

Possibilities and Limits of European Union Action against Democratic Backsliding and Decline of Migrants' Rights in Member States

JAN WOUTERS AND MAAIKE DE RIDDER

6.1 INTRODUCTION

Over the last decade, the European Union (EU or Union) has faced numerous crises. Among the most notable are the financial and eurozone sovereign debt crises, the migration crisis and more recently, the COVID-19 crisis. As a result, the political landscape of the EU has changed tremendously. The Union's institutions and the Member States have undergone significant transformations as regards political majorities, policy priorities and compliance with EU fundamental values.

As to the latter, it should be reminded that the Union is based on a set of fundamental values that are not only binding upon the EU itself, but also are – or ought to be – ‘common to the Member States’, as indicated in Article 2 of the Treaty on European Union (TEU). According to this provision, these values consist of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (including the rights of persons belonging to minorities), pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.¹ Respect for, and a commitment to promote, these values have long been prerequisites to become an EU Member State (Article 49 TEU). After accession, however, the Union has only limited means available to ensure Member States' compliance with them.

¹ Consolidated version of the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1. On the question whether there is a legal distinction between the values mentioned in the first sentence of Article 2 TEU and those mentioned in the second sentence, see *inter alia* Jan Wouters, ‘Revisiting Article 2 of the TEU: A True Union of Values?’ (2020) 5(1) *European Papers* 255–277.

Specifically for this chapter our focus lies with the value of democracy. While it constitutes one of the foundational values of the EU,² in the past years it has set foot on a downward path in a trend that has been labelled as ‘democratic backsliding’ in multiple Member States.³ Through this deterioration, the EU has been confronted with attacks on national judiciaries, censorship of national and international news outlets, the dismantling of multiple other rule of law foundations and restrictions of migrants’ rights.

In this chapter we aim to capture the substance and range of the EU’s toolbox in tackling the issues that arise out of democratic backsliding in its Member States and the limitations of these tools. The deterioration of democracy and, related to this, the rule of law have had significant consequences in the migration context, which will be taken into account in our analysis. In the first section, we look at the EU’s toolbox and whether these tools provide legal resilience in counteracting democratic backsliding. The second section evaluates the toolbox in a migration context and the third section discusses how the EU is currently bringing new initiatives forward to strengthen its democracy and legitimacy. We conclude with a number of suggestions *de lege lata* and *de lege ferenda* on how the EU’s toolbox could become more effective.

² It is beyond the scope of this chapter to analyse the concept of democracy in EU law. See *inter alia* Koen Lenaerts, ‘The Principle of Democracy in the Case Law of the European Court of Justice’ (2013) 62 *International & Comparative Law Quarterly* 271; Niels Petersen, ‘The Democracy Concept of the European Union: Coherent Constitutional Principle or Prosaic Declaration of Intent?’ in Philipp Dann and Michal Rynkowski (eds) *The Unity of the European Constitution. Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, vol 186 (Springer Berlin 2006) 97–118.

³ See *inter alia* Dariusz Adamski, ‘The Social Contract of Democratic Backsliding in the “New EU” Countries’ (2019) 56(3) *Common Market Law Review* 623; Michael Blauburger and R. Daniel Kelemen, ‘Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU’ (2016) 24(3) *Journal of European Public Policy* 321; Staffan I Lindberg, ‘The Nature of Democratic Backsliding in Europe’, 24 July 2018, Carnegie Europe <<https://camegieeurope.eu/2018/07/24/nature-of-democratic-backsliding-in-europe-pub-76868>>; Bernd Schlipphak and Oliver Treib, ‘Playing the Blame Game on Brussels: the Domestic Political Effects of EU Interventions against Democratic Backsliding’ (2016) 24(3) *Journal of European Public Policy* 352; Ulrich Sedelmeier, ‘Political Safeguards against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure’ (2017) 24 *Journal of European Public Policy* 337; Ingi Iusmen, ‘EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania’ (2015) 53 *Journal of Common Market Studies* 593; James Dawson and Seán Hanley, ‘Foreground Liberalism, Background Nationalism: A Discursive-Institutionalist Account of EU Leverage and “Democratic Backsliding” in East Central Europe’ (2019) 57 *Journal of Common Market Studies* 710; Nick Sitter and others, ‘Democratic Backsliding in the European Union’ [2019] Oxford Research Encyclopedia of Politics <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1476>>.

6.2 THE EU'S TOOLBOX FOR ACTION: A PARAGON OF LEGAL RESILIENCE?

Restrictions of migrants' rights and processes of democratic or rule of law backsliding do not always appear jointly.⁴ However, if one takes a closer look at the current democratic decay in the EU, there appears to be a crucial link between migration and respect for democracy and the rule of law.⁵ Concurrently with the EU migration crisis, we have witnessed an accelerated decrease in multiple Member States' respect for the values of democracy and the rule of law.⁶ Adherence to these values has, nonetheless, proven essential in a context of large-scale immigration.⁷ Democracy and the rule of law provide the basis for the protection of refugees and asylum seekers, as they ensure due process obligations, access to justice, respect for human rights and many other essential principles to safeguard migrants' rights in EU Member States.⁸

The EU has several tools available to deal with non-compliant Member States. However, not all of those tools are equally well-equipped to tackle the specific issues of democratic backsliding that have accompanied the rise of (authoritarian) populism – and the decline in migrants' rights – in some of its Member States. Bigotry towards immigrants is only one of the symptoms of the EU's democracy crisis, which is a much larger phenomenon.⁹ Therefore, the focus of this chapter predominantly lies with the EU's apparatus for counteracting democratic decay and rule of law backsliding. We will discuss whether the EU's tools are effective and whether they can offer legal resilience against populist movements that threaten migrants' rights in EU Member States.

⁴ Alexander T Aleinikoff, 'Inherent Instability: Immigration and Constitutional Democracies' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 478.

⁵ *Ibid.*

⁶ Milada Anna Vachudova, 'Ethnopolitics and Democratic Backsliding in Central Europe' (2020) 36 *East European Politics* 318, 321–323.

⁷ Lina Vosyliute and Carmine Conte, 'Policy Option Brief March 2019: Crackdown on NGOs Assisting Refugees and Other Migrants' (Research Social Platform on Migration and Asylum (Resoma)) 4 <www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/POBCrackdownonNGOs_o.pdf>.

⁸ Maria O'Sullivan and Dallal Stevens, 'Access to Refugee Protection. Key Concepts and Contemporary Challenges' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing 2017) 20–25; Valsamis Mitsilegas, 'Decriminalising Migration in EU Law: Upholding Human Rights and the Rule of Law After Lisbon' in Valsamis Mitsilegas (ed), *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015) 109.

⁹ Aleinikoff (n 4) 477–478.

6.2.1 *Infringement Proceedings under the TFEU*

A first path of action when a Member State is in breach of EU law, are the infringement proceedings that are provided by the Treaty on the Functioning of the European Union (TFEU). These procedures are foreseen for specific and concrete violations of EU law by otherwise compliant Member States.¹⁰ Structural and persistent deviations from the Union's values listed in Article 2 TEU, however, often fall beyond the scope of what can be achieved with infringement actions.¹¹ When Member States decide to no longer conform to the demands of maintaining a democracy, they are probably violating more than one part of EU law at the same time: starting an infringement action to bring one violation to a halt will most likely have little effect on the bigger picture.¹²

6.2.1.1 Article 258 TFEU

Article 258 TFEU gives the European Commission the possibility to deliver a reasoned opinion to a Member State that has failed its obligations under the Treaties, after giving the latter the opportunity to submit observations.¹³ This is the so-called administrative stage.¹⁴ If the Member State concerned gives no effect to the opinion, the judicial stage is entered, in which the Commission can bring the matter before the Court of Justice of the European Union (CJEU).

Important for all infringement proceedings under Article 258 TFEU is that the Commission enjoys full discretion as to when and whether it will commence a procedure and against which Member State it will do so.¹⁵ It can never be forced to initiate proceedings. However, since the Commission has

¹⁰ Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 108; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2015) 159–164.

¹¹ Lenaerts, Maselis and Gutman (n 10) 163.

¹² Scheppele (n 10).

¹³ Article 258 TFEU; Melanie Smith, 'The Evolution of Infringement and Sanction Procedures: Of Pilots, Diversions, Collisions and Circling' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Law* (Oxford University Press 2015) 352.

¹⁴ Laurence W Gormley, 'Infringement Proceedings' in Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 66.

¹⁵ *Ibid.*, 69; Lenaerts, Maselis and Gutman (n 10) 197.

to monitor the application of EU law across twenty-seven Member States, it needs to pick its battles carefully in view of its lack of sufficient resources and of a complete overview.¹⁶ The Commission will thus not be able to challenge every violation of EU law through infringement proceedings.

Article 258 TFEU offers a legal remedy to challenge infringements of the Union *acquis*. However, whether violations of Article 2 TEU can be considered part of the Union *acquis* is still being debated.¹⁷ Many believe that the provision is insufficiently precise to generate legal obligations enforceable through judicial action, while others believe that Article 2 is clearly meant to be endowed with legal value.¹⁸ Furthermore, the existence of a specific remedy designed for breaches of Article 2 TEU – namely Article 7 TEU – might also present itself as a hurdle for triggering legal action under Article 258 TFEU.¹⁹ At the moment, it remains unlikely that the Commission would initiate an infringement action on the sole ground of Article 2 TEU without involving other concrete obligations under the EU Treaties or secondary law of the Union.²⁰ Indeed, on numerous occasions, the Commission has brought infringement actions against Member States for disrespecting EU values.²¹ But it did not do so solely on the basis of Article 2 TEU. In *Commission v. Poland* (C-619/18), the Commission initiated infringement proceedings in response to a law that lowered the retirement age for Supreme Court Judges.²² Poland clearly violated – as it currently still does – the rule of law under Article 2 TEU, but an infringement action based on this article alone has not been launched. Instead, the Commission relied on Article 19 TEU and Article 47 of the EU Charter of Fundamental Rights (Charter) to start the proceedings.

On 6 October 2020, the CJEU ruled against Hungary in a landmark judgment.²³ The case concerned an infringement procedure against Hungary's 'Lex CEU': a law introduced by the Orbán government with the

¹⁶ Scheppele (n 10) 110.

¹⁷ Olivier De Schutter, 'Infringement Proceedings as a Tool for the Enforcement of Fundamental Rights in the European Union' (Report Open Society Foundations 2017) 28.

¹⁸ Dimity Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *Hague Journal on the Rule of Law* 153; De Schutter (n 17); Gormley (n 14).

¹⁹ De Schutter (n 17).

²⁰ Gormley (n 14) 74.

²¹ *Commission v. Hungary* [2014] ECJ C-288/12 ECLI:EU:C:2014:237; *Commission v. Poland* [2019] C-192/18 ECLI:EU:C:2019:924; *Commission v. Poland* [2018] ECJ C-619/18 R ECLI:EU:C:2018:1021; Carlos Closa, 'The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance' (2019) 26 *Journal of European Public Policy* 697.

²² *Commission v. Poland* [2019] ECJ C619/18 ECLI:EU:C:2018:910.

²³ *Commission v. Hungary* [2020] ECJ C-66/18 ECLI:EU:C:2020:792.

aim of chasing out the independent Central European University, founded by one of Orbán's opponents, George Soros. The CJEU found the law to be in breach of WTO commitments regarding services (GATS) and the Charter.²⁴ Although the judgment is of great importance to strengthen the legal protection of academic freedom, it came too late to bring about change in Hungary. The CEU had already relocated to Vienna.

In 2016 the European Parliament suggested that the Commission could launch a 'systemic infringement' action on democracy, the rule of law and fundamental rights.²⁵ This idea was originally brought up by Kim Lane Scheppele, who is convinced that the Commission should demonstrate the interconnectedness of specific issues to the larger pattern.²⁶ Systemic infringement actions should then enable the CJEU to spot this pattern and establish the existence of a threat to the EU's most fundamental of values. It remains to be seen whether the Commission will eventually bring a case before the CJEU solely based on Article 2 infringements and whether the CJEU will be willing to interpret an entire pattern of infringements under a single action.

6.2.1.2 Article 259 TFEU

Article 259 TFEU foresees in a similar means of action, but this time the initiative lies with the other Member States. One Member State violating EU law inevitably impacts the entire Union and the mutual trust that is supposed to be ensured between its Members. Therefore, other Member States are given the opportunity to bring alleged violations before the CJEU.²⁷ However, before they can do so, they have to bring the matter before the Commission. Only after the Commission has given the respective State the opportunity to submit its observations and has issued a reasoned opinion, will action before the Court be possible.²⁸ If the Commission omits to give a

²⁴ 'Press Release No 66/20 The Conditions Introduced by Hungary to Enable Foreign Higher Education Institutions to Carry out Their Activities in Its Territory Are Incompatible with EU Law' (2020) <www.curia.europa.eu> accessed 8 January 2021.

²⁵ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)).

²⁶ Scheppele (n 10); Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) *Yearbook of European Law* 62–103.

²⁷ Kochenov (n 18) 154–157.

²⁸ Article 259 TFEU, Consolidated versions of the Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.

reasoned opinion within a three-month timeframe, the matter may be brought before the Court directly.²⁹

So far only a handful of cases have been brought before the CJEU under Article 259 TFEU.³⁰ One of the reasons is that the political weight of one Member State bringing another Member State before the Court is rather significant. Additionally, the procedure still requires the involvement of the Commission, which could always use this information to launch a proceeding under Article 258 TFEU. Consequently, incentives for Member States to act on breaches of EU law themselves are very low.³¹ Lastly, similar to the issue that arises with Article 258 TFEU, it is unclear whether cases would come to the Court that are solely based on infringements of EU fundamental values.³² Interestingly, on 2 December 2020, the Dutch Parliament adopted a resolution requesting the Dutch government to start planning the deployment of Article 259 TFEU against Poland for disrespecting the rule of law.³³ If the Dutch government were to act upon the resolution – for which there is no indication at the time of writing – it would constitute a first use of the article in the specific context of the EU's crisis of values.³⁴

6.2.2 The 'Nuclear' Option: Article 7 TEU

Apart from the legal remedies offered by Articles 258–260 TFEU, the Union also has a specific political remedy at its disposal, as opposed to a judicial one, in case a Member State acts in conflict with the EU's fundamental values: Article 7 TEU.³⁵ The article contains two procedures: a preventive one and a

²⁹ Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) *Yearbook of European Law* 98–99.

³⁰ See: *France v. UK* [1979] ECR 2923, C141/78, ECLI:EU:C:1979:225 ; *Belgium v. Spain* [2000] ECR I-3123, C-388/95, ECLI:EU:C:2000:244 ; *Spain v. UK* [2006] ECR I-7917, C-145/04, ECLI:EU:C:2006:543 ; *Hungary v. Slovakia* [2012], C-364/10, ECLI:EU:C:2012:630.

³¹ Kochenov (n 18).

³² *Ibid.*, 165.

³³ Tweede Kamer der Staten-Generaal: Vaststelling van de begrotingsstaten van het Ministerie van Justitie en Veiligheid (VI) voor het jaar 2021; Motie van het Lid Groothuizen C.S. (35570 VI Nr. 58); Aleksandra Krzysztozek, 'Dutch Government Urged to Sue Poland in Top EU Court over Rule of Law Debacle' (1 December 2020).

³⁴ Scheppele, Kochenov and Grabowska-Moroz (n 26) 100.

³⁵ Leonard Besselink, 'The Bite, the Bark, and the Howl', in Jakab András and Dimitry Kochenov (eds.) *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) 128.

remedial one. They can be seen as separate, in the sense that one does not necessarily have to follow the other.³⁶

6.2.2.1 The Preventive Procedure

Article 7(1) TEU outlines the preventive procedure. To begin proceedings, either one third of the Member States, the European Parliament or the Commission has to make a reasoned proposal to the Council.³⁷ Acting by a majority of four fifths and after obtaining consent from the European Parliament, the Council can then determine the existence of a clear risk of a serious breach of the values laid out in Article 2 TEU. Before doing so, the Council will hear the respective Member State and has the opportunity to address recommendations. These recommendations can also be issued before the existence of a risk has been determined.³⁸ The advantages of Article 7(1) are the range of possible initiators and the still somewhat attainable thresholds compared to Article 7(2) and (3) TEU. However, its effectiveness is still a concern, since it only serves as a basis for dialogue and recommendations. This is especially the case when combined with the Commission's Framework to Strengthen the Rule of Law (*infra*), which also foresees the possibility of informal dialogue and addressing recommendations in order to avoid triggering Article 7 TEU procedures.³⁹

6.2.2.2 The Remedial Procedure

The remedial procedure laid down in Article 7(2) TEU is more problematic. It stipulates that the European Council, acting on a proposal of one third of the Member States or the Commission and after obtaining the consent from the European Parliament, can 'determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2'.⁴⁰ However, there are some impediments to reach this point. First of all,

³⁶ *Ibid.*, 133; Diego Lopez Garrido and Antonio Lopez Castillo, 'The EU Framework for Enforcing the Respect of the Rule of Law and the Union's Fundamental Principles and Values' (Policy Department for Citizens' Rights and Constitutional Affairs 2019) 14–16.

³⁷ Dana Burchardt, 'The Perils of Defending the Rule of Law through Dialogue' (2019) 15 *European Constitutional Law Review* 1, 1; Inger Österdahl, 'Article 7 TEU and the Rule of Law Mechanism: A Dissuasive Weapon or a Paper Tiger?' in Wolfgang Heusel and Jean-Philippe Raguec (eds), *The Authority of EU Law* (Springer 2019) 242.

³⁸ Besselink (n 35) 134; Österdahl (n 37) 243.

³⁹ Dmitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) 2017/10 8.

⁴⁰ Article 7(2) Consolidated version of the Treaty of the European Union [2016] OJ C202/1.

unanimity is required within the European Council, which means that each Member State (represented by its Head of State or Government) has a veto. The Member State concerned does not have a vote but every single other Member State, even those not complying with EU values themselves, does. If a serious and persistent breach has been found, the procedure moves forward to the Council of the EU. The Council, acting by a qualified majority, can then, according to Article 7(3) TEU, ‘decide to suspend certain of the rights deriving from the application of the Treaties to the Member States in question’.⁴¹

The purpose of the remedial arm of Article 7 TEU – which is the oldest part of the article, inserted by the Treaty of Amsterdam – is the possibility to impose a political sanction on a Member State that commits a serious and persistent breach of one of the Union’s fundamental values.⁴² Such a sanction could for example entail the loss of voting rights in the Council. The focus on ‘persistent’ in the article indicates that the aim is to only capture those violations that cannot be solved through national institutions or small corrections following infringement action or dialogue.⁴³

Both the preventive and the remedial components of Article 7 TEU are fully political in nature. The CJEU has no involvement in any step of the procedures, the only exception being that if sanctions are decided upon, the Member State concerned can still challenge the decision before the Court.⁴⁴

Article 7 TEU has often been coined as the ‘nuclear option’.⁴⁵ One of the reasons for this terminology is that the two procedures have high thresholds for their activation. The majorities or unanimity required are difficult or even impossible to obtain when more than a single Member State is at odds with the Union’s values, as is the case today. Another reason for the ‘nuclear’ terminology is the sanction that could follow a successful triggering of Article 7(3). Losing voting rights in the Council is the most serious political sanction the Union can impose on a Member State.⁴⁶ Since its inclusion in the TEU, following the Treaty of Nice, the mechanism of Article 7(1) TEU

⁴¹ De Schutter (n 17) 35.

⁴² Österdahl (n 37) 243.

⁴³ Kochenov (n 39) 10.

⁴⁴ De Schutter (n 17) 35.

⁴⁵ Kim Lane Scheppele and Laurent Pech, ‘Is Article 7 Really the EU’s “Nuclear Option”?’ (*Verfassungsblog*, 6 March 2018) <<https://verfassungsblog.de/is-article-7-really-the-eus-nuclear-option/>> accessed 8 January 2021; Kochenov (n 38); Endre Orbán, ‘Article 7 TEU Is a Nuclear Bomb – With All Its Consequences?’ (2016) 57 *Hungarian Journal of Legal Studies*, 119.

⁴⁶ Scheppele and Pech (n 45).

has only very recently been used (*infra*).⁴⁷ The remedial component of Article 7(2) TEU has so far remained unused.

On 20 December 2017, the European Commission started the procedure of Article 7(1) TEU for the first time in Union history. It submitted a reasoned proposal with regard to the rule of law in Poland as a result of the Polish government's disrespect for the independence of the Polish judiciary.⁴⁸ In September 2018 the same procedure was launched against Hungary. This time, it was the European Parliament which voted a resolution calling the Council to determine the existence of a clear risk.⁴⁹ It was preceded by numerous resolutions adopted by the Parliament between March 2011 and May 2017. The resolutions all related to concerns about judicial independence, freedom of expression, corruption, rights of minorities and, relevant to this volume, the situation of migrants and refugees in Hungary.⁵⁰ Although the initiation of these procedures constituted a strong political statement, Article 7(1) TEU was essentially triggered too late, as both countries had already been violating EU values for a long time. After launching the preventive phase of Article 7, the situation in Hungary and Poland has only deteriorated further.⁵¹

6.2.3 *The Commission's Rule of Law Review Cycle*

Between infringement proceedings with insufficient scope and Article 7 procedures with almost impossible thresholds, the European Commission felt the need to develop an additional tool. On 11 March 2014 it issued the 'EU Framework to Strengthen the Rule of Law'.⁵² This allows it to engage in a

⁴⁷ Burchardt (n 37) 1.

⁴⁸ COM(2017)835: 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; Dimitry Kochenov, Laurent Pech and Kim Lane Scheppele, 'Better Late Than Never? On the European Commission's Rule of Law Framework and Its First Activation' (2017) 54 *Journal of Common Market Studies* 1062; Armin von Bogdandy and others, 'A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines' (2018) 55 *Common Market Law Review* 983, 987.

⁴⁹ 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 (2017/2131 (INL)); Burchardt (n 37) 1.

⁵⁰ 'Legislative Train 09.2020 Fundamental Rights' (2020) <www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights>.

⁵¹ 'Rule of Law in Poland and Hungary Has Worsened' (*European Parliament Press Release*, 16 January 2020).

⁵² COM(2014) 158 final; von Bogdandy and others (n 48) 987.

structured dialogue with Member States addressing and redressing ‘systemic threats’ to the rule of law, and consequently other values, in order to prevent the emergence of a clear risk of a serious breach.⁵³ The Framework is meant to be an early warning system to complement the procedures of Article 7 TEU and Articles 258–260 TFEU.⁵⁴

As a result of encouragements by the European Parliament, the Commission issued a ‘Blueprint for Action’ in July 2019.⁵⁵ In this document it set out a new instrument called ‘the Rule of Law Review Cycle’. At the same time, the Commission proposed to publish a complementary Annual Rule of Law Report to promote an ongoing dialogue on the Rule of Law in the entire Union.⁵⁶ Unlike the Rule of Law Framework, the review encompasses all Member States instead of singling one or two out. On 30 September 2020 the Commission adopted its first annual review.⁵⁷ Regrettably, it was not the gamechanger many had hoped for. The Report uses soft and euphemistic language that understates the gravity of the situations that have unfolded in both Hungary and Poland and further fails to describe and offer recommendations for persistent rule of law backsliding.⁵⁸ As expressed by Daniel Kelemen, the Report is toothless and ‘fails to recognize – even at a conceptual level – the nature of the threat to the rule of law in the EU’.⁵⁹

⁵³ Commission Communication ‘A new Framework to Strengthen the Rule of Law’ 1 COM (2014) 158.

⁵⁴ Laurent Pech and Kim Lane Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’ (2017) *Cambridge Yearbook of European Legal Studies* 3, 10.

⁵⁵ European Parliament, Resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 25 October 2016 (2015/2254(INL)); European Parliament, Resolution on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, 7 November 2018 (2018/2886(RSP)); European Commission, ‘Communication from the Commission: Strengthening the rule of law within the Union, A blueprint for action’ COM (2019) 343 final.

⁵⁶ European Commission, ‘Communication from the Commission: Strengthening the rule of law within the Union, A blueprint for action’ COM (2019) 343 final.

⁵⁷ ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report: The Rule of Law Situation in the European Union COM(2020) 580 Final’ (2020) <https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf> accessed 8 January 2021.

⁵⁸ Dan Kelemen, ‘Op-Ed: “You Can’t Fight Autocracy with Toothless Reports”’ by R. Daniel Kelemen – EU Law Live (*EU Law Live*, 9 October 2020); Daniel Hegedüs, ‘The European Commission’s Missed Rule-of-Law Opportunity’ (*The German Marshall Fund of the United States*, 1 October 2020) <https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf> accessed 8 January 2021.

⁵⁹ Kelemen (n 65).

On 7 October 2020, the European Parliament overwhelmingly voted for a Resolution on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.⁶⁰ The Resolution aims to establish a more comprehensive and inter-institutional approach to tackle the deterioration of EU values instead of the fragmented instruments that have so far proven to be insufficient. The Resolution mentions how the Commission's Annual Rule of Law Report fails to encompass democracy and fundamental rights and does not cover the full scope of Article 2 TEU.⁶¹ The new Mechanism widens the scope, streamlines several existing tools and also contains an Annual Monitoring Cycle, which now encompasses all Member States and all EU values. The Cycle is set to provide country-specific recommendations with timelines and targets linked to concrete measures by the respective powers of each of the institutions.⁶² Findings of the annual review will thus be used to assess possibilities under Article 7 TEU, general infringement actions and, once adopted, budgetary conditionality measures (see *infra*).

6.3 THE LEGAL RESILIENCE OF THE EU'S TOOLBOX IN A MIGRATION CONTEXT

6.3.1 *Infringement Actions and Article 7 TEU*

The tools discussed above can to some extent help the EU enforce its values. However, there are indisputable limitations to the legal resilience they provide vis-à-vis democratic decay or rule of law backsliding and, by extension, restrictive migration policies in the Member States.

As indicated above, a crumbling democracy and rule of law linked with present-day populism seems to have manifested itself also in the extreme limitation of migrants' rights.⁶³ Intolerance towards immigrants has become one of the symptoms in the EU's democracy crisis, in which Member States,

⁶⁰ European Parliament Resolution of 7 October 2020 on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)).

⁶¹ *Ibid.* para 4.

⁶² *Ibid.*; 'Parliament Demands a Legally Binding, Effective Mechanism to Protect EU Values | News | European Parliament' <www.europarl.europa.eu/news/en/press-room/20201002IPR88432/parliament-demands-a-legally-binding-effective-mechanism-to-protect-eu-values> accessed January 2021.

⁶³ Kim Lane Scheppele and R Daniel Kelemen, 'Defending Democracy in EU Member States beyond Article 7 TEU' in F Bignami (ed) *EU Law in Populist Times* (Cambridge University Press 2020) 413–414.

besides degenerating their democracy and rule of law standards, have adopted restrictive laws and policies towards migration and often use immigrants as the scapegoat for the societal issues on which they build their populist narratives.⁶⁴

Infringement actions present an avenue for the Commission to react to violations of EU law. But, as discussed earlier, violations of EU values (Article 2 TEU) cannot currently serve as the only ground for such action. However, violations of primary and secondary EU law on migration and the Charter of Fundamental Rights can. The Commission has previously used this as a way of showing resilience against both democratic backsliding and restrictions of migrants' rights. It has initiated various infringement procedures based on a variety of legal grounds, including the treatment of migrants in breach of EU laws on asylum procedures, return procedures, reception conditions and several provisions of the Charter of Fundamental Rights.⁶⁵

Presently, over forty infringement procedures have been initiated against Member States (mostly Hungary and Italy) for not or incorrectly applying the Common European Asylum System (CEAS).⁶⁶ Hungary, for example, has been dismantling both the rule of law and its asylum system while simultaneously restricting the right to access to its territory and asylum procedures since 2015.⁶⁷

On 30 October 2020 the Commission opened a new infringement procedure – the fifth infringement action against Hungary related to asylum since 2015 – and this case clearly shows the link between migration and the crucial issues concerning the rule of law in Hungary.⁶⁸ Under the guise of COVID-19 emergency measures, Hungary had introduced new asylum procedures that further complicate the application procedure for asylum seekers. In doing so, it de facto removed itself from the EU asylum system and gravely deteriorated

⁶⁴ Commission v. Hungary [2018] C-808/18, ECLI:EU:C:2020:493; 'Migration: Commission Steps up Infringement against Hungary Concerning Its Asylum Law' (*Press release IP 17-5023*, 2017); European Commission Press Release IP/15/6228, Commission Opens Infringement Procedure against Hungary Concerning Its Asylum Law (10 December 2015); Aleinikoff (n 4) 477.

⁶⁵ 'Migration: Commission Steps up Infringement against Hungary Concerning Its Asylum Law' (n 71).

⁶⁶ Lopez Garrido and Lopez Castillo (n 36) 19.

⁶⁷ Krisztina Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies' (2017) 13 *Politics in Central Europe* 35.

⁶⁸ 'October Infringements Package: Key Decisions – Letters of Formal Notice' (30 October 2020) <https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_1687> accessed January 2021; Astrid Lorenz and others, *Illiberal Trends and Anti-EU Politics in East Central Europe* in Astrid Lorenz and Lisa H Anders (eds) (Palgrave Macmillan, 2020) 147.

migrants' rights.⁶⁹ This misuse of emergency powers in Hungary, which has allowed the Orbán government to rule by decree, has negatively impacted the rule of law and democracy.⁷⁰ The Commission addressed a letter of formal notice to Hungary on the incorrect application of EU asylum legislation, interpreted in the light of the EU's fundamental rights.⁷¹

Another infringement action related to migration gave rise to a judgment of 2 April 2020. The CJEU ruled on three joined cases that the Commission had brought against Hungary, Poland and the Czech Republic for failing to execute their migrant relocation obligations.⁷² Although these obligations had already expired, the Court still found the Member States to be in breach of their obligations under EU law.⁷³ Unfortunately, the consequences were entirely declaratory since the obligations had lapsed.

As for infringement actions under Article 259 TFEU, the chances of a Member State initiating infringement proceedings against another Member State for alleged violations of migrants' rights seem very slim, for all the earlier mentioned reasons (see *supra*). For those reasons, this tool does not offer much solace either.

After years of launching infringement procedures on migration and indirectly on rule of law or democratic concerns, actions have mostly proven insufficient in improving migrants' rights or respect for democracy and the rule of law.⁷⁴ When Article 7(1) TEU was triggered against Hungary, one of the twelve concerns at the root of the procedure related to the fundamental rights of migrants, asylum seekers and refugees.⁷⁵ However, as indicated above, even the preventive arm of Article 7 remains a heavy tool to lift and has so far failed to lead to any improvements, neither regarding democratic backsliding, nor as to the treatment of migrants.⁷⁶

⁶⁹ 'Hungary: Closing in On Itself | European Council on Refugees and Exiles (ECRE)' <www.ecre.org/hungary-closing-in-on-itself/> accessed January 2021.

⁷⁰ Kriszta Kovács, 'Hungary's Orbánistan: A Complete Arsenal of Emergency Powers' (6 April 2020) <<https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>> accessed 8 January 2021.

⁷¹ 'October Infringements Package: Key Decisions – Letters of Formal Notice' (n 75).

⁷² C-715/17, C-718/17 and C-719/17 [2020] ECJ, ECLI:EU:C:2020:257.

⁷³ Zocia Wanat, 'Top Court Rules Warsaw, Budapest and Prague Breached EU Law over Refugees' *POLITICO* (2 April 2020).

⁷⁴ Vision Europe Summit, 'Improving the Responses to the Migration and Refugee Crisis in Europe' (2016) 23.

⁷⁵ 'REPORT 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' (2018) <www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.html>.

⁷⁶ 'Rule of Law in Poland and Hungary Has Worsened' (n 51).

The EU's tools, and how they are deployed, are far from a paragon for legal resilience and fail to weaponise the EU against authoritarian populism that impacts democratic values and threatens migrants' rights.

6.3.2 *The Implications of Infringements on the CEAS for Democracy and the Rule of Law*

The EU sees its legitimacy challenged when migrants' rights are restricted or violated contrary to its fundamental values.⁷⁷ This not only decreases trust in the Union's institutions, but also in its constitutional order, severely affecting the EU's position of promoting and enforcing respect for democracy and the rule of law.

One can wonder whether the EU itself has already considered these wider implications of negated migrants' rights on democratic and rule of law standards and its position in their enforcement in the Member States. The Commission has brought a considerable amount of infringement proceedings against Member States for violating the CEAS and migrants' rights. But despite these actions from the Commission, it is impossible to ignore some of the mixed signals the Union has sent in its policy on systemic violations of CEAS' protective norms over the years. In many ways the EU's migration policy (particularly the Dublin Regulations) has even enabled non-conforming Member States to further consolidate both their anti-migration and backsliding politics.⁷⁸

The CEAS is based on the values of solidarity and respect for human rights and aims to align asylum procedures in the different Member States. The migration crisis exposed the severe shortcomings of the CEAS. As a consequence of the crisis and these shortcomings, the focus of the EU's migration and asylum policies has shifted from solidarity and protection of migrants' rights to control and security measures to protect the outer borders of the Union and the national sovereignty of States.⁷⁹ Countries, such as Hungary and Poland, that failed or refused to comply with the CEAS have only

⁷⁷ Katri Gadd, Viljam Engström and Barbara Grabowska-Moroz, 'Democratic Legitimacy in EU Migration Policies' 21 <www.reconnect-europe.eu>.

⁷⁸ Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, 'Understanding the Crisis of Refugee Law: Legal Scholarship and the EU Asylum System' (2020) 33 *Leiden Journal of International Law* 871; Pero Maldini and Marta Takahashi, 'Refugee Crisis and the European Union: Do the Failed Migration and Asylum Policies Indicate a Political and Structural Crisis of European Integration?' (2017) 02 *Communication Management Review* 54.

⁷⁹ Maldini and Takahashi (n 85) 59.

benefitted from their non-compliance.⁸⁰ Their burden was shifted to other Member States, disrupting the idea of solidarity altogether and further delegitimising EU policies and institutions in the meantime. The abandonment among certain Member States of the CEAS and the principles of solidarity has inevitably impacted on democratic and rule of law backsliding.

Another example of a mixed signal is the infamous EU Turkey Declaration, through which the EU chose to cooperate with Turkey, a country with a poor human rights record, only because the intended outcome of the deal was beneficial for both the EU's external and internal migration policies. Since both policies had failed to contain the migration crisis within the borders of the EU, the Union now prioritised external border control over migrants' rights protection.⁸¹

Whether the EU itself perceives the infringements on migrants' rights as a direct threat to the rule of law and democracy is therefore not entirely clear. Migration was one of the twelve concerns on which the European Parliament triggered the Article 7 TEU procedure against Hungary (see *supra*) and CEAS violations are not ignored in infringement actions,⁸² but an explicit consideration of the implications of national restrictions of migrants' rights on democracy and the rule of law does not seem to be present.

6.4 SUGGESTIONS DE LEGE LATA AND DE LEGE FERENDA

Rule of law and democracy serve as a basis for all the other fundamental values of the Union. The EU's ability to uphold these two values in its Member States is therefore essential. Particularly in the context of guaranteeing migrants' rights, it is of great importance that central elements of the rule of law, like the independence of the judiciary and the equal application of the law, can be maintained. This applies especially when all Member States have to be able to trust each other's judiciaries in order to apply EU law correctly in the light of the Dublin Regulations and, more generally, the Area of Freedom, Security and Justice.⁸³

⁸⁰ *Ibid.*, 61–63.

⁸¹ Gadd, Engström and Grabowska-Moroz (n 84) 23.

⁸² Julia Schmälder, 'A European Response to Non-Compliance: The Commission's Enforcement Efforts and the Common European Asylum System' (2018) 41 *West European Politics* 1330, 1348.

⁸³ Scheppele and Kelemen (n 70); Giulia Vicini, 'The Dublin Regulation Between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust?' (2015) 8 *European Journal of Legal Studies* 50.

The current tools and their usage by the EU institutions are unable to discipline Member States violating the Union's values. Article 7(1) TEU is what many have already called 'a bark without a bite', which Member States are free to ignore since they know sanctions under Article 7(2) TEU will be unlikely to follow due to the unanimity requirement.⁸⁴ In utopian circumstances, an effective Treaty change could entail a lowering of the voting requirements in Article 7 TEU or introducing sanctions under Article 7 that go beyond merely political punishments, such as monetary sanctions.⁸⁵ None of these scenarios are realistic. Since the EU's fundamental values are crucial for the proper functioning of the Union itself and mutual trust between Member States, the enforcement of Article 2 TEU cannot be left to the workings of one political mechanism alone.

6.4.1 *Effective Usage of the Tools at Hand*

To date, many suggestions have been made to expand the EU's toolbox. But options are limited. As Treaty change requires unanimous consent from all Member States and will thus not lead to any solutions in the near future, it seems preferable to use more effectively the tools that are already available to ensure adherence to the values of the EU.

As pointed out by Kim Lane Scheppele, the Commission should make better use of infringement actions by trying to bring a pattern of non-compliance to the attention of the CJEU.⁸⁶ Although infringement actions directly based on Article 2 TEU might still be considered a pipe dream, the CJEU seems to warm up to this possibility by using Article 19(1) TEU as a bypass.⁸⁷ Systemic infringements can also be tackled in combination with Article 4(3) TEU, which lays down the principle of sincere cooperation for Member States, and by invoking violations of the Charter of Fundamental Rights.⁸⁸ Strengthening the resilience of the Union's fundamental values

⁸⁴ Scheppele and Kelemen (n 70); Besselink (n 35).

⁸⁵ Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 512, 526.

⁸⁶ Scheppele (n 10); Oliver Mader, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law* (Springer International Publishing 2019) 159.

⁸⁷ The Court has already accepted this in two important cases: *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* [2018] C-64/16, ECLI:EU: C:2018:117; *Celmer* [2018] C-216/18 PPU, ECLI:EU:C:2018:586.

⁸⁸ The Commission has already applied this method (see, for example, European Commission Press Release IP/17/5023, Migration: Commission Steps Up Infringement against Hungary Concerning Its Asylum Law (7 December 2017); Scheppele and Kelemen (n 70) 438.

against autocratic Member State governments largely depends on the political will of the Commission to act more creatively and timely within the boundaries of infringement actions as set out by the TFEU and the CJEU in its case law.⁸⁹

However, time sides with those who aim to deconstruct democracy and the rule of law, and so far the EU has not been able to keep up. Accelerated action alone could already make a difference in avoiding the further decline of these core values.⁹⁰ Not only infringement actions but also Article 7 TEU should be triggered much more quickly. Additionally, Article 7(1) TEU should only be used in cases where the risk has not (yet) developed into a breach. Otherwise, it will only waste time before any meaningful action can be taken. The EU institutions should be able to call a spade a spade and immediately revert to the use of Article 7(2) TEU when a Member State has breached fundamental values.⁹¹

6.4.2 *Hitting Them Where It Hurts*

The biggest flaw in the EU's enforcement apparatus – or at least in the way the EU deploys it – has to do with the funding of Member States that are no longer committed to complying with the Union's fundamental values. Among the Member States that currently breach democratic standards most seriously are some of the largest beneficiaries of EU funds.⁹² As other sanctions leave autocratic regimes unimpressed, the Union should – if it wants to challenge democratic backsliding successfully – withhold funds from those unwilling to align with its fundamental values.

Making EU funds conditional on value compliance should be a concrete measure of enforcement when serious deficiencies to the rule of law or democracy occur in a Member State. In 2018, the Commission made a first proposal for a regulation to this end as part of a package of proposals on the multiannual financial framework (MFF) for the years 2021 to 2027.⁹³ The

⁸⁹ *Ibid.*, 447–452.

⁹⁰ Laurent Pech and Dimitry Kochenov, 'RECONNECT Policy Brief – Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (2019).

⁹¹ *Ibid.*

⁹² 'European Commission: European Structural and Investment Funds 2014–2020: Official Texts and Commentaries' <https://ec.europa.eu/regional_policy/sources/docgener/guides/blue_book/blueguide_en.pdf> accessed 9 January 2021.

⁹³ 'Proposal for a Regulation of the European Parliament and of the Council on the Protection For the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States 2018/0136 (COD) COM(2018) 324 Final' (2018).

Regulation was eventually adopted on 16 December 2020 after multiple concessions regarding the rule of law conditionality scheme at the European Council of 10–11 December 2020 (see *infra*).⁹⁴ However, it has been submitted that the EU already had the possibility to link the allocation of funds to compliance with the rule of law under the Common Provision Regulation (CPR), which regulates the administration of European Structural and Investment Funds (ESIFs).⁹⁵ Article 142(a) of the CPR allows the Commission to withhold ESIFs where a Member States does not respect the rule of law.⁹⁶ The article provides that the procedure occurs in private dialogue with the Member States, which means that the Commission may already be doing this behind the scenes.⁹⁷ But, as pointed out by Kim Lane Scheppele and Daniel Kelemen, the question arises how useful a secret dialogue can be in deterring other Member States from going down the same path.⁹⁸ To effectively suspend the flow of funds and affect rule of law violations, the Commission will again have to show political will and leadership.

An important development in rule of law conditionality to funding happened at the European Council Summit that was held from 17 to 21 July 2020, to discuss the EU's economic response to the COVID-19 pandemic and the Multiannual Financial Framework for 2021–2027 (MFF). What stands out about the European Council Conclusions of 21 July 2020 is that they contain language that ties the distribution of resources to compliance with the rule of law in order to protect these funds from the effects of backsliding (such as corruption):⁹⁹ 'a regime of conditionality to protect the budget and Next

⁹⁴ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020, L433/I.

⁹⁵ Scheppele and Kelemen (n 70) 442; Pech and Kochenov (n 97) 2.

⁹⁶ European Parliament and Council Regulation (EU) No 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006; Scheppele and Kelemen (n 78) 442; Israel Butler, 'Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework' (*Civil Liberties Union for Europe*, March 2018) 11–12 <<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>>.

⁹⁷ 'EU Funds Worth \$1.8 Billion at Risk for Hungary Due to Irregularities: Report | Reuters' <www.reuters.com/article/us-eu-hungary-budget/eu-funds-worth-18-billion-at-risk-for-hungary-due-to-irregularities-report-idUSKCN1M521H>.

⁹⁸ Scheppele and Kelemen (n 70) 443.

⁹⁹ 'Special Meeting of the European Council (17–21 July 2020)' – Conclusions EUCO 10/20 CO EUR 8 CONCL 4.

Generation EU will be introduced. In this context, the Commission will propose measures, in case of a breach, for adoption by the Council by a qualified majority'.¹⁰⁰

On 30 September 2020, the Council shared its position on the proposal for the MFF legislation that was put forward by the Commission in 2018.¹⁰¹ The Commission's proposal included reversed qualified majority voting, meaning that the majority of the Council would have to oppose the adoption of sanctions in order for them to be rejected.¹⁰² The Council's proposal reversed the voting once again, which means that a qualified majority is now needed to adopt measures against a Member State. This raises the bar, as most Member States have been reluctant to openly target a colleague Member State in the past.¹⁰³ The Council's proposal faced considerable contention because of this change in voting system, but also because it introduced a 'brake' system which would allow the targeted Member State to call on the Council and stall the procedure. Many members considered the proposal a 'watered down version of what was agreed in July'.¹⁰⁴

On 10 November 2020, the European Parliament and the Council, with the support of the Commission, reached an agreement on the EU's next long-term budget (MFF) and the Next Generation EU recovery fund.¹⁰⁵ The package includes the above-mentioned rule of law mechanism, which does not need unanimity to be adopted as law. However, the full package needed

¹⁰⁰ Ibid.

¹⁰¹ 'Multiannual Financial Framework and Recovery Package: Council Agrees Mandate for Negotiations with Parliament on the Regulation for the Protection of the EU Budget – Consilium' <www.consilium.europa.eu/en/press/press-releases/2020/09/30/multiannual-financial-framework-and-recovery-package-council-agrees-mandate-for-negotiations-with-parliament-on-the-regulation-for-the-protection-of-the-eu-budget/>.

¹⁰² 'Proposal for a Regulation of the European Parliament and of the Council on the Protection For the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States 2018/0136 (COD) COM(2018) 324 Final' (n 100).

¹⁰³ Jakub Jaraczewski, 'EU Budget Conditionality: Is the Rule of Law Being Sold Short? | Democracy Reporting International' <<https://democracy-reporting.org/eu-budget-conditionality-is-the-rule-of-law-being-sold-short/>>.

¹⁰⁴ Sam Fleming and Mehreen Khan, 'EU at Loggerheads over Linking Budget Payments to Rule of Law' *Financial Times* (28 September 2020).

¹⁰⁵ European Commission, 'EU'S Next Long-Term Budget & NextGenerationEU: Key Facts and Figures' <https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/mff_factsheet_agreement_en_web_20.11.pdf> accessed 24 November 2020; 'Compromise on Long-Term EU Budget: EP Obtains €16 Billion More for Key Programmes | News | European Parliament' <www.europarl.europa.eu/news/en/press-room/20201106IPR91014/>; 'European Parliament Legislative Resolution of 16 December 2020 on the Draft Council Regulation Laying down the Multiannual Financial Framework for the Years 2021 to 2027' (0909/2020 – C9-0409/2020 – 2018/0166(APP)).

unanimous support from all the Member States, and unsurprisingly this is where the shoe pinched.¹⁰⁶ Hungary and Poland retaliated against the rule of law conditionality scheme by vetoing the entire budgetary process. Orbán defended his veto by stating that the scheme only aims to target countries that reject migration: ‘[T]hey only view countries which let migrants in as those governed by the rule of law. Those who protect their borders cannot qualify as countries where rule of law prevails’.¹⁰⁷ Cynically, the statement once again illustrates how respect for the rule of law and the treatment of migrants are interlinked. The Slovenian Prime Minister Janez Janša supported the opposition of the two Member States by exclaiming that ‘[s]ome political groups in the European Parliament are openly threatening to use the instrument wrongly called “the rule of law” in order to discipline individual EU member states through a majority vote’.¹⁰⁸ The German Presidency led the negotiations that ended the deadlock, with various countries, in need of the recovery fund, being held hostage for ten weeks.¹⁰⁹ In its meeting of 10–11 December 2020, the European Council managed to seal a deal on the EU’s budget and Recovery Fund.¹¹⁰ The rule of law conditionality scheme is still included, but various concessions have been made to the advantage of Hungary and Poland. This includes *inter alia* that (i) the Commission intends to develop guidelines on the way it will apply the Regulation in close consultation with the Member States, (ii) these guidelines will only be finalised after the CJEU renders its judgment should an action for annulment be introduced with regard to the Regulation, and that (iii) until the finalisation of the guidelines, the Commission will not propose measures under the Regulation.¹¹¹ As a result, the implementation of the Regulation could be pushed back for a number of years and might possibly be delayed until after the Hungarian

¹⁰⁶ ‘Shallow Self-Interest Shapes the EU Rule of Law Showdown’ *Financial Times* (22 November 2020).

¹⁰⁷ ‘Morawiecki and Orbán Step up Attacks on EU over Rule of Law Debate on Eve of Summit’ *Euronews* (19 November 2020).

¹⁰⁸ ‘Slovenia PM Backs Hungary, Poland in EU Rule of Law Row’ *EURACTIV* (18 November 2020).

¹⁰⁹ Jorge Valero, ‘Commission Considers Options for Recovery Fund without Hungary and Poland’ *EURACTIV* (2 December 2020).

¹¹⁰ ‘Long-Term EU Budget 2021–2027 and Recovery Package’ <www.consilium.europa.eu/en/policies/the-eu-budget/long-term-eu-budget-2021-2027/>.

¹¹¹ www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf, 1–2; See also Alberto Alemanno and Merijn Chamon, ‘To Save the Rule of Law You Must Apparently Break It’ <<https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/>>; Aleksejs Dimitrovs, ‘Op-Ed: “Rule of Law-Conditionality as Interpreted by EU Leaders”’ (2020) EU Law Live <<https://eulawlive.com/op-ed-rule-of-law-conditionality-as-interpreted-by-eu-leaders-by-aleksejs-dimitrovs/>>.

elections of 2022.¹¹² Furthermore, the mechanism will only apply to the 2021–2027 budget, exempting all future projects that will be realised under the previous budgetary framework.¹¹³

6.5 CONCLUSION

Multiple tools offer avenues for the EU to address democratic backsliding and the subsequent restrictive effect on migrants' rights in the Member States. But given how these tools are constructed and how the institutions make very limited use of them, they turn out to be insufficient in providing legal resilience against this phenomenon. We have discussed the legal proceedings provided for by Articles 258–260 TFEU, the political procedures of Article 7 TEU and the soft law instruments that were introduced by the Commission to contain the value crisis that continues to develop throughout the Union. All of these options show significant shortcomings that, cynically enough, seem to have benefitted authoritarian governments in Member States.

EU institutions have long reacted too haltingly to serious rule of law and democratic concerns, which has enabled certain governments to excessively restrict migrants' rights in the meantime. While the Von der Leyen Commission has committed to introduce new initiatives to strengthen democracy and respect for the rule of law in the Union and no longer tolerate shortcomings in this regard, it remains to be seen how successful its initiatives will be.

This chapter has shown that the new initiatives already face quite some challenges and that further political will and engagement will be needed to enhance the democratic functioning of the Union and uphold respect for its fundamental values. The damage caused by backsliding Member States is substantial and the EU will have to act upfront if it wants to avoid further deterioration. In our suggestions we first of all proposed that the EU makes better use of the tools that are available. Second, we proposed to sanction rogue Member States by tying EU funding to rule of law compliance. However, while in December 2020 a rule of law conditionality mechanism was adopted in relation to EU funds, its practicality and effectiveness have been attenuated considerably under the pressure of obstinate Member States.

¹¹² Jorge Valero, 'EU Leaders to Decide on Compromise to Unblock EU Budget Package' *EURACTIV* (10 December 2020); Lili Bayer, 'EU Budget Plan Lets Hungary, Poland off the Rule-of-Law Hook (for Now)' *POLITICO* (9 December 2020).

¹¹³ Lili Bayer, 'EU Leaders Back Deal to End Budget Blockade by Hungary and Poland' *POLITICO* (10 December 2020).