the Recommendations. The text still contains a value judgement that is not substantiated by facts and goes well beyond the material scope of the European Semester.*

*As a result, the Presidency, at its own discretion, submits a text to the Council which does not allow Hungary to support the adoption of its own recommendations given that is not in line with the content and legal constraints of the Semester."*

**Source:** July 11, 2019 Declaration of the Hungarian Government on the June 6, 2019 Council Recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary. Available at:

<https://twitter.com/ProfPech/status/1149226846162210817>

## Appendix A.6

In November 2017, the Polish delegation in the European Council argued that the Commission's claim that the PiS government was undermining judicial independence contradicted the European Court of Justice's (ECJ) case law and threatened to undermine international cooperation, mutual trust, and the European Arrest Warrant system. At the same time, the Polish delegation emphasized the importance of good-faith dialogue, respecting the constitutional diversity of member states, and the importance of waiting for the full factual record of any reform to be evident before considering to take any action:

*... "The Polish delegation expressed gratitude for the first hearing on 26 June 2018, and stressed that it had been a very good opportunity to exchange views and hold a fact-based, substantial and fair debate. It stated that the Council was a place for a neutral, fact-based debate about reform of the justice system in a Member State and that the hearing should be limited to facts, giving the opportunity to present any missing aspects of the analysis of the situation in Poland. Poland was aware of the concerns raised by the EU institutions, some Member States and other international bodies. However, it was necessary to underline that, according to Article 67 TFEU, regulation of the judicial system was a competence of the individual Member State, and the EU respected the different legal systems and constitutional traditions of the Member States. That did not exclude a debate such as this on whether the implementation of such regulation was in accordance with the rule of law. Recent reforms of the judiciary, and in particular of the law on the Supreme Court (SC) and the National Council of the Judiciary (NCJ), had only been implemented in the last few months and more time and experience were needed to assess their performance"...*

*... "The French delegation reiterated the question asked by the German and Danish delegations on Poland's follow-up to the possible CJEU judgment concerning the retirement of judges. Following the Dutch question, Poland was asked how the disciplinary proceedings might affect the independence of judges, in particular in the light of the CJEU ruling of 25 July stating that disciplinary proceedings had to guarantee that no political control would be imposed on judicial decisions.*

*The Polish delegation repeated that there were no disciplinary procedures against any of the judges who had filed prejudicial questions. The CJEU judgment of 25 July was a careful judgment, confirming that general doubts about a justice system did not justify non-implementation of European Arrest Warrants (EAWs). Otherwise, it might put an end to the EAW since a lack of proper protection in the Member State's judicial system concerned at least 30 other cases too"...* [pgs. 2, 7].

**Source:** " Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal." November 5, 2018 Report of the hearing held by the Council on 18 September 2018. Available at: <https://static1.squarespace.com/static/5abb53e6372b9691939ac577/t/5c564874a4222f53ddeb2a08/1549158524254/2018Sept+Council+2nd+HEARING+report+released+via+FoI.pdf>

## Appendix A.7

As Finland assumed the rotating Presidency of the European Council, Prime Minister Viktor Orbán delivered a much-publicized speech in July 2019 charging Finland with hypocrisy and with jeopardizing equality and mutual trust in the EU by embracing double-standards in rule of law enforcement that it would fail to meet:

*" ...Well, Ladies and Gentlemen,*



*Today Hungary is on a promising course: sound finances, falling debt, strong growth, rising wages, strengthening small and medium-sized enterprises, growing families and vigorous nation-building. Of course everyone can and should perform better. Individual Hungarian citizens, Hungarian businesses and the Hungarian government can and should do their jobs better; but the reality is that today the threat to Hungary's continued progress on its promising course does not come from inside the country, but from outside. What is happening in Hungary today – and what will be happening in the year ahead of us leading up to our next meeting – is our countering of these attacks and our attempts to defend Hungary against them.*

*What are they? We've already successfully countered the first attack. This would have shown itself in the selection of unsuitable and hostile people to lead the European institutions that are important to us. I will not elaborate on every detail, but this was prevented through a number of complicated manoeuvres. Everywhere we have blocked George Soros's candidates. Everywhere. We've prevented ideological guerrillas from being installed at the head of important European institutions, and to lead the Commission we've succeeded in choosing a mother of seven who has a practical approach. Of course this doesn't end the struggle within the institutions; that will end in October, when the entire landscape is revealed. Two things can be said with certainty. The first is that the Commission, which has launched so many attacks on Hungary, has even now in recent days – as it is on its way out – launched another attack. It is taking a number of Hungarian laws to the European Court. So this Commission must return to its role as laid down in the Founding Treaty of the European Union: to act as the guardian of the treaties. And it must abandon its political activism. It is not a political body: it is not its remit to have a programme, and it is not its remit to launch political attacks on Member States. That is what happened in the earlier appointed "Juncker Cabinet", and it must be stopped. This has always been at odds with the European Union's founding treaties and principles. Now there is a chance for this...*

*...Well, the second such threat we need to deal with is the threat from the international arena. The fact is that there have been serious mistakes in the European Union over the last five years...*

*...Of course, as Justice Minister Judit Varga is here, let's not forget that we will be facing our battles here on the rule of law. Here we need strong nerves: not in representing our position, as the Minister has already shown is possible, but in preventing ourselves from bursting out laughing and thus offending our partners. That is the hardest part; that requires strong nerves and self-control. Now, for example, we're entering a period in which our Finnish friends will be evaluating the situation of the rule of law in Hungary. We'll be doing this with our Finnish friends. And Finland is a country, Ladies and Gentlemen, where there is no constitutional court. The defence of the Constitution is delegated to a special parliamentary committee set up for that purpose. Imagine the condition of the rule of law in Hungary if we simply announced the dissolution of the Constitutional Court and said that Parliament's Committee for Constitutional Affairs would be responsible for constitutional review! This is more or less the situation in Finland. Or to give you another nice example: in Finland, the Academy of Sciences is under the supervision and control of the Ministry of Education. Imagine if we'd brought the debate on the Hungarian Academy of Sciences to an end by simply giving the right to oversee and direct the Academy to the Minister of Education. This isn't the case, Minister Kásler, but just imagine if it was! Or just consider the state of the rule of law in Finland, where judges are appointed by the President of the Republic, on the recommendation of the Minister of Justice. The President of the Republic, on the recommendation of the Minister of Justice! Therefore we need a nervous system, a strong nervous system, to enable us to show due respect, and answer questions politely – not with a smile or a laugh – when our Finnish friends ask us about and delve into the rule of law in Hungary..."*

**Source:** Prime Minister Viktor Orbán's speech at the 30th Bálványos Summer Open University and Student Camp. July 27, 2019, available at: <http://abouthungary.hu/speeches-and-remarks/prime-minister-viktor-orbans-speech-at-the-30th-balvanyos-summer-open-university-and-student-camp/>

## Appendix A.8

Following Prime Minister Viktor Orbán's July 27, 2019 speech at Bálványos Summer Open University and Student Camp, his spokesperson reiterated Orbán's critique of Finland jeopardizing equality and mutual trust in the EU by hypocritically embracing double-standards against Hungary, as reported by *The Guardian*:

*"Finland has pledged to pursue a hearing into alleged breaches of the rule of law by Hungary's far-right government after a campaign of vilification led by the prime minister, Viktor Orbán.*

*Orbán and his spokesman, Zoltán Kovács, have launched a series of attacks in recent weeks ranging from criticism of the level of domestic violence in Finland to the purchase of strategically important Finnish islands by Russian oligarchs.*

*As the member state holding the EU's rolling presidency until the new year, the Finnish government is responsible for chairing meetings of the member states and pushing forward the bloc's agenda.*

*The European parliament took the unprecedented step last September of asking member states to determine whether Hungary had breached the bloc's founding values in its overhaul of the country's judiciary and alleged failure to respect freedom of expression, religion and equal treatment under the law.*

*In the most recent broadside, Kovács, who is Hungary's secretary of state for international communication and relations, wrote that Finland "doesn't have a constitutional court, independent judiciary or press freedom, it also shows signs of other serious problems as well".*

*He raised the "petrifying" numbers of women undergoing female genital mutilation and the "grave threat" facing "freshly settled religious minorities"..."*

**Source:** Boffey, Daniel. 2019. "Hungary's far-right government vilifies Finland over rule of law inquiry." *The Guardian*, August 13.

## Appendix A.9

In his 2012 State of the Union Address, European Commission President José Manuel Barroso invoked the futility thesis by claiming that the EU lacked the appropriate tools to effectively intervene in Hungary and Poland to defend constitutional democracy:

*"...A political union also means that we must strengthen the foundations on which our Union is built: the respect for our fundamental values, for the rule of law and democracy.*

*In recent months we have seen threats to the legal and democratic fabric in some of our European states. The European Parliament and the Commission were the first to raise the alarm and played the decisive role in seeing these worrying developments brought into check.*

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

*Our commitment to upholding the rule of law is also behind our intention to establish a European Public Prosecutor's Office, as foreseen by the Treaties. We will come with a proposal soon..."*

**Source:** September 12, 2012 State of the Union speech by European Commission President José Manuel Barroso. Available at: [https://europa.eu/rapid/press-release\\_SPEECH-12-596\\_en.htm](https://europa.eu/rapid/press-release_SPEECH-12-596_en.htm)

## **Appendix A.10**

Following the 2012 State of the Union Address by European Commission President José Manuel Barroso, the Commission legal service drafted a communication reiterating that it lacked the appropriate tools to effectively protect the rule of law in Hungary and Poland:

*"...recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern. During these events, there has been a clear request from the public at large for the EU, and notably for the Commission, to take action. Results have been achieved. However, the Commission and the EU had to find ad hoc solutions since current EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law.*

*The Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect. In September 2012, in his annual State of the Union speech to the European Parliament, President Barroso said: "We need a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU. In the following year's speech, he said that "experience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework [...]. The Commission will come forward with a communication on this. I believe it is a debate that is key to our idea of Europe..." [pg. 2].*

**Source:** March 11, 2014 Communication from the Commission to the European Parliament and the Council on a New EU Framework to Strengthen the Rule of Law. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN>

## **Appendix A.11**

As late as July 2017 (five months before triggering Article 7(1) against Poland), Commission Vice-President Frans Timmermans remained reluctant to activate Article 7(1) and hoped to pursue a softer, dialogue-based approach to the extent that it proved constructive:

*"As you know, the Commission already concluded in our 2016 Recommendations that there is a systemic threat to the rule of law in Poland..."*

*...On 13 July 2017, I wrote to both the Polish Minister of Foreign Affairs and the Polish Minister of Justice with my concerns about the new proposals.*

*I have asked the two Ministers to relaunch a dialogue and I have invited them to Brussels. The letter explicitly underlined the importance of not adopting the new proposals.*

*Unfortunately, on 15 July 2017 two of the laws were approved by the Parliament.*

*The rule of law is one of the values on which our Union is founded and which defines our Union.*

*This is no matter only for the Polish people. What is happening in Poland affects the Union as a whole. All of us, every single Member State, every citizen of the Union.*

*The new laws are not all yet officially in place. So today we cannot take formal decisions just yet.*

*But we can send a clear and strong political message.*

*First of all, we will swiftly prepare a third recommendation under the Rule of Law Framework to be formally adopted by College next week;*

*Secondly, we will swiftly prepare infringement procedures for breach of EU law, also to be launched next week;*

*Finally, with regard to Article 7, the option of triggering Article 7 of the Treaty was part of the discussion and it should come as no surprise to anyone that, given the latest developments, we are coming very close to triggering Article 7.*

*Having said all of this, our hand is still extended to the Polish authorities for dialogue. But dialogue must be aimed at redressing the situation. And dialogue, if it happens or not, will not stop the Commission from taking any measures it deems necessary in this framework."*

**Source:** 19 July 2017 Opening remarks of First Vice-President Frans Timmermans, "College readout on grave concerns about the clear risks for independence of the judiciary in Poland." Available at: [http://europa.eu/rapid/press-release\\_SPEECH-17-2084\\_en.pdf](http://europa.eu/rapid/press-release_SPEECH-17-2084_en.pdf)

## **Appendix A.12**

In late 2018, after Article 7(1) had been triggered against both Poland and Hungary, the Commission began considering the possibility of withholding EU funds to both recalcitrant member states. Yet in a resuscitation of the futility thesis, the legal service of the European Council quickly circulated a non-public opinion that rule of law conditionality would be *ultra vires*. While the Council opinion has not been made public despite several document access requests by Professor Laurent Pech, on November 12, 2018 Professors Kim Lane Scheppele, Laurent Pech, and R. Daniel Kelemen described its contents on *Verfassungsblog*:

*"...Regrettably, we now need to add the Council's Legal Service (hereinafter: CLS) to the list of key EU actors that seem intent on ignoring the existential threat to the Union posed by the spreading rule of law rot amongst EU member governments. In a (non-public) opinion on the proposed regulation of the Commission to create rule of law conditionality in the multi-annual financial framework (MFF) adopted on 25 October 2018 (and first reported here), the CLS indeed put forward multiple unpersuasive legal arguments to claim that the Commission's proposal as it currently stands cannot be adopted. In particular, the CLS is of the view that the*

*conditionality regime envisaged in the Commission's proposal "cannot be regarded as independent or autonomous from the procedure laid down in Article 7 TEU"...*

*... The CLS opinion also agreed that Article 322(1)(a) TFEU "is the correct legal basis for the establishment of a genuine conditionality regime of a general character."*

*But the CLS also argued that the Commission's proposal to make EU funds conditional on observing the rule of law was not compatible with the Treaties because withholding EU funds in this case would (allegedly) tread on the territory covered by Article 7 TEU. In the view of the CLS, Article 7 is the *lex specialis* for Article 2 TEU and no other legal authority can cover the same ground. The CLS also objected that, by failing to put Member States on more precise notice about just what would get a state into trouble under the proposed regulation and why those precise weaknesses in the rule of law violations would necessarily lead a state to mismanage EU funds or threaten the financial interests of the EU, the Commission did not use conditionality mechanisms appropriately.*

*The real purpose of the CLS opinion was clear: It aimed to establish that while the Commission was well within its power to prevent EU funds from being misspent, the Commission was powerless to prevent the basic values of the EU from being subverted..."*

**Source:** Scheppele, Kim Lane, Laurent Pech, and R. Daniel Kelemen. 2018. "Never Missing an Opportunity to Miss an Opportunity." *Verfassungsblog*, November 12. Available at: <https://doi.org/10.17176/20181115-215538-0>

## Appendix A.13

In 2013, former Hungarian Prime Minister and center-left opposition leader Gordon Bajnai invoked the perversity thesis and warned the EU not to intervene too strongly in Hungary. His remarks were reported by the *Financial Times*:

*"...Hungary's parliament motion, put forward by members of Mr Orban's Fidesz, said the Tavares report "arbitrarily defines requirements, arbitrarily introduces new procedures and creates new institutions which stand in violation of Hungary's sovereignty guaranteed in the EU Treaty".*

*Mr Orban himself used the analogy of the Soviet Union, telling a radio interview: "Since the rule of the Soviet empire, no other external power has dared to try to curb the sovereignty of Hungarians openly."*

*The Fidesz government has alleged the report resulted both from a socialist-led conspiracy against it and pressure from powerful west European utility companies on their governments after Mr Orban forced them to cut energy prices in Hungary.*

*But Gordon Bajnai, former prime minister of a left-of-centre technocrat government in 2009-10 and now an opposition leader, said Mr Orban's clash with Brussels was "not about protecting Hungary but about protecting his oversized power - the power to build an eastward-looking crony capitalism and a managed democracy".*

*"Such a system cannot be consolidated within the framework of the European Union," he said. "However, this power can only be brought down by the Hungarian voters and not by any external influence.""*

**Source:** Buckley, Neil, Fontanella-Khan, James, and Kester Eddy. 2013. "EU weighs fines for democratic breaches after Hungary tensions." *Financial Times*, July 11, 2013. Available at: <https://www.ft.com/content/3901b64c-ea12-11e2-913c-00144feabdc0>

## Appendix A.14

In 2015 European Commission Vice-President Frans Timmermans expressed worries about a perverse effect following a robust intervention to uphold the rule of law in Hungary, citing the "Haider affair" as a historical precedent. In that 2000 controversy, EU member states suspended diplomatic relations with Austria after the far-right Freedom Party came to power in the a new government coalition. While these sanctions were imposed outside the EU Treaty framework, the ensuing popular backlash weighed heavily on Timmermans' (and member state governments') minds. In a keynote address at Tilburg University in August 2015, Timmermans expressed his worries as follows:

*"...So what happens where fundamental values are disrespected in a Member State outside the scope of EU law? There are no infringement proceedings that apply, but there is the special mechanism in Article 7 of the EU Treaty, which can lead to the suspension of the Member State's rights, including its voting rights. Given its magnitude, the threshold for activating the mechanism (both on substance and voting requirements), are demanding. It is a measure of last resort – not to be excluded, but I would hope that we never let a situation escalate to the stage that it would require its use. I believe that the case of Austria, with Jörg Haider's party joining the government, has weakened the EU's capacity to react in such a case. It was a political response which completely backfired at the time, and since then Member States have been reluctant to take issue with other Member States on this basis. That is one of the challenges I personally will have to face in the coming years..."*

**Source:** Frans Timmermans. Keynote speech at Conference on the Rule of Law, Tilburg University, 31 August 2015. The link to the announcement has been deactivated on the Commission website, but the text of the speech is still available at:

[https://web.archive.org/web/20171004031216/https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015\\_en](https://web.archive.org/web/20171004031216/https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en)

## Appendix A.15

Echoing concerns about perverse effect expressed by European Commission Vice-President Frans Timmermans vis-à-vis Hungary in 2015, in 2016 *Politico* quoted EU officials expressing similar worries vis-à-vis Poland, suggesting that the perversity thesis was taken seriously and perceived as credible amongst EU policymakers:

*"...Several diplomats said the EU's Poland problem is mainly a Commission concern at this point and isn't creating serious problems in dealings among member countries. "The Poles are not sidelined in meetings," said one Eastern European diplomat, who added that few are talking about taking the drastic step of depriving Poland — the EU's sixth largest member country — of its voting rights in the Council.*

*Poland's heated rhetoric in recent days has raised concern in Brussels that the situation could spin out of control if the EU doesn't react. While the EU could use other tools to put pressure on Poland, including by carrying out tighter scrutiny of EU spending in the country, finding the right approach was crucial, diplomats said.*



*"There is the idea that this is a case of emerging populism and that we shouldn't use any tough method which would turn the Polish population against Europe," said an EU diplomat. "We can't be counterproductive..."*

**Source:** De la Baume, Maia. 2016. "Brussels Struggles with its Poland Problem." *Politico*, May 25. Available at: <https://www-politico-eu.ezproxy.uio.no/article/pis-commission-human-rights-warsaw-europe-struggles-to-solve-its-poland-problem/>

## Appendix A.16

That the "Haider affair" prompted some EU leaders to consider triggering Article 7 bolstered the plausibility of Hungary and Poland's claims that all states could be threatened by the breakdown of mutual trust and the turn to nuclear options. Rui Tavares – who authored the European Parliament's 2013 "Tavares report" on the breakdown of constitutional democracy in Hungary – explained that a stubborn commitment to dialogue and sincere cooperation belied reluctance to jeopardize international cooperation, as quoted by *Foreign Policy*:

*"...Dubbed the "nuclear option," the ultimate "weapon" against a member state, Article 7 has never been used. Nor is it likely to be in the near future. Article 7 "is unusable now, as it requires unanimity among member states. It was the product of the optimism of the beginning of the century," argues Rui Tavares, a former member of the European Parliament who worked on a report on the state of democracy in Hungary in 2013.*

*As this demonstrates, tools at the EU's disposal require its member governments to decide to sanction a fellow member. And that is unlikely to happen, thanks to a "gentlemen's club" agreement that Taraves sums up as "If you don't talk about my case, I don't talk about your case"..."*

**Source:** Zalan, Eszter. 2016. "Can Europe Stand Up to Its Own Strongmen?" *Foreign Policy*, March 10. Available at: <https://foreignpolicy-com.ezproxy.uio.no/2016/03/10/can-europe-stand-up-to-its-own-strongmen/>

## Appendix A.17

Upon being elected president of the European Commission in 2019, Ursula von der Leyen reiterated reluctance to take a forceful stand against Hungary in defense of the rule of law, invoking the jeopardy and perversity theses. The comments were made following a meeting with Hungarian Prime Minister Viktor Orbán in July, as quoted by *EUObserver*:

*"..."We have made a good decision so far," Orbán said told Hungary's public broadcaster after the meeting, adding that it was a good decision to keep "ideological gorillas", referring to Timmermans, away from the commission presidency, and nominate someone with a "pragmatic instinct".*

*Orbán described von der Leyen as a politician "who has the same questions in her thoughts about the future as us", specifying the future of children and families, security, and a common European force and the development of the military industry.*

*Von der Leyen tweeted after the meeting that she held a "good talk" about her political guidelines with Hungary's premier...*

*Von der Leyen told the European parliament before MEPs approved her nomination that "there can be no compromise when it comes to respecting the rule of law".*

*She later then said in an interview that in central and eastern European countries "many feel that they're not fully accepted, and if we guide debates as sharply as we have done, it contributes to countries and peoples believing that they are being targeted as a whole".*

*"We must all learn that full rule of law is always our goal, but nobody's perfect," she added then.*

*Orban confirmed on Thursday that von der Leyen is "sensitive" to issues such as migration, and also in this respect "she is able to think with central Europeans' head"..."*

**Source:** Zalan, Eszter. 2019. "Orban praises von der Leyen after first face-to-face." *EUObserver*, August 1. Available at: <https://euobserver.com/political/145579>

## Appendix A.18

In a June 26, 2018 hearing in the European Council concerning the Article 7(1) procedure against Poland, the Polish delegation reiterated that any further action would not be fact-based and premature. The delegation warned that the Council stood to set a legal precedent for the future and the responsibility for any failures in process, for acting prematurely without all the facts, or for failing to respect the diverse constitutional traditions of the member states would fall on the Council:

*"...The Polish delegation stressed that since the use of Article 7(1) TEU set a precedent in the EU, procedural aspects were of great importance. The ongoing dialogue was a sensitive issue in Poland and the EU. At this stage, the Council was responsible for taking over the process, which set a precedent for the future. The process and its outcome were now exclusively the responsibility of the Council and the Member States...*

*... On the separation of powers: there was no doubt that the separation of powers was a fundamental principle of the Polish constitution. However, the balance was different in each of the Member States. There were different constitutional traditions. The concessions and amendments offered so far were neither minor nor cosmetic but fundamental and of a systemic nature. Now these amendments were entering into force and only practice over time would show if further corrections were required. Any definite assessment at this stage would be premature. It was for the Council and the Member States to take responsibility concerning the Article 7 procedure and to assess the situation..." [pgs. 2, 10]*

**Source:** August 8, 2018 Report of the hearing held by the Council on 26 June 2018 Re-Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal. Available at: <http://www.statewatch.org/news/2018/aug/eu-council-rule-of-law-poland-10906-18.pdf>

## Appendix A.19

In a December 11, 2018 hearing in the European Council concerning the Article 7(1) procedure against Poland, the Polish delegation reiterated its commitment to dialogue and emphasized the need for EU institutions to not take any action in the absence of having received all the facts from the Polish delegation. It claimed that Polish reforms of the National Council of the Judiciary were modeled



after those of other EU member states, implying that any neutral and fact-based assessment would exonerate Poland:

*... "The Polish delegation referred to the Polish reply of 21 November 2018 informing the Commission about the new law enabling retired judges to return to active duty and revoking the President's power to extend the term of Supreme Court judges. The delegation voiced their belief that the Polish authorities deserve to receive the Commission's assessment on the Polish draft law within a reasonable timeframe. Taking into consideration recent events, the delegation asked the Member States how they saw the future developments of the Article 7 procedure, especially as the most pressing issue (the early retirement of judges) had been remedied by the Polish government..."*

*... All the changes that had been implemented in April and May were the result of the fruitful dialogue with the Commission... Concerning the NCJ, it was stated that the model chosen in Poland complied with European standards and was similar to existing models in other Member States. The reform had, among other things, introduced live broadcasted hearings of candidates for the NCJ and ensured that the selected members could not be removed from their position during the course of their four-year term. The next part of the presentation concerned the Constitutional Tribunal and focused, among other things, on guarantees of its impartiality and the publication of judgments following the Commission recommendation. With regard to further steps, it was noted that the Article 7(1) TEU procedure needs to remain objective and fact-based and take into account not only the legal text but also its practical application. Poland concluded by expressing its openness to a dialogue with the Council, the Member States and the Commission"...*

*... The German delegation asked whether there was a time schedule for the implementation of further reforms (e.g. concerning 350 ongoing disciplinary proceedings or the situation in the NCJ). It also asked how other concerns, e.g. those raised in the Venice Commission reports, would be addressed.*

*The Polish delegation replied that it would need more clarification on the facts referred to in the German delegation's question, as these did not correspond to the data available to the Polish delegation. The Polish delegation called upon other delegations not to refer to figures where the source was unknown or unofficial"...* [pgs. 2-3, 6].

**Source:** December 20, 2018 report of the hearing held by the Council on 11 December 2017 Re- Rule of Law in Poland / Article 7(1) TEU Reasoned Proposal. Available at: <https://static1.squarespace.com/static/5abb53e6372b9691939ac577/t/5c5648d9085229a138ae9015/1549158652559/2018Dec+Council+3rd+HEARING+report+released+via+FoI.pdf>

## **Appendix A.20**

In a September 2019 hearing in the European Council concerning the Article 7(1) procedure against Hungary, the Hungarian delegation reiterated its argument that the triggering of Article 7(1) by the Council was illegal and called the procedural legitimacy of the entire Article 7 process into question. Nevertheless, the Hungarian delegation reiterated its loyalty to sincere cooperation and dialogue. It reiterated also that Hungary was being subjected to unprecedented scrutiny for a broader set of practices. It concluded by emphasizing the importance to taking the time to dialogue and discuss the factual matters regarding reforms in Hungary:

*... "The Hungarian delegation was then given the floor. The Hungarian delegation referred to its updated information note of reply of 12 September 2019 (12133/19) and stated that it was ready to provide further*

*information and clarification. It stated that the European Parliament's Reasoned Proposal did not contribute to the unity of the Union and that it had been adopted in such way as to breach the European Parliament's rules of procedure. The delegation expressed the view, therefore, that the procedure pursuant to Article 7(1) TEU lacked a legal basis. Nevertheless, it stated that Hungary would participate constructively in the procedure, in a spirit of cooperation... It stated that Hungary had been subject to unprecedented international scrutiny and that the resources and reports were available to all interested parties.*

*The delegation stated that, although the Union's values were founded on common constitutional traditions, Hungary did not expect all Member States to follow exactly the same trajectory. This applied, for instance, in the matter of the creation of constitutional courts. In Hungary, there was overwhelming public support for EU integration, and EU membership was seen as beneficial. In the area of migration there was, however, a need to restore the balance between individual rights and the public interest...*

*...On the issue of media freedom, the Commission and the Council of Europe had examined the current media regulation in 2011. They had made a positive assessment at the time... Media concentration was similar or higher in other Member States...*

*...The Hungarian delegation stated that it had already replied on the issues of freedom of expression and the media. With regard to academia, the new law on higher education had been adopted in 2012 and an assessment was necessary after 5 years. The aim of this was to provide quality higher education. Amendments had been introduced to create a level playing field between Hungarian institutions and institutions that were based in another country. Requirements were no more stringent than in other Member States. The government had always consented to the extension of deadlines for compliance by institutions...*

*...In its closing comments, the Hungarian delegation welcomed the fact that sufficient time had been given to cover in sufficient detail the various issues discussed and to present the Hungarian context. Only one conclusion was possible: there was no systemic risk of a breach of Union's values by Hungary. All further procedural steps should have the support of a clear majority of Member States"... [pgs. 2-3, 5-6, 9].*

**Source:** September 19, 2019 report of the hearing held by the Council on 16 September 2019 Re-Values of the Union - Hungary - Article 7 (1) TEU Reasoned Proposal. Available at: <https://static1.squarespace.com/static/5abb53c6372b9691939ac577/t/5d9738413fabc75d8ff4136d/1570191429448/2019Sept16+COUNCIL+formal+minutes+of+Art+7+HUN+hearing.pdf>

## **Appendix A.21**

On September 12, 2018, the European Parliament adopted a resolution triggering Article 7(1) of the Treaty on European Union against Hungary for violations of Article 2 values. The list of specific violations was adopted in its Annex based on a report developed in the LIBE Committee by lead rapporteur Judith Sargentini (Green MEP, the Netherlands). The resolution summarized these violations as they related to the following:

*"The European Parliament,*

- ... 1. States that the concerns of Parliament relate to the following issues:*
- the functioning of the constitutional and electoral system;*
  - the independence of the judiciary and of other institutions and the rights of judges;*
  - corruption and conflicts of interest;*

- privacy and data protection;
- freedom of expression;
- academic freedom;
- freedom of religion;
- freedom of association;
- the right to equal treatment;
- the rights of persons belonging to minorities, including Roma and Jews, and protection against hateful statements against such minorities;
- the fundamental rights of migrants, asylum seekers and refugees;
- economic and social rights.

2. *Believes that the facts and trends mentioned in the Annex to this resolution taken together represent a systemic threat to the values of Article 2 TEU and constitute a clear risk of a serious breach thereof...*

*“4. Submits, therefore, in accordance with Article 7(1) TEU, the annexed reasoned proposal to the Council, inviting the Council to determine whether there is a clear risk of a serious breach by Hungary of the values referred to in Article 2 TEU and to address appropriate recommendations to Hungary in this regard”*

**Source:** European Parliament Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (P8\_TA(2018)0340). Available at [http://www.europarl.europa.eu/doceo/document/TA-8-2018-0340\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html).

## Appendix A.22

On December 20, 2017, the European Commission Vice President Timmermans announced that the Commission was referring Poland to the Council for breaching the values outlined in Article 2:

*“... (4) The present reasoned proposal sets out, in accordance with Article 7(1) TEU, the concerns of the Commission with regard to the rule of law in Poland. It invites the Council to determine, on the basis of the same provision, that there is a clear risk of a serious breach by the Republic of Poland of the rule of law which is one of the values referred to in Article 2 TEU.*

*(5) The concerns of the Commission relate to the following issues:*

- (1) the lack of an independent and legitimate constitutional review;*
- (2) the adoption by the Polish Parliament of new legislation relating to the Polish judiciary which raises grave concerns as regards judicial independence and increases significantly the systemic threat to the rule of law in Poland:*

*(a) the law on the Supreme Court; approved by the Senate on 15 December 2017.*

*(b) the law amending the law on the Ordinary Courts Organisation ('law on Ordinary Courts Organisation'); published in the Polish Official Journal on 28 July 2017 and in force since 12 August 2017;*

*(c) the law amending the law on the National Council for the Judiciary and certain other laws ('law on the National Council for the Judiciary'); approved by the Senate on 15 December 2017;*

*(d) the law amending the law on the National School of Judiciary and Public Prosecution, the law on Ordinary Courts Organisation and certain other laws ('law on the National School of Judiciary'); published in the Polish Official Journal on 13 June 2017 and in force since 20 June 2017. ...”*

**Source:** 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/2017/0835 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52017PC0835>

### Appendix A.23

President Barroso has referred to government officials' propensity to "Europeanize failure" on multiple occasions. In his 2013 State of the Union Address, he used the same language when discussing the EU's response to the Euro-crisis and the gap between how the EU is portrayed and what the EU actually does:

*"...I cannot emphasise this enough: citizens will not be convinced with rhetoric and promises only, but only with a concrete set of common achievements. We have to show the many areas where Europe has solved problems for citizens. Europe is not the cause of problems, Europe is part of the solution."*

*"...Does anyone seriously believe that, if the euro had collapsed, we or our Member States would still have any credibility left internationally?"*

*"...I know some people out there will say Europe is to blame for the crisis and the hardship. But we can remind people that Europe was not at the origin of this crisis. It resulted from mismanagement of public finances by national governments and irresponsible behaviour in financial markets. We can explain how Europe has worked to fix the crisis. What we would have lost if we hadn't succeeded in upholding the single market, because it was under threat, and the common currency, because some people predicted the end of the euro. If we hadn't coordinated recovery efforts and employment initiatives."*  
*"What I tell people is: when you are in the same boat, one cannot say: 'your end of the boat is sinking.' We were in the same boat when things went well, and we are in it together when things are difficult."*

*"...At the same time we must acknowledge that, in some areas, Europe still lacks the power to do what is asked of it. A fact that is all too easily forgotten by those, and there are many out there, who always like to nationalise success and Europeanise failure. Ultimately, what we have, and what we don't have, is the result of democratic decision-making. And I think we should remind people of that."*

**Source:** September 11, 2013 State of the Union Address by European Commission President José Manuel Barroso. Available at [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_13\\_684](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_684)

### Appendix A.24

In 2013, the European People's Party voted against the European Parliament's so-called "Tavares report," highlighting the alarming breakdown of constitutional democracy in Hungary. EPP President Manfred Weber defended the Hungarian Government and the EPP-member Fidesz party by emphasizing how the report was illegal and a partisan interference in Polish democracy, thus mirroring the jeopardy and perversity claims of Hungarian officials:

*"The EPP Group voted against the Tavares Report today. The Report is a wish list of the European leftist parties who aim to impose their own political agenda on Hungary. The European Parliament has no competence to act as a tribunal and tell people how they have to live..."*

*"The Tavares Report adopted today by the leftist parties goes far beyond the competence of the European Parliament. The EP does not have the right to interfere in issues such as defining marriage and references to Christianity in the Constitution. These belong solely to national competence. The dozens of legislative recommendations to the Hungarian Parliament and the setting-up of a monitoring procedure to assess their implementation have no legal basis and are totally unacceptable. The European Parliament must not turn itself into a Big Brother..."*

*"The EPP Group also denounces the use of double standards by the European Socialists. The Socialists are turning a blind eye to glaring breaches of European values in Socialist-led countries such as Bulgaria and Romania. This further proves the fact that their continuous attempts to condemn EPP-led governments is biased and politically motivated."*

**Source:** July 3, 2013 EPP Press Release, "EP Report on Hungary: EPP Group Rejects the Use of Double Standards." Available at <https://www.eppgroup.eu/newsroom/news/epp-group-rejects-the-use-of-double-standards>