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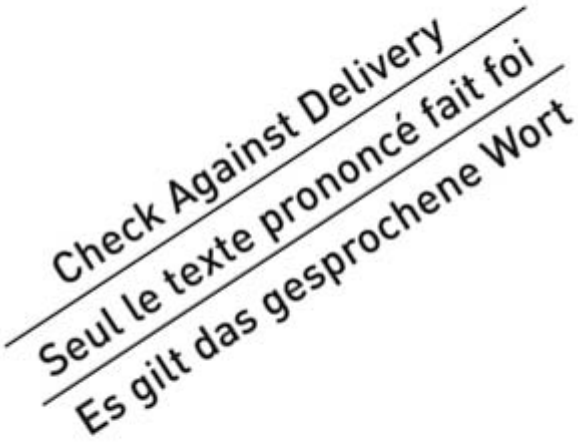
The EU and the Rule of Law – What next?



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1. MAIN MESSAGES

The Union is a unique construction, as it is not bound together by force, by a common army or a common police force, but only by the strength of the rule of law - a **"Community based on the rule of law" where all Member States need to be concerned if there are any deficiencies in the independence, efficiency or quality of the justice system in another Member State**.

In parallel to the economic and financial crisis, we also have been confronted on several occasions with a true "rule of law" crisis. They included notably the **Roma crisis in France** in summer 2010; the **Hungarian crisis** that started at the end of 2011; and the **Romanian rule of law crisis** in the summer of 2012.

In all these cases, **the Commission intervened** after reflection and sometimes intense internal discussions, partly with strong words, sometimes with letters, and sometimes with Treaty infringement proceedings. We have **always acted on the basis of the competences given to us by the Treaties and secondary EU legislation** adopted under the Treaties, be they the EU's free movement directive in the case of France, our antidiscrimination legislation in the case of Hungary or the specific powers under the Cooperation and Verification Mechanism in the case of Romania.

What should the guiding principles of a future rule of law mechanism be?

- **First,** it should be **legitimate:** Because the worst result of a new rule of law mechanism would be if it leaves the Commission institutionally damaged, and thus eliminates the only institution currently generally accepted as being able to deal with a rule of law crises.
- **Second,** we need to **draw on the necessary expertise** to back up the Commission's action on the rule of law. The EU Justice Scoreboard adopted by the Commission earlier this year, is a first tool to provide comparative data assessing the quality, independence and efficiency of national justice systems. It could become the basis for a more comprehensive tool in the future.
- **Third,** when upholding the rule of law, we need to ensure the **equality of Member States.** Any new tool to safeguard the rule of law has to be applicable and in the same way – on the same threshold of a serious and systematic threat to the rule of law - to all Member States, big or small, North or South, East or West.

The Way Ahead: I see the best way forward as a two-step approach.

- The **first step** would be to **exploit the potential offered already by the existing Treaties**, in order to develop an improved mechanism for handling a future rule of law crisis. I believe we could take a similar approach for Article 7 procedures as in Commission infringement proceedings, by giving "formal notice" to a Member State where we have reason to believe that a systemic rule of law crisis is on the way to developing.
- **A second step** could be to anchor a strong basis for a more far-reaching rule of law mechanism, which would include more detailed monitoring and sanctioning powers for the Commission, **in an amendment of the Treaty**. I could imagine that we present several options for such a mechanism: more pragmatic ones, as well as more ambitious ones, such as lowering the very high thresholds for triggering at least the first stage of the Article 7 procedure; extending the powers of the Fundamental Rights Agency, or abolishing Article 51 of the our Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States.

I believe we should be **at least as ambitious** when it comes to the rule of law and fundamental rights **as** the European Union currently is **with building up new financial solidarity mechanisms, common fiscal rules and Banking Union**. Because while banks and budgets are certainly very important for our economy, Europe is much more than banks and budgets.

2. FULL SPEECH

Ladies and gentlemen,

I welcome the opportunity provided by today's event at CEPS to discuss the important subject of the rule of law. The timing of this discussion is well chosen. As you know, the College of the European Commission last week, on the initiative of President Barroso, dedicated a seminar to the rule of law and reflected upon the development of a new rule of law mechanism for the European Union. You can also expect President Barroso to return to this subject in his speech on the State of the Union before the European Parliament next week.

My intervention on the rule of law today will be divided in four parts:

- First: What is the meaning of the rule of law and why is it of specific importance for the European Union?
- Second: Why is the rule of law on the European Union's strategic policy agenda today? Why are we talking about a future rule of law mechanism these days?
- Third: What should the guiding principles of such a future rule of law mechanism be?
- Fourth: What are the policy options for the European Commission when it comes to the rule of law?

1. What is the meaning of the rule of law and why is it of specific importance for the European Union?

The rule of law is the backbone of modern democratic, pluralist societies and constitutional democracies. It is one of the main values on which the European Union is founded, as Article 2 of the Treaty on European Union and the Preamble to the Treaty recall. Respect for the rule of law is in many ways a prerequisite for the protection of all other fundamental values listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties.

It is true: the exact meaning of the rule of law differs from Member State to Member State. What English constitutional lawyers call "the rule of law" is called "l'état de droit" in France and "Rechtsstaatsprinzip" in Germany.

It is interesting to note that for the French and German constitutional doctrine, there appears to be a strong connection between the rule of law and the state.

This has led to some terminological difficulties when the rule of law was incorporated into the European Union's legal system. Can one really apply a principle developed for nation states in the context of the European Union, with its *sui generis* institutional system? The French and German versions of the Treaty have answered this important question in the affirmative. This is why we find the words "*Etat* de droit" and ""Rechts*staat*lichkeit" in the French and German versions of Article 2 of the Treaty on European Union.

This can lead us to two observations. First: when it comes to the rule of law, the Union visibly wants to live up to a principle which has traditionally been reserved to nation states.

A second observation is that the principle of the rule of law in the Union's context is obviously meant to apply not only to the Union itself, but also to its component parts, to the Member States themselves. This is why the rule of law is very rightly also a pre-condition for EU Membership, one of the famous "Copenhagen criteria", as underlined by Article 49 of the TEU, which refers to Article 2.

If I try to digest some essential characteristics of the rule of law principle, as they are common to our Member States, I would say the following:

By "rule of law", we mean **a system where laws are applied and enforced** (so not only "black letter law") but also the spirit of the law and **fundamental rights**, which are the ultimate foundation of all laws.

The rule of law means **a** system in which no one – no government, no public official, no dominant company – is above the law; it means **equality before the law**.

The rule of law also means **fairness and due process**.

It means guarantees that laws cannot be abused for alien purposes, or retrospectively changed.

The rule of law means that justice is upheld by an **independent judiciary**, acting impartially.

It means ultimately **a system where justice *is not only done, but it is seen to be done***, so that the system can be trusted by all citizens to deliver justice.

For the European Union, the rule of law is of particular importance. The Union is a unique construction, as it is not bound together by force, by a common army or a common police force, but only by the strength of the rule of law. Very rightly, Walter Hallstein, the Commission's first President, called the European Community a **"Community based on the rule of law"**, "Rechtsgemeinschaft" in German, "Communauté de droit" in French.

The Court of Justice has picked up on Walter Hallstein's famous dictum in the famous ruling "*Les Verts*" in 1986. This case had been triggered by the Greens' question of whether it was possible under the Treaties to sue the European Parliament, as an institution, in the Court of Justice for an alleged illegal action even though the Parliament was at the time not mentioned by the text of the Treaty as one of the possible defendants in an action for annulment. The Court of Justice therefore had to go beyond the letter of the law to find an answer in the main principles on which our Union is founded.

This is what the Court said in 1986:

"*"[T]he European Economic Community is a Community based on the rule of law, inasmuch as neither the Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."*

Essentially, this says: Both the Union institutions and the Member States are subject to the laws, rules and principles which have been agreed to in the Treaties. And these laws, rules and principles are not just idle words, but a basic constitutional charter which can be effectively enforced, by means of judicial review and by independent courts.

In the case *Les Verts,* as the Treaty at the time had given the European Parliament the right to take certain decisions – even if it was only to grant or to refuse reimbursements for the cost of an election campaign – the compliance of this decision with the Treaties must therefore be able to be legally assessed by means of effective judicial review.

In the case in question, the Treaties did not provide for central judicial review by the Court of Justice. The Court of Justice therefore decided that judicial review must be available at the decentralised level of the Union, namely in the national courts.

The decision in the case *Les Verts* made clear that in the European Union, the rule of law is not only upheld by the Court of Justice in Luxembourg, but also by national courts, which in such cases become **decentralised "Union courts"**.

This is very important to underline. Because it leads to an important conclusion for the rule of law. In the European Union, the rule of law is not only preserved centrally, by the EU institutions and the Court of Justice. It is a duty of each national legal system to uphold the Treaties, to defend the rights granted under the EU Treaties.

This means that **the proper functioning of national court systems, the independence of national courts, their efficiency and quality, is essential for the proper functioning of the whole European Union** – which is why *all* Member States need to be concerned if there are any deficiencies in the independence, efficiency or quality of the justice system in another Member State. In our Union, these rule of law matters are thus no longer a "domaine reservé" for each Member State, but are of common European interest.

The legal obligation of national courts of last instance to refer questions of EU law for a final settlement to the Court of Justice in Luxembourg – foreseen in Article 267, subparagraph 3 of the Treaty on the Functioning of the European Union – completes the system of remedies available under the Treaties. If all national courts observe this obligation faithfully, lacunae in the system of remedies foreseen by the Treaties should not arise.

With the Treaties of Maastricht, Amsterdam, Nice and Lisbon, the importance of compliance with the rule of law in all Member States has become even more important for the Union. The reason is the introduction, by the Maastricht Treaty, of an evolving common policy in the field of justice and home affairs, a field which at the time was called the "third pillar" of the Union. "Third pillar" rules and decisions have led to an **increasing integration of our European judicial instruments and systems**. Today, a judgement in civil and commercial matters of a court in Spain or in Romania must be automatically recognised and enforced here in Belgium, without a Belgian court being able to question the decision of the German court. And a European Arrest Warrant against an alleged criminal issued in Germany or France must be executed as such in Finland or in Croatia, even if it concerns nationals of these countries.

These are the rules of the game in Europe, agreed by all Member States in the Treaties and in laws and decisions adopted under these Treaties. This is why the Treaty says that **Europe is not only an internal market or an economic and monetary union, but also offers its citizens a European area of freedom, security and justice**.

This is a very big step for many of our Member States and many of our citizens. It is also a process which is far from being completed. To be successful, it requires the confidence of all of our citizens and national authorities in the legal systems of all other Member States. This confidence will only be given and maintained if we can be sure that the rule of law is observed fully in all Member States. The need for this confidence is thus a further reason why the rule of law is of such great importance for the European Union.

2. Why is the rule of law on the European Union's strategic policy agenda today?

Few pay attention to the rule of law in normal times, when all functions well. The testing moment for the rule of law always comes in times of crisis. This is why it is perhaps understandable that in parallel to the economic and financial crisis which the European Union and its Member States have lived through since 2009, we also have been confronted on several occasions with a true "rule of law" crisis.

President Barroso recalled these crisis events we have witnessed during the past years at our Commission seminar last week. These were not small, isolated incidents or illegalities, as happen from time to time in our Member States and across the world, but matters that quickly took a systemic dimension and revealed systemic rule of law problems.

They included notably the **Roma crisis in France** in summer 2010, when the rights of the people belonging to an important minority were at stake; the **Hungarian crisis** from the end of 2011, where we were mostly concerned about the **independence of the judiciary**; and **the Romanian rule of law crisis** in the summer of 2012, where non-respect of constitutional court judgements threatened to undermine the rule of law.

In all these cases, lawyers and judges, non-governmental organisations, Foreign Ministers, International Organisations and notably the European Parliament turned to the European Commission, looking to us for a way out of the crisis.

In all these cases, the Commission intervened after reflection and sometimes intense internal discussions, partly with strong words, sometimes with letters, and sometimes with Treaty infringement proceedings, based on the political and legal authority of this institution as guardian of the Treaties.

I know well that we have not satisfied everybody with our actions. It is also not the Commission's role to satisfy everybody. But measured against the background of the role and duty the Commission has been given so far by the Treaties, I consider that the Commission has been rather successful in dealing with these often very difficult and complex cases.

Free movement legislation has been changed in France and in other Member States, thanks to our intervention, and brought in line with EU law.

All EU institutions and all Member States have agreed to a European Framework for national Roma integration strategies, which is an important step forward for improving the situation of Roma in Europe, even though we all know that there is still a long and challenging road ahead for many Member States in this field, and we must not relent in our action and resolve.

After many exchanges, Hungary has respected the legal views of the Commission and has brought its constitution back in line with EU law with regard to all the points raised by the Commission. Hungary has respected – as the rule of law requires – the judgement of the Court of Justice of November last year which confirmed the Commission's view that the anticipated mandatory retirement of 10% of the Hungarian judiciary was not in line with EU law. President Barroso and I were intensely involved in bringing all these matters to a satisfying conclusion from a legal perspective.

The same holds true for Romania where the intervention of the Commission helped to restore the authority of the constitutional court and to bring the constitutional conflict to an end, after many exchanges and public controversy.

The experience of these situations has been very instructive. It has highlighted the strength of the EU institutions, but also a number of shortcomings in the tools available to remedy a true rule of law crisis. It is thus now the time to draw the lessons from these experiences.

President Barroso, in his State of the Union address last September, already drew attention to the importance of the rule of law for the European Union, but also to the limits of the existing institutional arrangements for safeguarding the rule of law. He pointed to **the need for a better developed set of instruments that would fill the space that exists at present between the Commission's infringement role as guardian of the Treaties, and the Article 7 procedure**, which is very heavy to handle as it requires, in the end, unanimity in the European Council and the consent of a two-thirds majority in the European Parliament, representing at least a majority of its members. All this makes the procedure in practice almost impossible to use.

President Barroso also underlined in his speech last year that we want to move to a stronger Political Union. And he stressed that a Political Union first of all means strengthening the foundations on which our Union is built.

I myself have said in July 2012 that we have to make sure that our European area of freedom, security and justice does not remain similarly incomplete as was our Economic and Monetary Union, which led to the crisis we have experienced over the past years. I said at the time that we should not only think about a European Finance Minister for Europe's medium-term future, but perhaps also about a European Justice Minister.[1]

The Commission's reflections and proposals have been accompanied by a very rich discussion in academic circles and in think tanks, but also across all EU institutions and many Member States.

The European Parliament adopted the report of MEP Tavares in July, in which it developed many interesting ideas for strengthening the rule of law, and I welcome the level of ambition shown by the Parliament.

In the Council of Ministers, the Irish Presidency focussed attention on the subject of the rule of law, both in the General Affairs Council and the Justice Council. The Council also had a first discussion on how to strengthen respect for the rule of law in the light of ideas expressed in a joint letter of four foreign ministers from Germany, the Netherlands, Denmark and Finland.

You will also recall that eleven Foreign Ministers, on the initiative of Germany's Foreign Minister Westerwelle, debated in the so-called "Future of Europe" group about the next steps in European integration. They included in their final report, adopted in September 2012, the following paragraph on the rule of law: *"[A] new, light mechanism should be introduced*
enabling the Commission to draw up a report in the case of concrete evidence of violations of the values under Article 2 of the TEU and to make recommendations or refer the matter to the Council. It should only be triggered by an apparent breach in a member state of fundamental values or principles, like the rule of law."

President Barroso and I do of course welcome the emerging consensus on the need for a future rule of law mechanism as an important and integral part of the EU's development to a more closely integrated political union.

[1] "Wir brauchen einen EU-Justizminister", Interview with Frankfurter Allgemeine Zeitung of 19 July 2012.

It is also interesting to see that both Parliament and the Member States place a lot of faith in the quasi-judicial authority of the Commission as independent guardian of the Treaties.

Where such a strong consensus emerges, it normally means we are close to a further breakthrough in European integration, and we should in my view seize this occasion now.

3. What should the guiding principles of a future rule of law mechanism be?

It will of course be for President Barroso's speech next week to lay out the design of the new rule of law mechanism. However, let me already today explain a number of principles which are guiding the Commission's work on the future mechanism – principles which are based on experiences made and lessons learnt in the rule of law crises over the past years. I personally have identified four such principles, which I also shared with the College of Commissioners last week.

The first principle to be observed is the legitimacy of any future rule of law mechanism. The French, Hungarian and Romanian cases illustrate particularly well the great care that the Commission has taken to be seen to be always acting legitimately. We have always acted on the basis of the competences given to us by the Treaties and secondary EU legislation adopted under the Treaties, be they the EU's free movement directive in the case of France, our anti-discrimination legislation in the case of Hungary or the specific powers under the Cooperation and Verification Mechanism in the case of Romania. We have also always acted as independent arbiters, avoiding any partisan intervention as called for either from the left or from the right side of the Parliament. *"Lady justice is blind"*, is a sentence which President Barroso and I had to repeat regularly over the past years. It therefore cannot matter whether the rule of law is violated by a conservative, socialist or liberal government.

However, asking serious questions about the proper functioning of the rule of law in one of our Member States goes to the very heart of national sovereignty. If the Commission is to have stronger powers to intervene and criticise or even sanction national actions under the heading "violation of the rule of law", we therefore need enhanced legitimacy.

We have such legitimacy when we launch infringement proceedings – because Member States have decided to make the Commission the independent guardian of the Treaties they have signed and ratified. But does that legitimacy extend to the power to intervene in broader issues such as the rule of law?

Even when acting as guardian of the Treaties, and having won the case before the Court of Justice, I saw myself personally condemned by a two thirds majority in the Hungarian Parliament. Feelings run high in such cases. I therefore believe that we need our legitimacy basis to be properly recognised and possibly reinforced if the Commission is entrusted with an enhanced or new monitoring, supervision and enforcement role which goes with what we have been doing so far on the basis of the Treaties.

European Council conclusions and European Parliament resolutions endorsing with very broad majorities a new rule of law mechanism are therefore from my perspective the absolute minimum required if we want to go further.

Because the worst result of a new rule of law mechanism would be if it leaves the Commission institutionally damaged, and thus eliminates the only institution currently generally accepted as being able to deal with a rule of law crisis.

We know well from the field of economic governance how quick some Heads of State or Government are to condemn the "dictates from Brussels". We can only continue our work in such conflictual situations if we are able to remind Heads of State or Government that they themselves have agreed to give us this role.

My second principle is the need to draw on the necessary expertise to back up the Commission's action on the rule of law. I can only stress again and again how important this is. While all agreeing on the principle of the rule of law, each Member State has its own constitutional arrangements, its own traditions and safeguards as to how to ensure that the rule of law is upheld in detail. A deep comparative knowledge of these systems is required to be able to pass judgment on what lies outside constitutional norms on the rule of law.

We are not yet the United States of Europe! Unlike the U.S., the Commission does not have a Department of Justice, 200 years old, with more than 116 000 officials and lawyers in-house with the experience of having fought through the Civil Rights legislation. The Commission has a young and small DG Justice, just 4 years old and with barely 250 officials, most of them kept very busy with implementing the legislative agenda laid down in the Stockholm Programme. DG Justice has made enormous progress in developing its comparative expertise, for example, on sound, efficient and independent legal systems.

The result of this work, done in close cooperation with the Council of Europe, has been the **EU Justice Scoreboard** adopted by the Commission earlier this year, which is a first tool to provide comparative data assessing the quality, independence and efficiency of national justice systems. This could become the basis for a more comprehensive tool in the future. The Commission can also turn to the national judicial and European networks with which it works closely to help it in its work; and we can ask for support from the Fundamental Rights Agency, even though the Agency currently has only been given a rather limited mandate by the EU legislator, which I find regrettable.

My third principle is that we need, when upholding the rule of law, to ensure the equality of Member States. This is a legal principle firmly anchored in Article 4(2) TEU. It is part of the soul of the European Union. That means recognising that there can be no double standards. I give you an example: you certainly have noted that when a journalist is put under pressure in one of our Eastern Member States, Foreign Ministers from Germany, Britain, France, Sweden and Finland get very excited and ask the Commission to intervene. The European Parliament immediately calls for a plenary debate and tables a motion for a resolution condemning this incident. But we received not a single call from all these Foreign Ministers and all these Parliamentarians when Mr Miranda was arrested at the airport in London three weeks ago. Or when the Guardian had to destroy certain evidence on request of the British government.

As European Commission, we have to pay attention (when called upon to act) not to fall into the trap of a certain "anti-Eastern" bias in some of the current rule of law discussions.

I conclude from this that any new tool to safeguard the rule of law has to be applicable in the same way – on the same threshold of a serious and systematic threat to the rule of law - to all Member States, big or small, North or South, East or West. Otherwise we would violate the very first principle of the rule of law: the principle of equality before the law.

My fourth and last guiding principle is that any rule of law mechanism needs to properly accommodate the special role and complementary work on the rule of law undertaken by the Council of Europe. The Council of Europe has developed its own capability for monitoring the rule of law in particular through the expertise and valuable work carried out by the Venice Commission. The Commission has benefitted from the support and expertise of the Council of Europe during the rule of law crises in Hungary and Romania, and we have also based our Justice Scoreboard on input gathered by Council of Europe experts. There is good reason to continue this close cooperation in the future.

4. What next? The Commission's policy options

There are various options for the way ahead. On the basis of the principles set out before, I see the best way forward as a two-step approach.

The first step would be to exploit the potential offered already by the existing Treaties, in order to develop an improved mechanism for handling a future rule of law crisis. I see that there is still some scope to go further under the current Treaties and to consolidate the lessons learned under this Commission, including in relation to the use of the Cooperation and Verification Mechanism.

I see scope for developing a process to effectively address a rule of law crisis at an early stage, upstream of the launching of any formal procedures under Article 7. The wording of Article 7(1) TEU suggests that such a process is possible, as it gives the Commission the right to issue a **"reasoned proposal"** at the start of an Article 7 procedure. "Reasoned proposal" – this can remind us of the "reasoned opinion" that the Commission issues in Treaty infringement proceedings under Article 258 TFEU. In infringement proceedings, we chose many years ago the practice of preceding a reasoned opinion with a letter of formal notice, a kind of formalised first warning by which we present our concerns to a Member State and then give this Member State an opportunity to submit its observations. I believe we could take a similar approach for Article 7 procedures, by giving **"formal notice"** to a Member State where we have reason to believe that a systemic rule of law crisis is on the way to developing. We could lay down this new manner of proceeding in a new policy Communication of the Commission, which could be politically endorsed by the European Council and the European Parliament.

A second step could be to anchor a strong basis for a more far-reaching rule of law mechanism, which would include more detailed monitoring and sanctioning powers for the Commission, in an amendment of the Treaty. Such a big step in European integration would have to be included in the broader reflections on the future development of the EU into a Political Union.

As you will remember, President Barroso announced a Communication on the future of Europe for spring next year when he gave his State of the Union speech in September 2012. This could be the right place for making more concrete proposals on this matter. I could even imagine that we present several options for such a mechanism: more pragmatic ones, as well as more ambitious ones.

One option would be to expand the role of the Court of Justice in any future mechanism on the rule of law. Currently, the Court can only check whether the procedural rules of Article 7 TEU have been adhered to. We could go further, by creating a new specific procedure to enforce the rule of law principle of Article 2 TEU against Member States by means of an infringement procedure brought by the Commission or another Member State before the Court of Justice.

We could also envisage a Treaty amendment that lowers the very high thresholds for triggering at least the first stage of the Article 7 procedure. This could include giving the Commission specific information-gathering powers, or specific powers to issue sanctions in relation to rule of law violations ahead of political Article 7-decisions.

Member States could also be called upon to give the EU legislator greater powers as regards the mandate of the Fundamental Rights Agency. As you know, the FRA currently can only analyse fundamental rights issues at EU level and is barred from analysing national situations. The Council has even refused to amend the mandate of the FRA to include the justice and home affairs policies, as would be logical now that the Lisbon Treaty has entered into force. The unanimity rule for the mandate of the FRA is thus certainly not helpful. Those who ask for a stronger role of the FRA – and I am among them – should therefore call for a Treaty amendment that puts the legal basis of the FRA into the ordinary legislative procedure.

A very ambitious Treaty amendment – which I would personally favour for the next round of Treaty change – would be abolishing Article 51 of our Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States, including the right to effective judicial review (Article 47 of the Charter). I have raised this idea already in a speech at the FIDE Congress in Tallinn in May 2012[2]. This would open up the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law. I admit that this would be a very big federalising step. It took the United States more than 100 years until the first ten amendments started to be applied to the states by the Supreme Court.

Perhaps we will need two Treaty amendments to achieve all this. But I believe we should be at least as ambitious when it comes to the rule of law and fundamental rights as the European Union currently is with building up new financial solidarity mechanisms, common fiscal rules and Banking Union. Because while banks and budgets are certainly very important for our economy, Europe is much more than banks and budgets. And it must be much more if we want to win over not only the purse, but also the heart and minds of European citizens. This is why creating a new rule of law mechanism is so important.

Thank you for your attention.

[2] SPEECH/12/379