



HOW TO SAVE EUROPEAN DEMOCRACY?

11 Policy Proposals from Participants of
the Our Rule of Law Academy

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ACKNOWLEDGEMENTS

We hope that you know how special this report is. The document you have just opened is the outcome of the hard work of 45 bachelor students from across Europe, who under the guidance of professionals, came up with 11 policy proposals on the future of European Democracy. None of this would be possible without our sponsors and supporters: Meijers Committee, Dutch Permanent Representation to the EU, Radboud University, Maastricht University, the Good Lobby, and the Good Lobby Profs. In the first place, none of this would be possible without the best mentor students could ask for – John Morijn. Thank you for being our biggest cheerleader. Thank you for showing us that studying law can be actually fun.

Elene Amiranashvili, Tekla Emborg, Zuzanna Uba, and Anna Walczak

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OUR RULE OF LAW

The Our Rule of Law (ORoL) is a cross-border, for-students-by-students grassroots initiative using education to **counter the rule of law backsliding in Europe**. Created in 2021 in Groningen by four international law students, Elene Amiranashvili, Tekla Emborg, Zuzanna Uba, and Anna Walczak, with the mentorship of Professor John Morijn, the project aims to bring democratic values closer to young people.

Since its founding, the project has expanded to a pan-European initiative, with a network of hundreds of engaged students all across Europe, and more than 50 professionals and experts on democracy and the rule of law. The first event was the so-called OurRuleofLaw Festival, which took place in Groningen in September 2021 with a focus on the independence of the judiciary and media in Poland. Since Poland is not the only country at risk, ORoL has gradually expanded to focus on broader Europe, including with the conference The Law and Politics of Protecting Liberal Democracy – Conversations Between Rule of Law Heroes, which took place in Groningen in June 2022. **The aim is to create opportunities for students to learn about democratic backsliding in Europe from leading experts in the field and create a platform for students to take part in defending the rule of law in Europe.**



THE ACADEMY

The Our Rule of Law Academy is an academic mentorship program for the future generation of rule of law defenders. Between January and March 2023, 45 Bachelor students from 25 Member States conducted research on and **developed policy proposals in 11 different areas of European Law** under the supervision of 22 rule of law experts.

The project culminated in a two-day event in Brussels, from the 16 to the 17th of March, where the students had a chance to pitch their ideas to policymakers, academics and other professionals working on the rule of law. **The participants also heard from inspiring speakers such as European Court of Human Rights President Síoфра O'Leary, European Commissioners Věra Jourová, Michał Wawrykiewicz (#WolneSądy), Daniel Freund (MEP), Former Advocate-General Eleanor Sharpston and many more.** Additionally, the participants of the Academy visited the European Commission for a special meeting with the **cabinet members of Commissioner Reynders.**

The report in your hands is the final product of the Our Rule of Law Academy.



SO YOU WANT TO BE A RULE OF LAW DEFENDER?

Speech by Eleanor Sharpston,
March 17th 2023, Brussels

During the closing ceremony of the Our Rule of Law Academy, former Advocate General **Eleanor Sharpston** gave us the honor of delivering a phenomenal closing speech, setting out **five points of advice for young rule of law defenders**.

This speech is a must-read for every aspiring rule of law defender.

[Click here](#) to read it or visit:
www.ourruleoflaw.eu/so-you-want-to-be-a-rule-of-law-defender



WE ARE NOT TURTLES ON OUR BACK



Speech by Elene, Tekla, Zuza and Anna

March 16th 2023, Brussels

2 years ago, we arrived in Groningen for our first year of law school in the middle of a pandemic. That year can be summarized as scant interactions with co-students and faculty obstructed by masks and black squares on video calls. Luckily, we met each other at an online lecture given by Prof John Morijn with the title **'Fighting for (y)our rule of law in Poland'**. The talk included a screenshot of a post by Igor Tuleya – a Polish judge who was suspended from his work for more than 2 years for allowing journalists to attend the public pronouncement of a ruling. Tuleya compared his situation to that of Joseph K from Kafka's famous novella 'The Trial': 'I was accused of something which is not a crime, the matter was assessed by something which is not a court, and somebody who is not a judge gave a verdict which is not a verdict'.

The EU rule of law crisis poses serious challenges to the existence of an EU as we know it today. Despite this, there were no courses in our first year of law school that addressed the topic

Anna and Zuzana were well aware of the crisis unfolding in their home country Poland – Anna had in fact encouraged all law students to join her at a Groningen protest against the Polish ban on abortions in the autumn of 2020. Elene has spent most summers of her life with her grandparents in Georgia, and thus knows first-hand the idealisation of the so-called 'European Values' in states of the EU neighbourhood. Tekla was convinced by the argument that 'what happens in Poland could spread to other EU Member States' like her home country Denmark.

In reaction to the lecture by Prof Morijn, Tekla invited Anna to be her partner for 'a walk with a stranger' – an initiative that Tekla organised for law students in Groningen to get to know each other despite the strict Covid lockdown. While out walking and discussing how our peers could engage more deeply with the rule of law crisis, luck would have it that Zuza and Elene were paired up as strangers for a walk as well and were walking in the very same park.

We ran into each other and our conversation manifested a week later in an email to professor John Morijn, proposing to organise 'Our Rule of Law Festival' at the University of Groningen.

6 months down the line, Igor Tuleya along with 8 other Polish rule of law heroes arrived in Groningen for the two-day **"Our Rule of Law Festival"**. There were journalists, lawyers, academics, a LGBT activist, a documentary film director, judges, and more from both Poland and the Netherlands.

The aims were clear: Firstly, we wanted to create an opportunity for students to better understand the democratic backsliding in our European Union. Secondly, we wanted to show solidarity with people making significant personal sacrifices to fight for European democratic values. And, perhaps most importantly, we wanted to connect with like-minded co-students eager to put our degree to good use.

The festival programme was not limited to lectures. Students could join for dinner with a rule of law hero, watch the documentary 'Judges Under Pressure', and get a kick from a shot of self-imported Zubrowka. We had a letter-writing session with Amnesty Netherlands where participants wrote solidarity cards for Polish judges. In a call for action, more than 80 students signed a letter for Commissioner Jourova. And earlier today her deputy head of cabinet, Simona Constantin, joined us to talk about how it actually is to work on European values in the Commission.

Our second push was **the inaugural lecture of Prof Morijn** which was a good occasion to get more students and academic experts together. Prior to the inaugural lecture, 5 panel-conversations took place with 17 experts - NGO directors, judges, journalists, and even a Member of the European Parliament. And most importantly, more than 200 students took part in the conversations.

A few ideas from that day made a particular impact on us. Judge Igor Tuleya, by now our friend, wrote the foreword to John's inaugural lecture. He quotes Władysław Bartoszewski (survivor of Auschwitz and member of the Polish resistance movement) "somebody had to do it. Somebody was to react. **Somebody needed to say no. Somebody was going to have to protest. I interrogated myself about all this. And found the answer: if somebody, then why not me?**".

The sense of responsibility that Tuleya and Bartoszewski expressed resonated with us - too few people seemed to be taking the democratic backsliding seriously. Someone had to start the conversations. And **if not us, law students with direct and real stakes in the digressions, then who?**

A second memory that stuck was when students from Zimbabwe and Hungary asked during a panel how to deal with dire democratic digressions in their home countries while being abroad. Kim Lane Scheppele, Princeton Professor, replied that **it is important to keep going back home - if all critical voices leave there is no one to keep fighting.**

Akudo McGee, a PhD candidate, followed up, encouraging the young crowd with a metaphor. **'You are not a turtle on your back'** she said. That was a different way of expressing the same sense of autonomy and responsibility that Bartoszewski had expressed decades earlier. And today, we are here to remind Brussels of this kind of autonomy.

We, students, young EU citizens, are not turtles on our backs. We want to be part of ensuring a democratic future for Europe and we are ready to contribute. Over the past three months, 44 students from across Europe and beyond have worked together. They were divided into 11 working groups working under the mentorship of 23 experts – academics, scholars, NGO directors, judges, journalists, and lawyers.

Each group addresses a niche issue of the European rule of law crisis: from academic freedom and judicial independence to protecting the EU budget and national democracies, to the role of the European Court of Human rights and NGOs. **This is what we call 'Our Rule of Law Academy'.**

We want to take this opportunity to give a big round of applause for the efforts and commitment of students and mentors. It is the team-work of everyone who has been involved in the Academy that makes this program special.

It is important to realise that our story would not exist without John Morijn. He was on board with our project from the first email; he has activated his enormous network time and again to get impressive people to take action together in new and valuable constellations;

and he prioritizes to educate, encourage and engage students. We have been incredibly lucky to learn from and work together with John over the past 3 years. This experience has marked us for life.

There is enough to fight for. In Poland Justyna Wydrzyńska was just sentenced for 8 months for providing abortion pills. In Italy, police recently searched the newsroom of the major newspaper Domani over an article about a member of the government, which journalism organisations decried as an attempt to intimidate the free media. In Georgia we have recently seen the power of protesting after people managed to get the government to roll back reforms silencing and minimising the role of NGOs in Georgia.

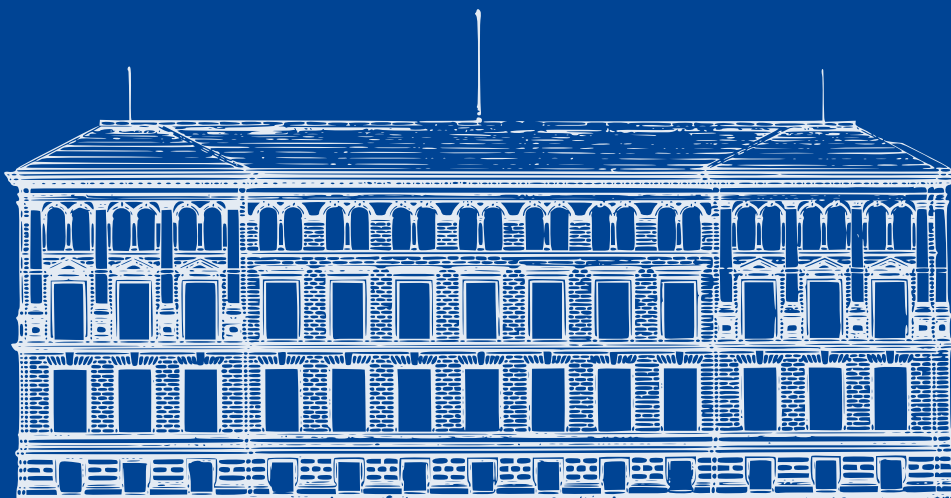
To get through the current rule of law crisis, there is a need for youth across the Union to engage with and stand up for the rule of law. We, ourselves, are reaching the final months of our LLB. We are excited to continue creating platforms for law students to engage with the intricate legal and political problems of the 27 Member States. This week young law students from across the continent have contributed their perspectives on how the EU Institutions can better fulfil one of their central tasks: to keep the Member States accountable for sustaining and strengthening ambitious democracies. **It is time the EU institutions show that they are not turtles on their backs either.**



THE REPORT

Each working group has developed a policy proposal tackling a particular aspect of the rule of law crisis. In the following sections, we (Anna, Zuzanna, Tekla and Elene) have **summarized key points from the proposals and organized them according to themes that run across the 11 proposals.**

First we've included **sections pertaining to specific institutions** – how the Court of Justice (CJEU), the European Commission, the European Parliament (EUP), Fundamental Rights Agency, cross-institutional cooperation, increased transparency of EU institutions, and introduction of new supporting institutional bodies can all be part of a better protection of the rule of law from the top-down level. Then we **outline proposals relating to the particular rule of law tools developed over the past 10 years** in the EU; the Rule of Law Mechanism and Rule of Law Framework. Finally, we summarize how **Civil Society Organizations (CSOs) and Citizens** can be empowered to uphold the rule of law in our European Union from the bottom up.



INSTITUTIONS

Court of Justice of the European Union

Firstly, Article 133 of the Rules of Procedure of the Court of Justice should be modified to require the use of expedited procedures for cases concerning judicial independence. If the utilization of an expedited procedure is not possible, then the European Commission should prioritize those cases by requesting for a case to be determined pursuant to an expedited procedure. (Judicial Independence WG)

Secondly, the divergence in tests on judicial independence adopted by the European Court of Human Rights (ECtHR)

and the Court of Justice of the European Union (CJEU) should be resolved to address legal uncertainties and difficulties in implementing and enforcing EU law. The CJEU can adopt a more holistic approach to the requirement of a court 'established by law' by encompassing not only the legislation providing for the establishment of judicial organs and their competence but also the process of appointing judges and the participation of judges in the examination of the case. (Legal Methods to Protect the Rule of Law WG)

Thirdly, the Statute of the Court of Justice of the European Union needs to be amended to allow amici curiae to submit their briefs in cases pending before it. The second sentence of Article 40, the second paragraph, of the statute must also be deleted. The European Parliament and the Council can do this at the request of the Court of Justice or on a proposal of the Commission. (Amicus Curiae at the Court of Justice of the European Union WG)

In addition to the above, several policy changes can be made with regard to the amicus briefs. Firstly, the Court of Justice and the General Court should issue guidelines regarding the submission of amicus curiae briefs. Secondly, the interpretation of the requirements to become a third-party intervener should be eased so that representative associations defending collective interests find it easier to participate in the cases of the Court of Justice of the European Union. Thirdly, an automated notification system should be established based on the information available in the CURIA database to help potential amici to be aware of new cases that may be of their interest. Finally, an online form to submit amicus curiae briefs by the Court of Justice of the European Union should be established. (Amicus Curiae at the Court of Justice of the European Union WG)

European Commission

RoL Enforcement

The European Commission should implement a new universal mechanism for enforcing rule of law protection. This mechanism would be similar to the Cooperation and Verification Mechanisms used in accession cases. Upon a finding by the European Commission that a Member State engages in systemic violations of the rule of law, the Commission should be able to impose on that state a benchmark of (re)implementation measures repairing the damage done to the rule of law. If the Member State is found to not cooperate in good faith in repairing the damage after a number of Commission Reports on the issue, the Commission would then have the competence to suspend the obligation of Member States to recognize and carry out, under EU law, the judgments and judicial decisions of the Member State concerned, including European Arrest Warrants. (Legal Methods to Protect the Rule of Law WG)

Conditionality Regulation

The Commission should also reconsider the steps that follow the suspension of payment of funds from the EU budget under the Conditionality Regulation. Once the Member State concerned has implemented remedial measures that adequately and effectively address the concerns of the Commission, disbursement of the suspended funds should not take place at once. Rather, disbursement should be gradual and contingent upon genuine and continuous progress. (EU Budget WG)

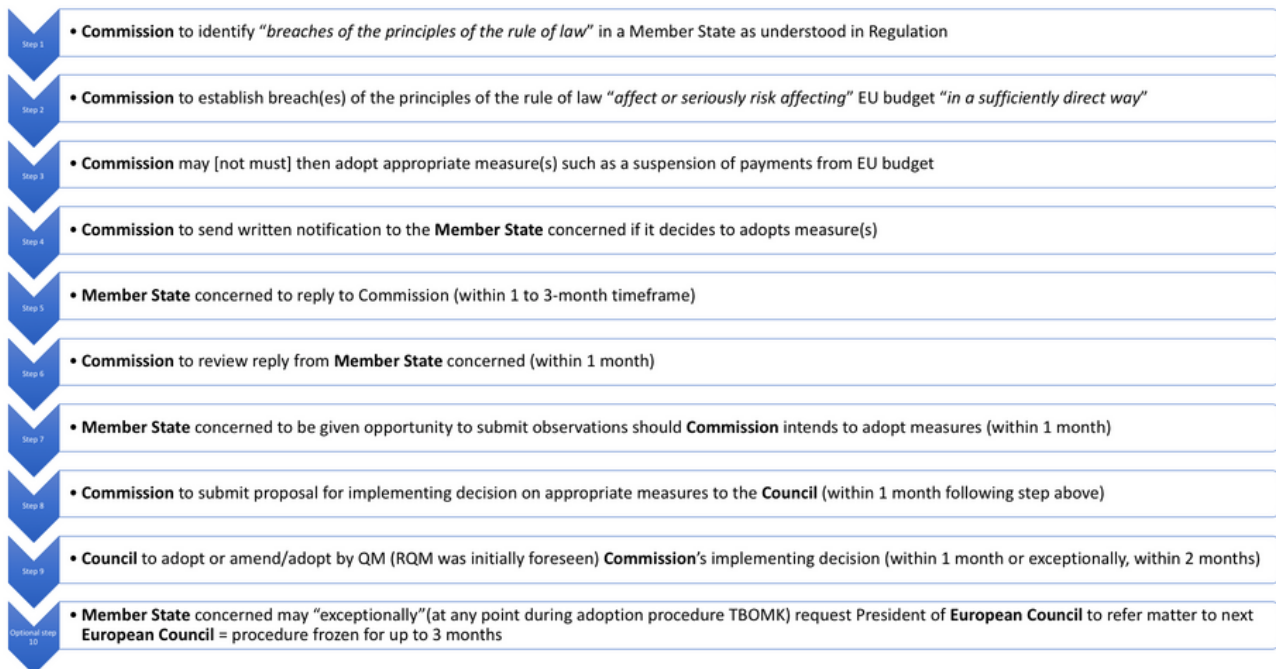
Infringement Procedures

The European Commission should also initiate the infringement procedures as soon as the Member State fails to comply with the recommendations regarding systemic violations determined in the Commission's Rule of Law Report/within the Rule of Law Framework. This will ensure that the EU responds promptly when a Member State fails to uphold the rule of law. (Judicial Independence WG)

Moreover, the Commission should ensure the effectiveness of remedial measures proposed by the Member States concerned. Firstly, the Commission should assess, to a greater extent, remedial measures based both on their adequacy and their effectiveness. Secondly, the Commission should establish a monitoring mechanism by equipping independent bodies with the competence to continuously review the implementation and application of the remedial measures. These two steps would ensure that remedial measures are not only adequate on paper but effective in practice. (EU Budget WG)

Finally, the multiple stages of conditionality currently endorsed under the Recovery and Resilience Facility Regulation should be replicated under the Common Provisions Regulation in view of the next Multiannual Financial Framework. By doing so, the Common Provisions Regulation could become an important instrument for protecting the EU budget via rule of law principles, in substitution of the Recovery and Resilience Facility Regulation, whose time scope is limited. (EU Budget WG)

Step-by-step overview of new EU general conditionality mechanism for the protection of the EU budget (@ProfPech)



Twitter, Laurent Pech @ProfPech

Source: <https://twitter.com/ProfPech/status/1339521579022241793>

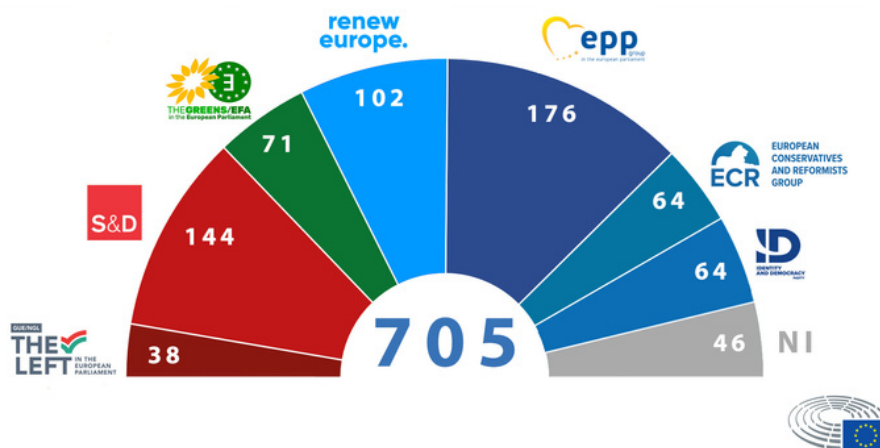
European Parliament

The European Parliament should establish a system of sanctions to address cases of anti-democratic action. Europarties and/or political groups should lose part of their funding when their members undermine democratic values. The financial loss should be increased with every new violation to reinforce compliance with Article 2 TEU values. (European Political Parties and European Political Groups WG)

The European Parliament and the Council should lower the registration threshold for Europarties by amending Regulation 1141/2014 by replacing article 3(1)(b) . The current party threshold makes it difficult for new Europarties to register. A lower threshold would increase the visibility and attention of Europarties and pan-European. (European Political Parties and European Political Groups WG)

The European Parliament should empower citizens to request the Authority for European political parties and European political foundations to verify whether a registered Europarty complies with democratic values by amending Rule 235(3) of the EUP Procedure before the next European Parliament Elections. A group of at least 50 citizens should be allowed to submit a reasoned request on starting the verification by the Authority on the compliance with democratic values directly to the committee responsible without relying on referral from the EUP President. (Protection of National Democracies WG)

The European Parliament and the Council should establish an internal framework for Europarties and European political groups to expel their national member parties in case of violations of Article 3 (1)(c) and the 'European values' as constituted in Article 2 TEU before the European Parliament elections in May 2024. At present, no collective framework exists for Europarties and European political groups to expel their members if these violate such. (European Political Parties and European Political Groups WG)



European Parliament – Seat distribution by political group on 16 February 2023. NI stands for Non-Inscrits, French for non-attached, who are not part of a group. Source: <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190612STO54311/parliament-s-seven-political-groups>

Article 11(3) of Regulation 1141/2014 should be amended to grant the Committee of Independent Eminent Persons more binding decision-making power before the next European Parliament elections. Its autonomy is currently limited by the will of the Authority for European political parties and European political foundations, and the function of the Committee is reduced to merely providing advice. (European Political Parties and European Political Groups WG)

The European Parliament should make use of Article Protocol (No 1) on the role of national Parliaments in the European Union to **enforce inter-parliamentary conferences before the next European Parliament elections**. There should be specific emphasis on the preservation and maintenance of the democratic values of the Union. (Protection of National Democracies WG)

Finally, the European Parliament should further adopt a resolution stating that if, in a given Member State, the democratic process through which the Members of the European Parliament have been elected does not meet democratic standards, a **systematic infringement under Article 258 TFEU** can be executed on grounds of a violation of Article 2 TEU in conjunction with Article 10(2) TEU first sentence Article 39 of the Charter of Fundamental Rights. (Protection of National Democracies WG)

Fundamental Rights Agency

The Fundamental Rights Agency (FRA) should seek to enhance its mandate by proactively inviting relevant organizations involved in reporting, monitoring, and protecting academic freedom to join the Fundamental Rights Platform (FRP). This would allow the FRA to collaborate more effectively with other stakeholders in the field of human rights, thereby improving the quality of reporting, monitoring, and protection of academic freedom. Further, the agency should be granted greater autonomy in determining its operational priorities and provided with more resources to carry out its mandate, in order to empower the agency to play an active role in decision-making processes and achieve tangible results. (Academic Freedom WG, (Non) Implementation of ECtHR and ECJ WG)

To help safeguard the rights, values and freedoms enshrined in the EU's Charter of Fundamental Rights, the FRA:

- Collects and analyses law and data
- Provides independent, evidence-based advice on rights
- Identifies trends by collecting and analysing comparable data
- Helps better law making and implementation
- Supports rights-compliant policy responses
- Strengthens cooperation and ties between fundamental rights actors

Want to learn more? See the FRA's current work program here: <https://fra.europa.eu/en/about-fra/what-we-do/annual-work-programme>

Institutional Cooperation

One suggestion is that the European Parliament Forum on Academic Freedom should collaborate with the Commission, Fundamental Rights Agency, and the Fundamental Rights Platform to **develop a common method for monitoring academic freedom**. This collaboration will help to establish a consistent method for monitoring academic freedom across the EU and ensure that the monitoring process is carried out effectively. (Academic Freedom WG)

Another recommendation is that EU institutions draft guidelines or provide advice on the practical aspects of the Charter of Fundamental Rights for Member States to facilitate effective implementation of judgements. This step-by-step implementation process will be supported with guidance, not just deadlines and outcomes. By offering guidance, EU institutions can help Member States to better understand the most effective way to implement judgements and promote the rule of law. ((Non) Implementation of ECtHR and ECJ WG)

Finally, it is crucial to strengthen cooperation with the Venice Commission. The Venice Commission has consistently published reports on the rule of law issues in multiple backsliding European States and is considered a highly esteemed source. The proposed Copenhagen Committee, and the Commission as a whole, should be acutely aware of the Rule of Law Checklist and other publications by the Venice Commission. Furthermore, it is urgent to engage in an exchange of experience in monitoring and reporting breaches in Member States. This further ensures that the expertise of the Venice Commission is not wasted and increases the quality of the Rule of Law reporting coming from the EU. (Legal Methods to Protect the Rule of Law WG)

Transparency

The Fundamental Rights Agency (FRA) should seek to enhance its mandate by proactively inviting relevant organizations involved in reporting, monitoring, and protecting academic freedom to join the Fundamental Rights Platform (FRP). This would allow the FRA to collaborate more effectively with other stakeholders in the field of human rights, thereby improving the quality of reporting, monitoring,

and protection of academic freedom. Further, the agency should be granted greater autonomy in determining its operational priorities and provided with more resources to carry out its mandate, in order to empower the agency to play an active role in decision making processes and achieve tangible results. (Academic Freedom WG, (Non) Implementation of ECtHR and ECJ WG)

New Institutional Bodies

In order to monitor the adherence of Member States to the accession values, a Copenhagen Committee could be established. Such a committee would monitor Member States' development as compared to their standards at accession and provide regular reports to the Commission. Additionally, such information could be utilized in future Commission Guidelines or infringement procedures based on the principle of non-regression. (Legal Methods to Protect the Rule of Law WG)

To further support the Commission, an independent expert body should be more

losely involved during the preliminary assessment phase of the Conditionality Regulation. These assessments should be carried out by a competent body that can provide recommendations to the Commission. Furthermore, if the conditions are met, the competent body should alert the Commission so that the necessary actions can be taken. Such a dual approach could alleviate the monitoring requirement on the side of the Commission when monitoring adherence with the Conditionality Regulation targets and make the enforcement procedure faster and more efficient. (EU Budget WG)

CITIZENS

Citizens should **have a direct say in the decision-making process** of the European Union. Therefore, Article 11(4) of the Treaty on European Union (TEU) should be altered so that the European Commission is required, rather than invited, to submit a legislative proposal in response to a valid citizen's initiative that fits within the framework of the Commission's powers with the submission of a proposal. This will increase the responsiveness of the EU to citizens' concerns. (Political Methods to Protect the Rule of Law WG)

Another initiative to increase citizen involvement would be to **make the hearings about article 7 TEU in the Council public**. This would allow citizens and civil society to put pressure on their national politicians (ministers) to stop shielding autocratizing MSs from political repercussions. (Judicial Independence WG)

CIVIL SOCIETY ORGANIZATIONS

The European Commission should set up internal guidelines dedicated to Civil Society Organizations (CSOs) within the EU. These guidelines would provide an internal framework on CSO freedoms and help ensure that they can operate effectively. The Commission should also consider potential tax implications that may arise from cross-border transactions, creating a blueprint for national philanthropy tax laws that are adequate for foreign and national EU-based public benefit organizations and their donors. This will help ensure that CSOs do not face undue financial burdens when working across borders. (Protection of NGOs/Civic Space WG)

CSOs play an important role in preserving pluralism of views in public discourse and media. The Commission should support this function by funding opportunities for NGOs

to encourage public exchanges of citizens' views, for example by calling for proposals under the CERV funding program. The Union values strand of this programme, laid down in Regulation (EU) 2021/692, which aims to give financial opportunities to local NGOs could be utilized to promote and raise awareness of the rule of law. (Media Freedom WG)

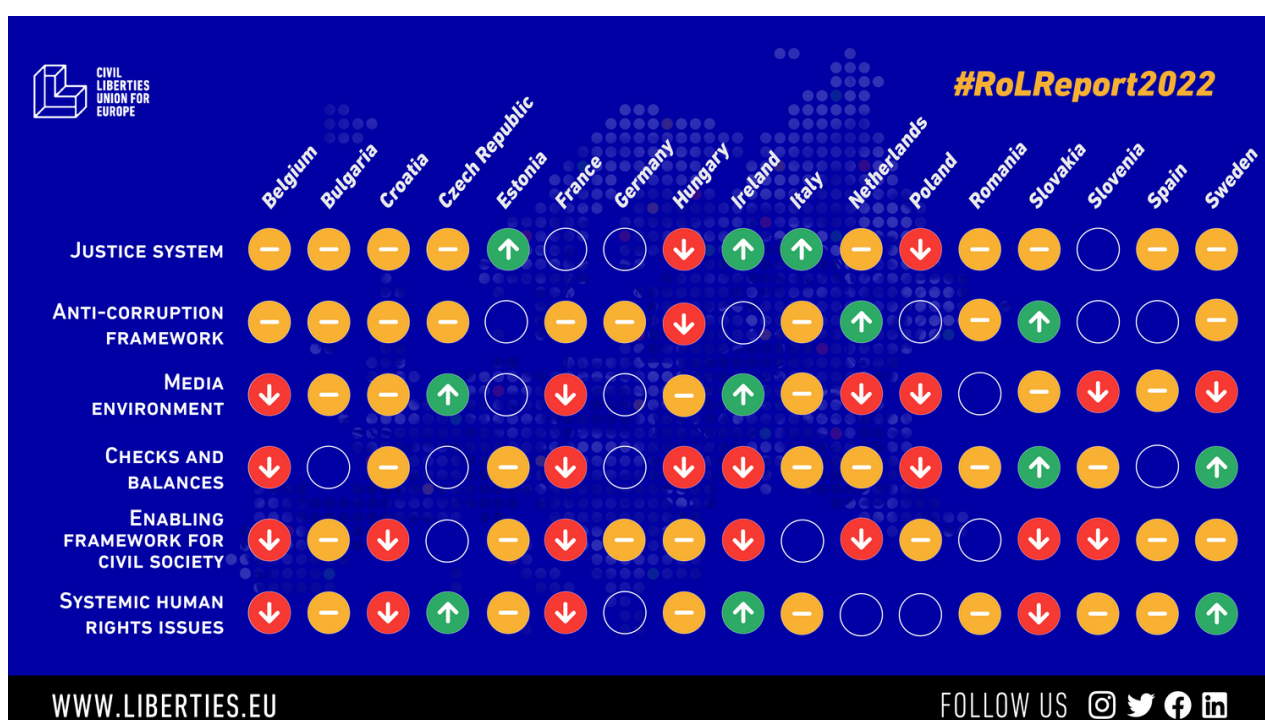
Moreover, the European Commission should conciliate the EEAS external guideline for Human Rights Defenders for third countries with CSOs that are Human Rights Defenders (HRDs) inside the EU. It should follow international, regional and EU frameworks on protecting CSOs. This could be a powerful tool reminding EU institutions and MS of their responsibilities towards CSOs as well as implementing principles of legality and proportionality. (Protection of NGOs/Civic Space WG)

RULE OF LAW MECHANISMS AND REPORTS

The existing Rule of Law Mechanism and Rule of Law Framework require specific improvements to allow the Commission to effectively monitor the progress, such as **precise deadlines for implementation, clear distinction between minor violations and major violations, and specific recommendations**. This will help to ensure that the Member State follows a clear and reliable structure of actions to remedy their violations, and help the Commission effectively monitor the implementation. ((Non) Implementation of ECtHR and ECJ WG)

It has been observed that the enforcement mechanism is lacking in effect due to the fragmented use of the existing mechanisms. There ought to be an established link between the intereffecting instruments. Currently, a failure to implement the recommendations by a Member State holds no direct consequences, which means that the enforcement mechanism is lacking. (Judicial Independence WG)

In case of failure to comply with the recommendation regarding systemic violations of the rule of law, the Commission should automatically initiate the Article 7 Procedure. This will introduce an enforcement mechanism to this soft-law monitoring mechanism and mitigate the political character of the Article 7 Procedure, by introducing an objective element for its initiation. It would also ensure that the infringement does not remain unaddressed. (Judicial Independence WG) It is essential that the report is more vocal about the crisis faced by EU Member States. The investigation methods should also be improved, in order to identify problems with greater accuracy and thoroughness. (Political Methods to Protect the Rule of Law WG) In addition, the results of the MPM and the 'Rule of Law' country reports should be published more widely by the European Commission. One way to achieve this is through social media posts, which can reach a wider audience and address more internet users. (Media Freedom WG)



JUDICIAL INDEPENDENCE

Policy proposal by Sophia Burg, Kasia Niedźwiecka,
Canan Ersoy and Tiago Guimarães Arantes

Mentored by Professor Laurent Pech and Judge Filipe
Marques

MEET THE TEAM



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FILIFE
MARQUES

Judge,
Former President of
MEDEL Europe

Executive summary

The Our Rule of Law Academy Working Group on Judicial independence, consisting of Sophia Burg, Katarzyna Niedźwiecka, Canan Ersoy, and Tiago Arantes; mentored by Judge Filipe Marques and Professor Laurent Pech, make the following recommendations:

- End the Council's Annual Rule of Law Dialogue;
- Improve the existing soft-law instruments, namely the Rule of Law Mechanism and the Rule of Law Framework;
- Connect existing Rule of Law instruments so they become interconnected and develop enforcement mechanisms;
- Make the hearings between the Council and the MS subject to Article 7 TEU public
- The European Commission should initiate the Infringement procedures as soon as the Member State fails to comply with the recommendations regarding systemic violations determined in the Commission's Rule of Law Report/ within the Rule of Law Framework;
- Modify the Art. 133 of the Rules of Procedure of the Court of Justice, in order for it to require the utilization of the expedited procedure in relation to all cases concerning judicial independence / should it not be possible, then require the European Commission to prioritize them by requesting for a case to be determined pursuant to an expedited procedure.

1. The nature of the problem

All over the world, we are facing the rise of populist movements in power.¹ Historical, social, political, and economic circumstances of a given community may tend toward the advancement of these movements. This is because “democracy is a political system in which leaders are accountable to the people”² and the populists know how to play this to their advantage.

Present-day we face Orbán, Kaczyński, Netanyahu, and Erdoğan, who all share among themselves an “authoritarian-populist art of governance”.³ Notably, their administration involves taking control of democratic institutions by modifying its design to the ends of a one-party state, the capture of the judiciary and media, undermining their independence, and an extremist nationalism that guides its public policies. Populists focus their speech on specific issues expressing value judgments that they believe to be an extension of the true and real people's thoughts. Though the concept of “populism” is complex, we can face it in a sort of fictional, conspirational, and antagonistic relationship between the populist parties as the legitimate representatives of the “will of the real people” or the “good citizens” (We) and the “system” and its democratic institutions as a “corrupt and morally inferior elite” (They). Populist right-wing⁴ parties like the ones we have begun to see at the head of the governments of some Member States self-legitimize their actions from this premise. They are not (contrary to what they proclaim) willing to unite the People. They want to unify the nation on their own and only on their terms: unification that does not accept diversity or political pluralism. In most cases, they often persecute groups of individuals who have historically been discriminated against: women, migrants, minority religions, and LGBTQI+ citizens. This showcases that not all individuals are part of this concept of “real people”, whoever these real people are.

Within the European Union, the grounds on which populist movements are based blatantly contradict the values and principles that “define the very identity of the EU as a common legal order” (Case-156/21, CJEU). Since the recent past, the focus of populist propaganda has been the judicial power and, consequently, its delegitimation. They do so to disable the key institution that has the power to challenge and stop their actions by questioning the legitimacy of judges to annul and revoke decisions of democratically elected assemblies.

¹Gultchin, Limor and Kyle, Jordan, *Populism in Power Around the World* (November 13, 2018) <<https://ssrn.com/abstract=3283962>> accessed 24 February 2023.

²Kim Scheppele and Kim Lane. “Autocratic Legalism.” *The University of Chicago Law Review* 85, no. 2 (2018): p. 557.

³Jan-Werner Müller, ‘Populism and the People’ (*London Review of Books*, Vol. 41 No. 10, 23 May 2019) <<https://www.lrb.co.uk/the-paper/v41/n10/jan-werner-mueller/populism-and-the-people>> accessed 24 February 2023.

⁴Even though this phenomenon is not circumscribed to right-wing religious/nationalist/conservative parties the truth is that in our political field – the EU – that is in fact the scenario: in Hungary with Fidesz, in Poland with Law and Justice (PiS) and more recently in Italy with Brothers of Italy (Fratelli d’Italia).

The argument of empowered populists is as follows: if the will of the people externally legitimizes the Government or Parliament's political choices at the time of the elections, how can judges, whose legitimacy lies solely in the law and in the reasoning of their decisions, declare as unconstitutional laws approved by them? Are the Constitutional Courts when they declare certain laws as unconstitutional to interfere with the "will of the real people"? For populist autocrats they are. This is how we understand the need to attack and control the judicial power because only in this way will they be able to carry out their policies in the name of "The People". The goal is to secure a "free avenue" and eliminate one of the constitutional mechanisms that often work as an obstacle to the legislative and executive power: *the judicial review*.

Within the European Union, the two famous cases of empowered populists who have carried out constitutional reforms to capture judicial power and its independence are the Fidesz party in Hungary and Law and Justice (PiS) in Poland. What we have seen in recent decades is what some Authors call "Rule of Law Backsliding" or "Democratic Backsliding". By "Backsliding", they mean a deliberate process through which governments and political parties aim to dismantle, weaken or even capture checks and balances on power with the clear intention to turn the democratic state into a one-party state. It "implies that a country was once better, and then regressed".⁵ This brings us to the idea of continuous distancing from the democratic principles on which liberal democracies are based and, in our specific case, the structuring principles of the European Union.

Observing the attacks made by the aforementioned parties: firstly, they attack and control the Constitutional Court, then the Supreme Court and ordinary courts; secondly, and on a more personal level, they press coerce and control individual judges. The control of the Constitutional Court as a first step and target is used as a tool to legitimate the ruling party's actions and legislation. In Hungary and Poland, the executive power captured the Court and then used it to carry the regime's propaganda. If Constitutional Courts are, in most democratic states the final arbiter on the constitutionality of national legislation by controlling them, both rulings' parties could convey an appearance of healthy constitutional experience, where the executive and parliamentary legislation formally, organically, and materially respect its own Constitution and where there are no checks and balances on the government's work. To this, the literature calls "abusive use of judicial review".⁶ It happens when autocrats use courts to give them the green light to carry out anti-democratic constitutional "reforms" and, by carrying out their dirty work, they benefit from the presumption of legality and the

⁵ Kim Lane Scheppele and Laurent Pech, 'What is Rule of Law Backsliding?' (VerfBlog, 2 March 2018) <<https://verfassungsblog.de/what-is-rule-of-law-backsliding/>> accessed 7 February 2023.

⁶ Rosalin Dixon and David Landau, 'Abusive Constitutional Borrowing', Oxford University Press, Chapter 5 (2021).

associations that judicial review has with constitutional traditions and the rule of law. On the other hand, by coercing and capturing judges, the autocratic governments want to prevent them, given the legal configuration of the European Union, from being able to establish any dialogue with the CJEU, *maxime* through preliminary rulings.

If, in general, this situation is alarming and worrying to any Constitutional system, as far as the European Union is concerned the problems raised are much more complex. In attacking judicial independence, we have moved from mere axiological conflict between concepts to a serious attack on the entire architectural structure of the European project and this is due to the role that national judges and courts play within the European Union. The law created at the EU level, and its effectiveness and primacy in the internal legal orders at the Member States are guaranteed by the national courts or tribunals as defined by the EU law. With the integration process increasingly advanced and following the jurisprudence by the CJEU, such as *Costa* and *Van Gend en Loos*, we can no longer see judges in a purely national and local dimension. It becomes clear at this point that judiciaries are made up of true European Judges (or common Judges of EU law), and courts, having general jurisdiction of the EU law, must uphold the values and principles enshrined in it. Thus, the normal functioning of courts as an impartial and independent power is the essential key to the maintenance of the European Union and, in particular, to the proper working of the judicial cooperation system. Not only at the judicial cooperation between the CJEU and national courts and tribunals level but between the national courts and tribunals of each member state as well. The failure to uphold the values enshrined in Article 2 TUE leads to serious problems concerning the principle of mutual trust between national judiciaries with judges starting to question the independence of their peers.

2. Legal and policy basis/bases for the EU to act

The Union's toolkit for promoting the rule of law received additional soft law instruments in 2013. To begin with, the Commission introduced the **Justice Scoreboard**. It is an annual data-gathering procedure that has subsequently developed to include the appointment and dismissal of national prosecutors and the authorities involved in disciplinary proceedings regarding judges. Moreover, the **Rule of Law Framework**, sometimes known as the "pre-Article 7 procedure," was adopted by the Commission in 2014. After the Framework is activated, the Commission may adopt a formal opinion if it thinks there may be a systemic threat to the rule of law in the concerned EU nation (stage 1); if the concerned Member State does not respond satisfactorily, the Commission may then issue a formal rule of law recommendation, which may include specific recommendations and a deadline to implement them (stage 2). Finally, the Commission may decide to activate one of the mechanisms outlined in Article 7 TEU (stage 3). Thirdly, the **Annual Rule of Law Dialogue** was introduced by the Council in the same year. Initially created to promote and protect the rule of law, it was modified

halfway through 2020 due to a lack of unanimity. It introduced two new categories of dialogues and political debates: (i) horizontal discussions addressing the general rule of law developments across the EU and (ii) country-specific discussions addressing significant changes in a selected Member State (Laurent Pech). The new **Rule of Law Mechanism** is soft law the Commission adopted in 2020. It is an overarching report that examines the condition of the rule of law across the whole of the EU and the 27 Member States. As for the original "four pillars" chosen by the Commission in 2020—justice systems, the anti-corruption framework, media pluralism, and other institutional checks and balances—their scope has not changed. It also includes an annual rule of law update. Thus, it has a broad scope since it considers matters beyond the literal implementation of EU legislation (based on Article 7 TEU).⁷

The toolkit also received hard law: **The Rule of Law Conditionality Regulation**, commonly known as Regulation 2020/2092, established by the Parliament and Council in 2020. The regulation establishes a mechanism to link the disbursement of EU funds with respect to the rule of law in the member states, consequently protecting the EU budget. The European Commission carries out assessments of whether each member state is fulfilling their obligations to respect the rule of law under the EU treaty obligations. If a member state is found not to have respected the rule of law, the Commission may propose measures to remedy the situation. In extreme cases, the Commission may propose suspending or reducing EU funding to the member state in question. The regulation is intended to ensure that EU funds are used in a manner consistent with the EU's values and principles, including the rule of law. Case-by-case decisions on this will be made by the Commission, with qualified majority approval from the Council.⁸

Henceforth, pre-2012 EU tools to address the rule of law breaches in Member States will be briefly examined. The Treaty of Amsterdam commissioned Article 7 TEU, sometimes called "hard law" (1997). Enabling the EU to adopt sanctions against national authorities of a Member State if a substantial and ongoing violation of the EU's shared values has materialized. The Nice Treaty, which modified the Article in 2001, now permits the EU to take preventive action where there is "a clear risk of a serious breach by a Member State" (currently Article 7(1) TEU) of the principles as outlined in Article 2 TEU. Because of its preventive (**Article 7(1) TEU**) and punitive (**Articles 7(2), (3), and (4) TEU**) measures, the relevant EU institutions are permitted to monitor and access the actions and inactions of national authorities in any field, including those not covered by Union legislation. Regardless of the area in which the violation occurs, if a Member State violates the fundamental values in a way serious enough to be covered by Article 7, this is likely to

⁷ Petra Bard and Laurent Pech, 'The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values' (Study, European Parliament, 21 February 2022) <The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values (europa.eu)> accessed 9 April 2023

⁸ *ibid*

damage the very foundations of the Union and the trust amongst its members. Notably, there is no prescribed sequence in which the contents of this article must be applied.⁹

The Commission can request **interim measures** based on Art 279 TFEU to protect judicial independence at the EUMS level while an infringement action is pending before the ECJ. Which they have done based inter alia on Article 19(1) TEU in 2018 with respect to actions that, at first sight, undermine judicial independence, in addition to the regular infringement process outlined in Article 258 TFEU. The latter article describes how the Commission shall act if a Member State fails to fulfill a Treaty obligation and can ultimately bring the case to the Court of Justice. Article 267 TFEU lays down the preliminary reference procedure, which provides a dialogue between the Court of Justice of the European Union (CJEU) and national courts.¹⁰

3. Action(s) by EU institutions to date and their impact/effect

The EU's rule of law toolbox has rapidly evolved since 2012 due to heightened awareness of the threat posed by the Rule of Law backsliding within the EU. The key moment in that regard was the speech given by José Manuel Barroso, the President of the European Commission, who pointed out that the rule of law backsliding constitutes a threat to the order and values of the Union.¹¹

One of the first 'soft' tools on the rule of law that were added to the EU Rule of Law toolbox was the **Council's Annual Rule of Law Dialogue** in 2014. The Council's, 2020 ameliorated, tool has resulted in the publication of precedential conclusions. However, these conclusions are often brief and vague. Since the introduction of the tool, no specific details have been provided on the discussions of the Member States. In practice, the Council's horizontal discussions on the overall rule of law situation in the EU are confidential and approximately one hour per year. Similarly, the confidential country-specific dialogue on the situations in each Member State amounts to only a 30-minute discussion every 3 years. Thus, even with the introduction of the 2.0 version, the tool lacks transparency and ultimately any tangible results.¹²

In 2014, the EU adopted the **Rule of Law Framework**, frequently referred to as the "pre-Article 7 procedure". In 2016, the Framework was activated for the first time in relation to Poland on two grounds: the lack of compliance with binding rulings of the Polish Constitutional Tribunal and the adoption of measures by the Polish legislature to

⁹ *ibid*

¹⁰ *ibid*

¹¹ José Manuel Barroso, President of the European Commission, 'State of the Union 2012 Address', (Speech/12/596 at the Plenary session of the European Parliament, 12 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596> accessed 10 February 2023.

¹² Laurent Pech and Petra Bárd, 'The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values' (2022).

undermine its functioning. Notwithstanding one formal Rule of Law Opinion and four formal Rule of Law Recommendations, the impact of the Framework has been limited due to the 'soft' law nature of the instrument. Regarding Hungary, since 2015, the European Parliament has repeatedly requested the Commission to activate the Framework regarding the member state. However, the Commission has consistently declined to do so.¹³

Due to the lack of success in addressing the concerns about the rule of law in Poland through the Framework, the Commission made its first decision to initiate an **Article 7 procedure** in December 2017. The preventive aim of the procedure in Article 7(1) was activated as a result of concerns over changes made by the Polish government undermining judicial independence.¹⁴ Similarly, in September 2018, Article 7(1) was activated by the European Parliament in relation to Hungary in regard to broader Article 2 TEU.¹⁵ This procedure remains blocked in Council, where few hearings took place, and no recommendation was adopted. The parliament was denied the right to present its position at the Council hearings, notwithstanding its role as initiator of the procedure. Therefore, the two ongoing Article 7 proceedings have yet to yield concrete outcomes, raising concerns over the lack of tangible results as the member states have thus far avoided voting.

The most successful instruments in addressing the violations of judicial independence are the judicial means, namely the infringement proceedings (Art. 258 TFEU) and preliminary references (Art. 267 TFEU). With respect to Article 267, several **preliminary references** relate to concerns about the impact of recent reforms to the Polish judicial system on the independence and impartiality of Polish judges. For instance, in 2018, the Dutch Supreme Court made a preliminary reference to the validity of the new Polish law on the Supreme Court, which lowered the retirement age of judges and allowed the Polish government to select new judges (Case C-127/08). The Court of Justice ruled that the Polish law on the Supreme Court was incompatible with EU law, as it did not ensure the independence and impartiality of the Polish judiciary. The Court ordered Poland to suspend the application of the new law immediately and to ensure that the Polish Supreme Court can continue to carry out its duties independently and impartially. However, the ruling has not yielded concrete measures against Poland, and the issue remains unresolved.

In 2018, the Commission brought two **infringement proceedings** under Article 258 TFEU in relation to Poland before the Court of Justice. The two cases (Case C-619/18; Case

¹³ Kim Lane Scheppele and Laurent Pech, 'Why Poland and not Hungary' (VerfBlog, 8 March 2018).

¹⁴ European Parliament, 'Motion for a Resolution on Ongoing Hearings under Article 7(1) TEU Regarding Poland and Hungary' (2022) 2022/2647(RSP).

¹⁵ Kim Lane Scheppele and Roger Daniel Kelemen, 'Defending Democracy in EU Member States: Beyond Article 7 TEU' in Peers, S. and Barnard, C. (eds.), *EU Law in Populist Times* (Cambridge University Press, 2020), p. 416.

C-192/18) were based on Article 19(1) TEU, interpreted in combination with Articles 2 and 4(3) TEU in line with the *Portuguese Judges* case (Case C-64/16). These cases concerned the independence of the Supreme Court and the Independence of the Disciplinary Chamber of the Supreme Court. The Court's finding in both cases that Poland's judicial reforms violated Article 19(1) TEU marked a significant moment as it was the first time that a Member State was deemed to have failed to fulfill its Treaty obligations by impeding the principle of judicial independence. Several cases against Poland have ever since been brought before the Court of Justice on the retirement age of the Supreme Court judges, judicial appointments (Case C-791/19; Case C-824/18), disciplinary regimes for judges (Case C-969/21) and the Muzzle law (Case C-204/21). Notwithstanding the title of the guardian of the Treaties, the parsimonious use of infringement by the Commission is noteworthy. The non-compliance with rulings by member states such as Poland raises further concerns.

As a result, a number of **interim measures** were issued upon the Commission's request. These were regarding national laws governing what amounted to a purge of Poland's Supreme Court, temporary suspensions of laws governing the operation of a body considered by national authorities to be a judicial body, and temporary requests regarding Poland's Muzzle Law (2019), respectively.¹⁶ In the latter, Polish authorities disregarded the Court's ruling, leaving the Commission little choice but to request the imposition of a daily penalty payment. This became the first application for a daily penalty payment within the framework of an infringement action based on judicial independence matters, Article 19(1) TEU in 2021.

In 2019, **Country-Specific Recommendation (CSR)** tool was used with respect to the rule of law in Poland and Hungary. These two member states undergoing Article 7(1) proceedings were subjected to comprehensive and explicit reports on the active backsliding of the rule of law in their country. Meanwhile, the Council's adoption of recommendations for the national reform program of Poland and Hungary followed the Commission's footsteps. The Council went beyond acknowledging the concerns of the Commission in regard to Hungary and issued a formal recommendation for measures to be taken for an anti-corruptions framework, including strengthening judicial independence. As a result, the Hungarian government issued a statement of its own, which may be the first instance of a Member State doing so within the European Semester timeline. Such a response indicates that there may be a present capacity for this tool to provide a more critical evaluation of progress in Member States with regard to the values set out in Article 2.¹⁷ This may lead to increased use of the tool in creating pressure on Member States.

¹⁶ C-204/21 R, *Commission v Poland* [2021] ECLI:EU:C:2021:320.

¹⁷ Kim Lane Scheppele and Dimitry V. Kochenov and Barbara Grabowska-Moroz. 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 Yearbook of European Law 3.

In 2020, the **Rule of Law Report**, under the European Rule of Law Mechanism, was introduced. This new tool is complementary to the EU Rule of Law toolbox that has been in development since 2012 after the speech by President Barroso. The Rule of Law report provides an overview of each country's legal systems and institutional frameworks and their implementation and effectiveness in practice. The report presents that threats to the rule of law in one member state can have wider implications for the entire EU's legal, political, and economic foundations. The Commission's aim to promote a rule of law culture through education and civil society is commendable. However, the Report remains criticized for its reporting nature and the lack of concrete recommendations. As a result, there are doubts about the report's effectiveness in preventing or promptly addressing situations where there is a clear risk of a serious breach of Article 2 values.

In the same year, the European Parliament passed a resolution urging "the Commission to avoid any further delay in its application" under the **Rule of Law Conditionality Regulation**¹⁸ in relation to Poland and Hungary. The Parliament believed that the Commission was not using the necessary tools to address the ongoing backsliding of the rule of law in Member States such as Poland and Hungary. Notwithstanding this, the Commission has just recently written to Hungary and Poland a letter solely requesting information in accordance with Article 6(4) of the Regulation. The European Parliament stated that if no further actions are taken by the Commission, failing to act in pursuance of Article 265 TFEU will be triggered as a result of their tardiness. While it was the Commission's responsibility to do so, they consistently declined to submit written notification as required by Article 6(1) of the Regulation. While there were many questions on the effectiveness of the conditionality mechanism, it was triggered on 27 April 2022 against Hungary for the first time.

¹⁸ Regulation (EU) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I.

4. Gap analysis: scope and necessity for further action

As discussed in the previous sections, the EU institutions have undertaken various actions to protect one of the key elements of the rule of law – judicial independence. Nevertheless, it appears that they failed to acquire the desired effect, and we continuously witness states breaching the principle of judicial independence. As underlined by experts, the tools used were either ineffective due to their nature or the EU institutions failed to utilize them to their fullest extent.

The EU possesses numerous – and we argue too many – soft-law tools, which follow management rather than enforcement logic. While the former is more suitable for addressing involuntary violations, the latter is more effective in dealing with voluntary ones. This causes a problem since the mechanisms used by the EU to address voluntary (intentional) non-compliance are ill-suited. This is clearly visible in relation to the three main mechanisms, i.e., the Rule of Law Dialogue, the Rule of Law Mechanism, and the Rule of Law Framework.

While the **Rule of Law Dialogue** is a soft-law mechanism, it has been the least effective and highly criticized tool. While conducted by the Council, it appears to be a supplementary mechanism to Article 7 Procedure, but with no means of enforcement.¹⁹ The dialogue may be effective when the non-compliance is involuntary but not when the violations are intentional. The utilization of this mechanism shows the unwillingness of the Council to initiate Article 7 Procedure and sends a signal to non-complying States that no “real” consequences are going to be drawn. Together with the absence of transparency and any tangible results after multiple publications, the tool has proven to be unsuccessful.

The **Rule of Law Mechanism** shows similar flaws. While since 2022, the Rule of Law Report also provides country-specific recommendations, they are general, lack precision, include no specific time frame during which they should be complied with, and lack any enforcement mechanism.²⁰ The report is prepared on a yearly basis for each state and treats all states equally, irrespective of the fact that some commit minor violations and unintended violations, while others huge and voluntary. The absence of any distinction between them causes confusion and provides the “Backsliding” States with an excuse that each state has its own violations.²¹ Moreover, Commission has failed to recognize the systemic violations of judicial independence in countries like Lithuania,

¹⁹ Laurent Pech, ‘Doing More Harm than Good? A Critical Assessment of the European Commission’s First Rule of Law Report.’ *Heinrich Böll Stiftung* (4 December 2020) <<https://eu.boell.org/en/2020/12/04/doing-more-harm-good-critical-assessment-european-commissions-first-rule-law-report>> accessed March 1, 2023

²⁰ *ibid.*

²¹ Lili Bayer, ‘Is the EU’s Rule-of-Law Report Still Relevant?’ *Politico* (19 July 2021) <<https://www.politico.eu/article/is-eu-rule-of-law-report-still-relevant-hungary-anti-lgbtq-poland/>> accessed March 1, 2023

preoccupied with individual assaults and not considering it as a whole, which undermines the Mechanism's role as a preventive tool.²²

This is particularly visible in the case of the **Rule of Law Framework** – the Pre-Article 7 Procedure. While the mechanism has been used against Poland, it was not initiated against Hungary. This shows an absolute lack of consistency in the process of initiation of this mechanism. Moreover, the Framework is ineffective in addressing the rule of law backsliding. It is based on a 'structured exchange', where solutions are found through a dialogue between the Commission and the Member States.²³ This is a structurally invalid approach. The success of this mechanism is based on the goodwill of a State to implement the recommendations proposed by the Commission, which is unlikely to happen when the violation is intentional. The Framework lacks effectiveness due to the absence of clearly defined measures, deadlines, and enforcement strategies in case of failure to address such recommendations.

As discussed, the **Article 7 Procedure** provides a mechanism allowing for the imposition of sanctions and constitutes the main political enforcement mechanism. However, it is perceived as a "nuclear option", which ought not to be used. This is further exacerbated by the fact that the key role in this process is the European Council – the intergovernmental institution – consisting of the heads of the Member States, which due to political concerns, are unwilling to act. Because of that, the Member States that intentionally breach the rule of law know that the 'sanction arm' of Art. 7 TEU is never going to be utilized against them due to political considerations. This leads to the mechanism losing its deterring character and becoming a "dog that barks but does not bite".²⁴ Moreover, there are no objective criteria to determine that the serious and persistent breach of Article 2 values occurred in a Member State, which makes the initiation of Art. 7 Procedure difficult even in justified cases.²⁵

Furthermore, one of the key problems in enforcing the principle of judicial independence is the absence of consistent and prone reaction by the Commission to situations when judicial independence is undermined by initiating **infringement proceedings** and requesting **interim measures**. Being the Guardian of the Treaties, the European Commission is responsible for acting when the EU law is breached, i.e., by initiating infringement procedures (Art. 258 TFEU). The Commission, with the exception of its first two rule of law infringement actions in respect of Poland's alleged "judicial reforms", has

²² Beatrice Monciunskaitė, 'To Live and to Learn: The EU Commission's Failure to Recognise Rule of Law Deficiencies in Lithuania.' (2022) 14 Hague J Rule Law 49.

²³ Sonja Priebe, 'The Commission's Approach to Rule of Law Backsliding: Managing Instead of Enforcing Democratic Values?' (2022) 60 JCMS 1691.

²⁴ Laurent Pech, 'Article 7 TEU: From 'Nuclear Option' to 'Sisyphean Procedure'?', in Uladzislau Belavusau, and Aleksandra Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (Oxford Academic, 2020), <https://doi.org/10.1093/oso/9780198864738.003.0011>.

²⁵ Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias Schmidt (eds.) *Defending Checks and Balances in EU member states* (Springer 2021)

arguably failed to act decisively and promptly in addition to failing to target systemic violations of the rule of law in all relevant areas in respect of Poland. Beyond Poland, there have been many examples of the Commission's inaction in respect of Hungary, Bulgaria, Lithuania, etc. notwithstanding manifest violations of judicial independence.

Lastly, while the **Conditionality Mechanism** appears to be a promising tool in the hands of the Commission, it is once again crucial that it uses it in a consistent and decisive manner. Up till now, it has been only triggered against Hungary, but not Poland.

To conclude, we recognize that the main issue lies in the EU institutions' lack of willingness to effectively utilize the tools and mechanisms already available to them. They multiply and create new soft-law instruments based on dialogue, which are doomed to fail, rather than rely on the existing ones and use them consistently and predictably.

5. Recommendations on judicial independence

1. End the Council's Annual Rule of Law Dialogue

The Annual Rule of Law Dialogue, which is conducted by the European Council, has so far served as an additional mechanism to the one determined in Article 7 TEU. While it was modified in 2020, the "upgraded 2.0 version" has not led to any tangible results and must be considered unsuccessful in addressing the rule of law backsliding. This is due to the fact that the mechanism only provides a superficial proceeding that is ineffective in addressing the problem at hand, therefore it simply amounts to a facade of confidential actions. We thus think that a possible 3.0 version would require transparency to enhance the functioning of the tool which would also result in public accountability. However, considering the insistence by the Council to keep the tool confidential and the lack of tangible results of the 2.0 version, we recommend ending this soft tool mechanism. Instead, we advise the Council to pay attention to the tools provided to it by Article 7.

2. Improve the existing soft-law instruments, namely the Rule of Law Mechanism and the Rule of Law Framework

The key problem regarding both the Rule of Law Mechanism with its final Rule of Law Report and the Rule of Law Framework is their general character, the absence of specific recommendations, no clear distinction between minor violations and major violations, systemic ones in a form of ratings as well as the absence of explicit time-frames for the implementation of these recommendations. The absence of these elements undermines the effectiveness of these mechanisms and further dilutes their ability to enforce compliance. The introduction of these elements both to the Rule of Law Report and the Rule of Law Framework would provide a clear and reliable structure of actions that the Member State would have to follow to remedy their violations. This would also allow the

Commission to effectively monitor the progress of the recommendations' implementation.

3. Connect existing Rule of Law instruments so they become interconnected and develop enforcement mechanisms

As of now, all the instruments available under the Rule of Law Toolkit appear to be stand-alone mechanisms. We argue that there ought to be an established link between them, where one instrument influences the other. Currently, a failure to implement the recommendations by a Member State holds no direct consequences, which means that the enforcement mechanism is lacking. Hence, to cure this and not create any new mechanisms, we recommend that the existing ones are used in a consistent manner, meaning that the initiation of another mechanism happens as a direct consequence of the failure to comply with the findings of the former.

We advise that it takes the following form. First, it is necessary that the Commission's Rule of Law Report, the final element of the Rule of Law Mechanism, should not only elaborate on the violations of the Rule of Law in each Member State but also determine their gravity and distinguish the systemic violations. In order to address them, the Commission should provide specific recommendations and establish precise deadlines for their implementation. Nowadays, a failure to implement the recommendations by a Member State holds no direct consequences. We propose that such a failure results in automatic triggering by the Commission of the Rule of Law Framework, so the infringement does not remain unaddressed. As the Framework consists of a three-stage process, there should be a clear time frame introduced by the Commission within which the Member State would have to implement the recommendations.

Similarly to the previous Mechanism, also this instrument lacks the enforcement mechanism. In order to improve compliance, we propose that in case of failure to comply with the recommendation regarding the systemic violation of the rule of law, the Commission automatically initiates the Article 7 Procedure. This would both introduce an enforcement mechanism to this soft-law monitoring mechanism and mitigate the political character of the Article 7 Procedure, by introducing an objective element for its initiation. Our proposal would not require any Treaty change.

4. Make the hearings between the Council and the MS subject to Article 7 TUE public

Since we propose a mechanism facilitating the initiation of Article 7 Procedure, we also recommend that the process itself becomes more transparent and public. Rule of law advocates transparency and it seems clear that there is nothing that urges to be more transparent than the procedure behind the so-called "nuclear option". There is no legal provision at the primary law level that prohibits the transparency we call for and currently, the hearings in the Council are essentially confidential; only the minutes are published but they serve merely to further confusion as they are excessively concise.

Making the hearings public will reverse the lack of transparency that documents relating to Article 7(1) involve and will not just allow us to know how the MS responded to the Council's questions but will increase the political accountability of the national governments represented in the latter. By knowing which topics were discussed and which national governments added questions to the hearings, we can see in some way if the Council as a whole is willing to uphold the values enshrined in Article 2. We are aware that this transparency can be used as a "propaganda" tool by the MS subject to these procedures and as a way to speak to "The People" with imprecise and false statements. For that reason, we recommend that all Article 7 hearings should be objective and fact-checked by legal experts on the judicial independence fields when that is the issue concerned. Additionally, according to the principle of sincere cooperation, enshrined in Article 4(3) TEU, the relevant Member States shall collaborate in good faith throughout the process (European Parliament resolution).

5. The European Commission should initiate the Infringement procedures as soon as the Member State fails to comply with the recommendations regarding systemic violations determined in the Commission's Rule of Law Report/ within the Rule of Law Framework

One of the key drawbacks of the current state of matters identified in the previous section is the absence of consistency and stalling undertaking legal actions by Commission against the non-compliant Member States. While in some cases, the Commission triggers infringement procedures and requests interim measures, it fails to do so in other cases. Hence, we propose that the Commission initiates infringement proceedings when a Member State fails to comply with the recommendation concerning the systemic violation that threatens the rule of law and endangers the legal order of the Union. We argue that when a recommendation is issued based on the Commission's Rule of Law Framework the MS must comply with those within short and strict deadlines due to the interconnectivity that judicial independence has with other matters, particularly the protection of Human Rights. Additionally, the Commission should consider activating mechanisms/tools available to it simultaneously, for example, article 7 together with the "systemic" infringement actions and request for interim measures as well as activate the rule of law Conditionally Regulation. It is worth noting that those tools are not mutually exclusive and when undertaken together, they impose more pressure on the non-compliant Member State that undermines the rule of law.

6. Modify the Art. 133 of the Rules of Procedure of the Court of Justice, in order for it to require the utilization of the expedited procedure in relation to all cases concerning judicial independence / should it not be possible, then require the European Commission to prioritize them by requesting for a case to be determined pursuant to an expedited procedure

Finally, we recommend that ECJ cases concerning judicial independence are automatically considered as ones that require to be dealt with within a short time".²⁶ To demonstrate, in the case of Poland and Hungary, the changes to judicial independence happened so rapidly that the EU failed to act effectively, and consequently, irreparable changes to both the Polish and Hungarian judicial systems occurred. Moreover, as demonstrated above, the attacks on the rule of law have been detrimental not only to the judicial independence of the "European judges"²⁷ and the mutual trust but also to the rights of individuals. If this complication is not addressed primarily, there will not only be backsliding but rather a wipeout of judicial independence.²⁸ Hence, we advise that Article 133 of the Rules of Procedure of the Court of Justice is modified, so it utilizes the expedited procedure to all cases concerning judicial independence. Should that not be possible, we advise that the European Commission itself requests for such cases to be determined pursuant to an expedited procedure.

Overall, we would suggest that all European Union institutions are consistent, but more importantly, actively scrutinizing in their pursuit to stop threats and violations of the rule of law with respect to judicial independence. Since, as the records show "cherry picking" their fights with Member States have thus far not been effective concerning this objective.

²⁶ Article 133 Rules of Procedure of the Court of Justice (European Court of Justice).

²⁷ Portuguese judges case.

²⁸ See the situation in Poland.

MEDIA FREEDOM

Policy proposal by Tariro Gugulethu Muzenda, Jagoda Marcinkowska, Csenge Kiss and Niclas Rast

Mentored by Dr Anna Wójcik, Dr Evangelia Psychogiopoulou and Dr Yustyna Samahalska

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Executive summary

The Our Rule of Law Academy Working Group on Media Freedom, consisting of Tariro Muzenda, Jagoda Marcinkowska, Csenge Kiss, Niclas Rast and; mentored by Dr Anna Wójcik, Dr Evangelia Psychogiopoulou, and Dr Yustyna Samahalska, makes the following recommendations:

- The European Commission should issue a call for proposals regarding media freedom under the Union values and Citizens' engagement strands of CERV, in order to provide more funding opportunities to NGOs trying to preserve media pluralism in their respective Member States.
- The European institutions should work towards a European Media Freedom Act that eliminates the phenomenon of 'deplatforming', which can constitute a threat to media plurality.
- The Centre of Media Pluralism and Media Freedom should implement a ranking to emphasize improvements by (and not only risks in) the Member States regarding media pluralism. To encourage Member States to continue taking positive steps, Member States could be invited for a conference organized by the European Commission as a symbolic reward to discuss their strategies.
- In addition, the results of the MPM and the Rule of Law country reports should be better published by the European Commission through social media posts in order to address more internet users who can consider this information in view of prospective national elections. These posts could be short and illustrative (like those on Instagram) in cooperation with widely known social media creators who provide daily news to their audience.

1. The nature of the problem

As was foreseeable, media freedom, being a major contributing factor to the rule of law, has been affected immensely by the democracy crisis across Europe. The consequences are mutual: the weakening of the rule of law affects media freedom, and vice versa. The persisting struggle to keep the status quo in these two areas has been the subject of extensive public debate and EU action, especially regarding the threats to pluralism, independence, and freedom of expression.

With backsliding movements eager to reinforce an autocracy-like system by employing media silencing techniques, such as in Hungary for example,¹ the EU has conceived many tools to protect the rule of law, provide an independent perspective in the political sphere and foster a pluralistic and representative media environment. However, to the rising concern of civil society represented by journalists, NGOs and academia, not all of them have been utilized or developed effectively.

The attacks on the rule of law implicate, from the perspective of civil society, a need for non-profit and engaged journalism. This is especially true for States in which a large portion of advertising in media is pro-government.² The ways in which non-profit organizations that work on journalism receive funding is rather limited, however, and is usually provided in the form of grants by independent organizations, such as the European Journalism Centre.³

In a broader context, there has been a push both by civil society,⁴ and EU institutions themselves for more funding opportunities on an EU level to support the work of NGOs in promoting democracy and the rule of law.⁵ The Citizens, Equality, Rights and Values programme (CERV), introduced in 2021, has therefore been seen as a significant step in the right direction, especially as it explicitly creates the possibility for NGOs to receive funding related to activities that aim to promote Union values and citizens' engagement.

¹ European Parliament, 'MEPs: Hungary Can No Longer Be Considered a Full Democracy' (Press release, *News: European Parliament*, 15 September 2022) <<https://www.europarl.europa.eu/news/en/press-room/20220909IPR40137/meps-hungary-can-no-longer-be-considered-a-full-democracy>> accessed 10 March 2023.

² Hungarian NGOs, 'Contributions of Hungarian NGOs to the European Commission's Rule of Law Report' (January 2022), p 40.

³ 'Engaged Journalism Accelerator' (*European Journalism Centre*) <<https://ejc.net/for-funders/programmes/engaged-journalism-accelerator/>> accessed 10 April 2023.

⁴ European CSOs, 'Towards a Value-Driven European Policy: European CSOs Call for The Instrument to Support European Values in Europe' (December 2017) <https://www.europuls.ro/wp-content/uploads/2018/02/EVI_CSO-Appeal_final-with-signatories_Jan-2018.pdf> accessed 10 March 2023.

⁵ Opinion of the European Economic and Social Committee on 'Financing of civil society organisations by the EU' (own-initiative opinion) [2018] OJ C 81/9; European Parliament resolution of 19 April 2018 on the need to establish a European Values Instrument to support civil society organisations which promote fundamental values within the European Union at a local and national level (2018/2619(RSP)) [2019] OJ C 390/117; Marco Fisicaro, 'Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union's values' (2022) vol 7 no 2 *European Papers* 697.

With respect to media freedom, the Commission has not used CERV so far to issue calls for proposals from NGOs on the topic.

One tool which merits careful consideration is the Media Pluralism Monitor (hereinafter referred to as 'MPM'). The EU uses this mechanism to evaluate risks to media pluralism within the Member States (hereinafter referred to as 'MS') and 5 EU candidate countries. Later, Rule of Law Reports are issued, which provide an overview of the countries reviewed in the following key areas: the justice system, the anti-corruption framework, media pluralism, and freedom and checks and balances.⁶ In 2022, for the first time the MPM implemented a ranking in order to compare the risks to media pluralism within the EU MS. It shows that Bulgaria, Greece, Hungary, Malta, Poland, Romania, and Slovenia are considered to be high-risk countries.⁷

Recognizing these threats the European Commission has proposed an unprecedented legislature, the European Media Freedom Act (hereinafter referred to as 'EMFA') aimed at ensuring that both private and public media can operate easily across the EU internal market and without any interference.⁸ It is expected that a new watchdog (the proposed European Board for Media Services) will promote the application of new policies and common safeguards to protect media freedom and pluralism in the EU.⁹

Media freedom and pluralism constitute a precondition for the rule of law and, subsequently, democracy. As a means of creating space for discussion on socially and politically critical issues, the media shapes public opinion and subsequently influences public discourse in elections.

This policy brief focuses on the threats of media capture and de-platforming, as well as the weaknesses of existing soft-law procedures with regard to preventing the progressing deterioration of media freedom in the EU.

Media capture is a derivative of the pressure state power exerts over various pillars of independence in order to strengthen its own position. It can be defined as 'a systemic governance problem where political leaders and media owners work together in a symbiotic but mutually corrupting relationship: media owners provide supportive news coverage to political leaders in exchange for favorable government treatment of their businesses and political interests.

⁶ 'The Media Pluralism Monitor informs the EU Commission's Rule of Law Report' (*Centre for Media Pluralism and Freedom*, 13 July 2022) <<https://cmpf.eu.europa.eu/rule-of-law-report-eu-commission-mpm2022/>> accessed 7 March 2023.

⁷ Centre for Media Pluralism and Media Freedom, 'Monitoring media pluralism in the digital era: application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the year 2021' (Research Project Report, European University Institute 2022), p 13.

⁸ European Commission, 'European Media Freedom Act: Commission proposes rules to protect media pluralism and independence in the EU' (Press release, Brussels, 16 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5504> accessed 9 April 2023.

⁹ *ibid.*

Deplatforming relates to freedom of expression and media pluralism. It is described as a phenomenon of 'removing and banning a registered user from a mass communication medium such as a social networking or blogging website'.¹⁰ Undeniably this mechanism can pose a threat to the aforementioned safeguards of the rule of law when coupled with other disquieting trends like the ownership of media outlets by oligarchs. The decision to exclude an opinion from the public debate increasingly becomes an arbitrary one, without an apparent basis on merit.

Turning to soft law procedures, every soft law mechanism such as the MPM has the weakness of not being obligatory. Based on the results, the EU MS receive recommendations to improve their situation on media pluralism. These recommendations are not binding like EU legislation. However, these tools as soft law help the MS become aware of their weaknesses regarding media pluralism and aim to support them in their efforts to implement planned reforms and encourage positive developments. Thus, it is important to increase public pressure by communicating the results of the MPM and the Rule of Law country reports better.

2. Legal and policy basis/bases for the EU to act

Due to the principle of conferral enshrined in Art. 5 TEU, the EU may act only as far as the MS has given it the competence;¹¹ matters relating to the media as such, therefore, fall outside of its legislative scope.¹² Hence, the EU has linked the media to different issues in order to regulate it.

A relevant example is Directive 2010/13/EU, the Audiovisual Media Services Directive (AVMSD), introduced on the basis of art. 53 (1) TFEU, which permits the EU to issue directives to coordinate national laws in order to facilitate people pursuing self-employment, and art. 62 TFEU.¹³ One of its most notable provisions related to media freedom is Art. 30 (1), which prescribes that MS must designate independent national regulatory authorities to monitor audiovisual media services.¹⁴ Additionally, the AVMSD has established the European Regulators Group for Audiovisual Media Services (ERGA), an EU board that is composed of such national authorities;¹⁵ its main aims included

¹⁰ 'deplatform, v' (*Merriam-Webster Online*) <www.merriam-webster.com/dictionary/deplatform> accessed 9 April 2023.

¹¹ Consolidated Version of the Treaty on European Union (TEU) [2012] OJ C 326/13, art 5.

¹² Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/47, arts 3–6.

¹³ TFEU, art 53 (1).

¹⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1, art 30 (1).

¹⁵ Directive 2010/13/EU, art 30b (1)(2).

providing a platform for national authorities to exchange best practices,¹⁶ and providing the Commission with technical expertise.¹⁷

Building on aspects of the AVMSD, the Commission has proposed a Regulation for establishing a common framework for media services in the internal market, the EMFA, based on art. 114 TFEU. While it has not been adopted yet, it is important to make note of it, as it would amend the AVMSD. The most notable change is the replacement of the ERGA by the European Board for Media Services,¹⁸ amongst other measures linked to media freedom.

Under art. 258 TFEU the Commission has the possibility to initiate an infringement procedure against a MS should it fail to fulfill its obligations under the Treaties.¹⁹ This would provide the EU with the possibility to act in relation to media freedom in case a MS fails to implement the AVMSD correctly, for example. Such an infringement procedure may also be linked to Art. 11 of the Charter of Fundamental Rights of the EU,²⁰ in case there is a violation of the right to freedom of expression.

While the explicit routes for the EU to act in regard to media freedom are rather limited, they may be complemented by indirect regulation through funding opportunities. Particularly CERV, established in Regulation (EU) 2021/692. It merges two previous instruments: the Rights, Equality and Citizenship Programme for 2014–2020, outlined by Regulation (EU) 1381/2013, and the ‘Europe for Citizens’ programme, as laid down by Council Regulation (EU) 390/2014.²¹ By offering to fund the projects of local civil society organizations falling under one of the four strands, Union values, Equality, Rights and Gender Equality, Citizens’ Engagement and Participation and Daphne respectively, the main objective of the programme is to promote EU values.²² In regards to media freedom, there is potential for EU action under the Union values strand, outlined in Article 3 of the Regulation, and the Citizens’ engagement strand outlined in Article 5 of the Regulation.

The legal basis of the Media Pluralism Monitor (MPM) is found in art. 167 TFEU.²³ The primary objective is to protect the MS culturally, by protecting ‘artistic and literary creation, including in the audiovisual sector’ within the EU. It outlines the EU’s

¹⁶ Directive 2010/13/EU, art 30b (3)(b).

¹⁷ Directive 2010/13/EU, art 30b (3)(a).

¹⁸ Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU [2022] COM/2022/457, art 8.

¹⁹ TFEU, art 258.

²⁰ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391, art 11.

²¹ Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014 [2021] OJ L 156/1, recital 2.

²² Regulation (EU) 2021/692, art 2.

²³ Kristina Irion and Peggy Valcke, ‘Cultural Diversity in the Digital Age: EU Competences, Policies and Regulations for Diverse Audiovisual and Online Content’ in Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union* (Palgrave Macmillan UK 2015).

competence to implement measures promoting media pluralism. At the moment it is a peer review tool, which creates soft law: scholars based in various MS identify threats to media freedom and provide recommendations specifically for each state.

3. Action(s) by EU institutions to date

In relation to CERV, the Commission so far has issued two multi-annual work programmes, one for 2021-2022 and the other for 2023-24.²⁴ In the programme's first year, under 14 calls for proposals, a total of 368 projects were awarded funding in total,²⁵ and the current list displays a total of 945.²⁶

In a theme that may be linked to media freedom, several projects combating disinformation have received funding in 2022 about a multitude of topics, including climate change, for example.²⁷ Relatedly, subsection 3.8. of the 2023-2024 work programme contains a call for proposals that is aimed at counteracting disinformation and promoting media literacy between citizens,²⁸ under the Citizens' engagement and participation strand. Being a rather new addition to the Commission's funding toolkit, however, the information about CERV and its impact is limited.

Currently, there is scant legislation addressing de-platforming. Solely the EMFA addresses the issue, with the Digital Services Act (hereinafter referred to as 'DSA') indirectly applying to it to some degree. Notably, to date the former is a proposal,²⁹ while the latter has already been adopted.³⁰

²⁴ European Commission, 'Citizens, Equality, Rights and Values programme' <https://commission.europa.eu/about-european-commission/departments-and-executive-agencies/justice-and-consumers/justice-and-consumers-funding-tenders/funding-programmes/citizens-equality-rights-and-values-programme_en> accessed 10 March 2023.

²⁵ European Commission, 'Citizens, Equality, Rights and Values Programme - Performance' <https://commission.europa.eu/strategy-and-policy/eu-budget/performance-and-reporting/programme-performance-overview/citizens-equality-rights-and-values-programme-performance_en> accessed 10 March 2023.

²⁶ European Commission, 'Projects and Results: Citizens, Equality, Rights and Values Programme' (*Funding & tender opportunities*) <<https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/projects-results;programCode=CERV>> accessed 9 April 2023.

²⁷ European Commission, 'DisinformACTION! - Counter Climate Change Disinformation through youth E-participation' (*Funding & tender opportunities*) <<https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/projects-details/43251589/101081183/CERV>> accessed 9 April 2023.

²⁸ Annex to the Commission Implementing Decision on the financing of the Citizens, Equality, Rights and Values programme and the adoption of the work programme for 2023-2024 C (2022) 8588 1 December 2022.

²⁹ European Commission, 'European Media Freedom Act - Proposal for a Regulation and Recommendation' (*Shaping Europe's digital future*, 16 September 2022) <<https://digital-strategy.ec.europa.eu/en/library/european-media-freedom-act-proposal-regulation-and-recommendation>> accessed 13 March 2023.

³⁰ European Commission, 'The Digital Services Act Package' (*Shaping Europe's digital future*) <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 13 March 2023.

The DSA indirectly applies to the issue by proposing a notice-and-action mechanism in article 16, which allows 'any individual or entity to notify [providers of hosting services] of the presence on their service of specific items of information that the individual or entity considers to be illegal content'.³¹ While it contains safeguards towards the protection of freedom of expression in the process (eg. pursuant to art. 14 (2)(a) users must explain why they believe the notified content is illegal), the cited law effectively empowers hosting providers to make decisions about the legality of content upon receipt of substantiated notice of alleged illegality.³² This gives hosting providers an incentive to remove content upon notice without further moderation.

The EMFA tackles the problem of de-platforming from a different perspective. It provides that in cases not involving systemic risks such as disinformation, very large online platforms that intend to take down certain legal media content considered to be contrary to the platform's policies will have to inform the media service providers about the reasons before such taking down takes effect (art. 17 (2)). What is worth noting here is the limited scope of application – pertaining only to matters of internal policy, not involving other risks which could lead to a decline of the rule of law in the future. Another worrisome aspect is the apparent lack of crucial guarantees. As opposed to the DSA, the EMFA doesn't require that platforms have 'due regard' to the 'fundamental rights' of users under the EU Charter of Fundamental Rights, which guarantees freedom of expression.

The EU uses the MPM as a peer review tool to evaluate the risk to media pluralism in dimensions of fundamental protection, market plurality, political independence and social inclusiveness.³³ On the basis of the MPM report, recommendations are issued to the MS to improve problem areas. It is unclear whether the recommendations are always crucial in promoting the implementation of EU legislation, or if the process would go on independently. However, recent findings indicate that efforts have been undertaken in the MS to strengthen the legal frame of media pluralism protection. For instance, in Spain, the reform of the Official Secrets Law constitutes a clear attempt to facilitate journalists' access to state information.³⁴ Publishing the MPM reports highlights the

³¹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1, art 16 (1).

³² ARTICLE 19, 'At a glance: Does the EU Digital Services Act protect freedom of expression?' (ARTICLE 19, 11 February 2021) <https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/> accessed March 13, 2023.

³³ Centre for Media Pluralism and Media Freedom, 'Monitoring media pluralism in the digital era: application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the year 2021' (Research Project Report, European University Institute 2022).

³⁴ Laura Kabelka and Molly Killeen, 'Spanish secrecy law would hamper public participation, civil society warns' (EURACTIV, 19 August 2022) <https://www.euractiv.com/section/politics/news/spanish-secrecy-law-would-hamper-public-participation-civil-society-warns/> accessed 9 April 2023.

progress of implementing EU provisions and measures aimed at improving media pluralism.

At the moment, media freedom is enshrined in existing EU law. It can be found in Article 11 of the Charter of Fundamental Rights of the European Union which safeguards the freedom and pluralism of the media. The EU has also taken a proactive stance for the protection of freedom and pluralism of the media. This can be observed in the Klubrádió case,³⁵ as the Commission condemned and took Hungary to court for the attack on the independent radio station, Klubrádió. Although the infringement procedure has had a rather limited impact on journalistic safety, as seen in the backlash faced by other Hungarian liberal radio stations since the start of the case such as Tilos, it is still important that the EU has expressed its support for journalists and media workers who face threats and violence.

Furthermore, the EU has taken additional steps not only to protect media outlets but also individuals, for example by means of the EU Whistleblowing Directive. In November 2019, the EU adopted this directive, urging all MS to establish rights and obligations under national law to protect whistleblowers.³⁶ This explicitly illustrates the active steps the EU has adopted to safeguard media freedom.

4. Gap analysis: scope and necessity for further action

While the Commission's limited action with regards to calling for proposals for media freedom under CERV is not responsible for media inequalities, it does constitute a missed opportunity to tackle the problem. Strengthening CERV contribution to protecting media freedom on a larger scale is necessary. As mentioned previously, the Commission itself has made note of an uneven playing field in favor of the government in Hungarian media, for example,³⁷ supporting NGOs in trying to 'balance the scales' through funding would be a logical step to attempt remedying it. It would prove especially beneficial in connection to ensuring fair and democratic elections, which constitute building blocks of the rule of law as a whole.

Regarding deplatforming, while the aim of the EMFA art. 17 is proper, especially given the follow-up in the next article, it would seem that not enough is being proposed on the

³⁵ Lucia Bellucci, 'Media Law, Illiberal Democracy and the COVID-19 Pandemic: The Case of Hungary' in Mathieu Deflem and Derek M. D. Silva (eds), *Media and Law: Between Free Speech and Censorship* (Emerald Publishing Limited 2021).

³⁶ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law [2019] OJ L 305/17.

³⁷

European Commission, '2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report The rule of law situation in the European Union' (SWD/2022/517 final).

matter. Article 18 proposes self-regulatory measures for the purpose of implementing art. 17, through structured dialogue organized by the Board – between providers of very large online platforms, representatives of media service providers and representatives of civil society.

The vague wording however leaves little legal certainty of the processes which would be supposed to take place in case of a deplatforming, therefore clarification is required.

Two main risk areas emerge: the platforms themselves being the ultimate arbiter in each case and no clear indication of how representatives for the structured dialogue meetings should be elected. Furthermore, effectively the regulation doesn't eliminate the risk of de-platforming users who contribute to media pluralism, but merely requires that such user is informed of the action.

To increase legal certainty, it should be wise to create a system of actions to be taken whenever a de-platforming case is opened, which would be advantageous not only for the affected party, but also to other users of the given platform. The proposed EMFA solution is useful, but should not be the only step before a user is removed.

Moreover, the review process should be extended to encompass other issues, going beyond ensuring that the internal policies of the online platform concerned are abided by to encompass EU policies, so as to avoid limiting pluralism and independency of political opinions. Otherwise, arbitrary decisions will become the source of de-platforming, based on internal policies developed in line with the agenda of the platform. That is especially noteworthy in the context of media capture and ownership of media outlets by oligarchs.

Another pressing issue, this time regarding the soft-law methods for protecting media freedom, are the recommendations of the Centre for Media Pluralism and Media, based on the MPM. It would seem that they are too general in their nature, without creating a clear *modus operandi* for improving recognized problem areas. This can be observed in the case of the 2023 country report on Germany, which stated that the government should 'ensure transparency and access to data from online platforms'.³⁸

The Hungary country report illustrates this issue excellently. As it states, Orbán's administration is hiding behind the declaration of a 'state of danger' to effectively hinder access to public information.³⁹ Although the recommendations suggest increased

³⁸ Centre for Media Pluralism and Media Freedom, 'Monitoring media pluralism in the digital era: application of the Media Pluralism Monitor in the European Union, Albania, Montenegro, the Republic of North Macedonia, Serbia and Turkey in the year 2021' (Research Project Report, European University Institute 2022).

³⁹ European Commission, '2022 Rule of Law Report Country Chapter on the rule of law situation in Hungary Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report The rule of law situation in the European Union' (SWD/2022/517 final).

transparency, they focus on introducing mechanisms to enhance the functional independence of the media regulatory authority taking into account European standards on the independence of media regulators. While those include increased transparency, they don't specifically address the malicious restriction of information.

Additionally, there is no pressure on the MS to fulfill the recommendations. MPM results were released by using Youtube, however, relevant videos did not receive plenty of views (110 views after 8 months).⁴⁰ The EU institutions should make the information of the MPM better accessible for the Internet user.

⁴⁰ CMPF EUI, 'How to ensure media pluralism in the EU? Presentation of the Media Pluralism Monitor 2022' (5 July 2022) <https://www.youtube.com/watch?v=s_u3wPZHwgg> accessed 13 March 2023.

5. Recommendations

In light of the previous analysis, the following recommendations are made:

Recommendation no 1:

The Commission must call for proposals under CERV specifically related to the protection of media freedom and pluralism, notably in a political context.

This may be achieved firstly through CERV's Union values strand. Under Article 3 of Regulation (EU) 2021/692, this strand of the programme aims to give financial opportunities to local NGOs to promote and raise awareness of rights and the rule of law. There is a strong link between media and Union values. Article 2 of the TEU, laying down the foundations of the Union itself, enshrines democracy as one of them; only by preserving a plurality of opinions in the media and information can it be protected. Furthermore, this issue is very much related to freedom of expression, enshrined in Article 11 of the Charter of Fundamental Rights, which includes the right to receive and impart information without interference by public authorities.

Key actions concerning media freedom under the Union values strand may also be complemented by further action taken under the Citizens' engagement and participation strand, notably as outlined in Article 5 (2) of Regulation (EU) 2021/692. By providing a CERV opportunity for funding to NGOs that want to encourage and facilitate public exchanges of citizens' views, the Commission could enhance and strengthen its efforts to preserve pluralism in the media of MS, using funding as a means to do so.

Recommendation no 2:

A series of steps also need to be undertaken when de-platforming occurs. Information on the profile of the given user, even in a graphic form, should be added when a review process starts, to inform other users of the fact and to signal the basis for it – be it the spread of disinformation or anything else deemed inadequate. Moreover, if the user usually earns money from his activity on the platform, they could be demonetized for the duration of the review process. The review process itself could either be carried out by a committee of the platform in cooperation with/under the external control of the Board, in order to make sure it abides by EU policies or a new sub-body of the Board could be created to take on such actions. In that case, de-platforming of users contributing to media pluralism should be evaluated on an ad casum basis, with the bigger cases creating precedence – so as not to overwhelm the Board. Once precedences is created in a problematic case, the internal committees should follow it, without specifically relating work to the Board. Issues the Board sub-body should assess in such a way should include which parties could be considered crucial enough to public opinion to be de-platformed in the strict sense – according to professional occupation, number of followers, or reach on a platform. The whole process should not be carried out in regards

to banning any user, but those more relevant to the public debate – politicians, journalists, and influencers, among others.

In the case of there being no clear indication of how representatives for the structured dialogue meetings should be elected, it is advised to develop a catalog of bodies involved in reviewing the application of art. 17 of the EMFA. Other organizations of civil society should be included, such as journalists' unions and associations and academia. The catalog should however stay open, given the rapid development of what exactly is considered media. The Board should take into account the fact that the profession of journalism is not regulated in the EU and many of its MS. This could however in the future enable it to recognize other persons or organizations as eligible to participate in the review process; these could include influencers and social media creators. A possible solution would be to create another, independent review body comprising the aforementioned agents. This body could operate on the basis of a mechanism similar to that of the peer review, or as a group of interconnected media councils with regular meetings.

Moreover, sanctions should be imposed on platforms that do not abide by the proposed regulations. Penalties could be inflicted in case of restricting EU-based users and content in an arbitrary and discriminatory manner, or if the users are not informed on the basis of their removal.

Recommendation no 3:

As mentioned before, the MPM offers recommendations to promote media pluralism within the EU. These recommendations could encourage the MS to take action. To make the recommendations more encouraging, it is important to give the MS a clear recommendation. With that being said, clear recommendations are easier to implement by the MS. Especially, because of the fact that these recommendations are not obligatory, it is essential to formulate them as clearly as possible.

Protecting media freedom is essential for maintaining a healthy and functioning democracy, and peer review could prove a helpful tool in this respect. To make the procedures of peer review more efficient in the EU for protecting media freedom, the Media pluralism monitor should establish clear guidelines, standardize the review process and increase transparency. In order to ensure a more efficient peer review process, clear guidelines must be established for the system. These guidelines should be transparent and easily accessible to all state authorities and media outlets so that they understand what is expected of them and how the review process works.

Secondly, we suggest that the review process should be standardized to ensure that all Member States and media outlets are evaluated using the same criteria. This will help to

minimize any biases or inconsistencies in the review process, ensuring equal comparison and evaluation.

Peer review should finally be transparent, with clear criteria and standards for evaluation, and the results of the review should be publicized more widely. Furthermore, clear criteria and standards for evaluation should be published. This will increase trust in the process and use of the findings to exert pressure on Member States and media outlets to correct problems identified.

Furthermore, to encourage the implementation of the recommendations made, positive developments within a member state could be honored by the EU. By diffusing information about such positive developments, for instance, in social media, MS could feel proud to continue their efforts to improve the situation regarding media pluralism. At the same time, MS which indicates a positive development could serve as a role model to encourage other MS to achieve similar goals. It is more effective psychologically to encourage people by giving them good feedback.⁴¹

To increase the motivation for implementation, it could be helpful to add some benefits. These benefits could be symbolic in nature. For instance, the states with the major progress in promoting media freedom could be invited to a conference organized by the EU in which they could present and exchange information on their strategies. A ranking of the Member States and their progress in addressing failings could also be published in short and visualized posts in social media like Facebook, Instagram, Twitter, and Youtube, and addressed to young people.

Young people take this into consideration for the next national election. They will make a considered decision as to whom they will vote for. Politicians have to adapt their politics in order to win their elections. Thus, the government of the MS would be encouraged to protect media pluralism by the pressure from the EU institutions and their citizens.

In regards to the recognized risks by the MPM, these could form the object of more detailed discussion in national politics when social media posts raise more awareness about them, for example on issues concerning the safety of journalists or effectiveness of national regulators. Politicians should know that these are important topics for young people or, in general, for social media users.

In conclusion, it is essential to highlight and emphasize the improvements within the MS regarding media pluralism. In addition, the EU should provide precise steps on how the MS can implement these recommendations.

⁴¹ Lauren Eskreis-Winkler and Ayelet Fishbach, 'You Think Failure Is Hard? So is Learning From It' (2022) 17 (6) Perspectives on Psychological Science 1511.

ACADEMIC FREEDOM

Policy proposal by Roisin O'Donovan, Anna Paula Kitz,
Defne Ertach Halil, Hedvika Slováková

Mentored by Professor Gráinne de Búrca and Dr Vasiliki
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Executive summary

The Our Rule of Law Academy Working Group on Academic Freedom consists of Roisin O'Donovan, Anna Paula Kitz, Defne Ertach Halil, and Hedvika Slováková; mentored by Professor Gráinne de Búrca and Dr. Vicky Kosta, make the following recommendations:

- We recommend that the Fundamental Rights Agency (FRA) proactively invites organizations involved in reporting, monitoring, and protecting academic freedom, such as the European Universities Association, to join the Fundamental Rights Platform (FRP). As of now, the FRP includes universities. We recommend that this category is broadened to “Academic and Research institutions”, and that the FRA invites these organisations to form a working group. We also recommend that the FRA engages with these organisations to advise on monitoring academic freedom and to develop, through this cooperation, effective indicators for such monitoring. The pool of information gathered should then be shared with the European Parliament Forum on academic freedom.
- We recommend that academic freedom be incorporated into the accession process. This examination should take place under the three negotiating chapters: Judiciary & Fundamental Rights, Education & Culture, and Science & Research. To ensure consistency and a shared EU standard of academic freedom, we propose a monitoring system that fully aligns with that carried out by the European Parliament Forum.
- We advise the European Parliament Forum on Academic Freedom to cooperate with the Commission, the Fundamental Rights Agency, and the Fundamental Rights Platform, in order to create a common method of monitoring academic freedom. Furthermore, the Forum should make use of its position by encouraging the European Parliament to issue a recommendation on academic freedom that includes a definition of academic freedom that encapsulates all three dimensions of this freedom.
- **The Fundamental Rights Agency should:**
 - (i) Invite organisations involved in reporting, monitoring and protecting academic freedom to join the Fundamental Rights Platform and
 - (ii) Engage with these organisations to advise on monitoring academic freedom
- **The European Commission should assess the protection of academic freedom in candidate countries during the accession process. This assessment should take place under the three negotiating chapters of Judiciary & Fundamental Rights, Education & Culture and Science & Research.**
- **The Europe Parliament Forum on Academic Freedom should:**
 - (i) Work alongside the European Commission, the Fundamental Rights Agency and its Fundamental Rights Platform to create a common method of monitoring academic freedom for existing Member States and candidate States, and

(ii) invite the European Parliament to issue a recommendation defining academic freedom

1. The nature of the problem

I. State of Play of Academic Freedom within the EU

Academic freedom has not been a priority for the European Union to date. It was not until 2020 that the European Union's competence in this area was first considered by the Court of Justice of the European Union (CJEU).¹ That is not to say there has been no EU action in this area, as the issue of academic freedom appears to be gaining greater attention in recent years. The European Parliament's Panel for the Future of Science and Technology (STOA) established a Forum on Academic Freedom in 2022, which amongst other things will produce an annual report on the state of academic freedom across the EU.² Further, EU action adopted in this field will be discussed in part 3 below.

The concept of academic freedom has been defined in terms of three different dimensions: first, academic freedom as an individual right; second, academic freedom as an institutional right; and third, the obligation of the state to promote and protect academic freedom.³ These three dimensions of academic freedom were implicitly recognized by the Court of Justice of the EU in the C-66/18 *Commission v. Hungary*.⁴ This case displays the first consideration of academic freedom by the CJEU. In terms of individual right, the Court looked in particular at freedom of expression and of action, freedom to disseminate information, and freedom to conduct research and to distribute knowledge and truth without restriction, extending to academics expressing their views freely and openly. Moreover, the CJEU discussed the second institutional and organizational dimension, emphasizing institutional autonomy. Institutional autonomy is a vital component in order to ensure the creation and maintaining of academic freedom

¹ C-66/18 *Commission v Hungary* [2020] EU:C:2020:792.

² The STOA is a European Parliament hosted high-level conference of the Panel for the Future of Science and Technology, which last took place on the 28th of November in 2022 with the focus on academic freedom protection in Europe. The next one is scheduled by the European Parliament for the 16th of March 2023 with the focus on food energy and technological security. See European Parliament Forum for Academic Freedom, 'How to Provide Enforceable Protection for Academic Freedom at EU Level?' (STOA conference, Science and Technology Options Assessment Panel, 28 November 2022) <https://multimedia.europarl.europa.eu/en/webstreaming/panel-for-future-of-science-and-technology_20221128-1500-SPECIAL-STOA> accessed 12 February 2023.

³ Jogchum Vrielink, Paul Lemmens, Stephan Parmentier, Leru Group on Human Rights, 'Academic Freedom as a Fundamental Right' (*Advice Paper of League of European Research Universities*, December 2010) <<https://www.leru.org/files/Academic-Freedom-as-a-Fundamental-Right-Full-paper.pdf>> accessed 27 February 2023; Jogchum Vrielink, Koen Lemmens, 'Challenges to academic freedom as a fundamental right' (LERU, April 2023) <<https://www.leru.org/publications/challenges-to-academic-freedom-as-a-fundamental-right>> accessed 5 May 2023.

⁴ C-66/18 (n1) 224-227.

and is threatened by governmental interference.⁵ Additionally, the Court effectively recognized the Member State's obligation to protect higher education institutions from threats to their autonomy.⁶ A study commissioned by the European Parliament distinguishes between essential and supporting elements of academic freedom. Freedom of teaching, freedom of research, freedom to disseminate knowledge, freedom to learn, and the right to self-governance belong to the former category.⁷ Institutional autonomy, employment security, and financial security belong to the latter category. The study also points out that academic freedom involves rights, obligations, responsibilities, and accountability which need to be defined to the same extent as the freedoms inherent to academic freedom as when they are not respected they undermine the legitimacy and integrity of academia and the academic profession as a whole.⁸

One of the most cited ranking systems for academic freedom is the Academic Freedom Index (hereafter, AFI).⁹ Within the 2023 rankings, many EU member states were highly ranked with 12 EU member states in the top 10% and 24 states being accorded "status A".¹⁰ However, Greece, Poland and Hungary dropped significantly with Hungary being ranked in the bottom 20–30% and accorded a D status.¹¹ V-Dem, the organization which collects and aggregates the data, has acknowledged that academic freedom is an abstract concept that is hard to quantify.¹² The AFI uses expert assessments to create these rankings which they acknowledge have inherent limitations.¹³ This data, therefore, requires critical engagement, as the ranking is not a complete picture of academic freedom although it remains a useful indicator. For example, Denmark has a status A under the AFI even though freedom of research in Denmark has been said to be

⁵ Peter Maassen, Dennis Martinsen, Mari Elken, Jens Jungblut, Elisabeth Lackner, 'State of play of academic freedom in the EU member states: Overview of de facto trends and developments' (STOA, 23 March 2023), 173.

⁶ *ibid.*

⁷ Gergely Kováts, Zoltán Rónay, 'How academic freedom is monitored – Overview of methods and procedures' (STOA, March 2023).

⁸ Gergely Kováts, Zoltán Rónay (n7) 15.

⁹ V-Dem, 'Academic Freedom' (V-Dem Institute, 2023) <<https://www.v-dem.net/our-work/research-programs/academic-freedom/>> accessed 13 February 2023.

¹⁰ Katrin Kinzelbach, Staffan Lindberg, Lars Pelke, Janika Spannagel, 'Academic Freedom Index Update 2023' (FAU Erlangen-Nürnberg and V-Dem Institute, 2023) <<https://academic-freedom-index.net/>> accessed 13 February 2023.

¹¹ *ibid.*

¹² V-Dem is a research project which measures and analyses the quality of democracy around the world using a comprehensive database of democracy indicators. See V-Dem, 'Academic Freedom' (V-Dem Institute) <<https://www.v-dem.net/about/v-dem-project/>> accessed 9 March 2023; Katrin Kinzelbach, Ilyas Saliba, Janika Spannagel, Robert Quinn, 'Free Universities – Putting the Academic Freedom Index into Action' (Global Public Policy Institute, March 2021) <https://gppi.net/media/KinzelbachEtAl_2021_Free_Universities_Afi-2020_upd.pdf> accessed 12 February 2023.

¹³ *ibid.*

extremely limited by EU standards.¹⁴ Scholars at Risk provide an Academic Freedom Monitoring Project which analyses recorded attacks on academic freedom worldwide.¹⁵ Since January 2022, Scholars at Risk have recorded 8 instances under the “killings, violence and disappearances” category within EU Member states, most of which took place in Greece,¹⁶ and yet Greece ranks in the top 40–50% in the AFI.¹⁷ Further, this system of disaggregated data is not useful from a comparative point of view as it has been described as unrepresentative of the true number of incidents that take place and does not account for denial of funding, intimidation, and censorship.¹⁸ Many Member states which feature highly in the AFI rankings and maintain status A level are experiencing attacks on academic freedom, as will be discussed below. In their report for the European parliament, Gergely Kováts and Zoltán Rónay have identified academic freedom as one of the least reported fundamental values in international monitoring reports.¹⁹

II. Threats and Challenges

A key challenge for the maintenance of academic freedom is that it is a relatively low-profile issue to which not much public attention is given. Member States have remained relatively unchecked in the domain of education, and the goal of ensuring academic freedom has not been a priority for the EU. By comparison, freedom of expression is debated in society and there is scholarly literature on the topic, whereas academic freedom is often viewed as merely an offshoot of this right and remains relatively undefined.²⁰ In particular, there is no clear legal definition of what academic freedom is and no widespread understanding of what it entails. “Strengthening the binding legal definition of academic freedom” is one of the policy proposals put forward by a study by Gergely Kováts and Zoltán Rónay.²¹ Citizens, students and academics lack a widely understood and shared vision of this right. This deficit can exacerbate anti-intellectualism and strengthen the misperception that academia is for the elite and

¹⁴ Nanna Balslev, ‘Denmark gets Bottom Score in Freedom of Research within the EU’ (*University Post*, 25 October 2017) <<https://uniavisen.dk/en/denmark-gets-bottom-score-in-freedom-of-research-within-the-eu/>> accessed 12 February 2023.

¹⁵ Scholars at Risk is a global network of academic institutions and individuals dedicated to promoting academic freedom and protecting scholars at risk of persecution or violence. See Scholars at Risk, ‘Academic Freedom Policy Making at the European Union’ (*Scholars at Risk Europe*) <<https://www.scholarsatrisk.org/>> accessed 17 February 2023; Scholars at Risk, ‘Academic Freedom Policy Making at the European Union’ (*Scholars at Risk Europe*) <<https://www.scholarsatrisk.org/academic-freedom-monitoring-project-index/>> accessed 17 February 2023.

¹⁶ *ibid.*

¹⁷ *ibid.*; V–Dem (n9).

¹⁸ Jannis Grimm, Ilyas Saliba, ‘Free Research in Fearful Times: Conceptualizing an Index to Monitor Academic Freedom’ (2017) 3(1) *Interdisciplinary Political Studies* 52.

¹⁹ Gergely Kováts, Zoltán Rónay (n7).

²⁰ Jogchum Vrielink, Paul Lemmens, Stephan Parmentier, LERU Group on Human Rights (n3); Jogchum Vrielink, Koen Lemmens (n3); Vasiliki Kosta, Darinka Piqani, ‘Where trade and academic freedom meet: Commission v Hungary’ (2022) 59(3) *Common Market Law Review* 843.

²¹ Gergely Kováts, Zoltán Rónay (n7) 66.

not something that affects everyday citizens. MEP Christian Ehrler has pointed out at the European Parliament's Science and Technology Options Assessment (STOA) that not all EU Member States would encourage an EU initiative in this area, which points to the need to demonstrate the importance of cooperation and action in the field of academic freedom at the EU level.²² National governments have a crucial role to play in supporting academic freedom, even though they are also often the culprits of such attacks on this freedom. Therefore action in this domain will depend greatly on creating publicity and improving the public understanding and perception of academic freedom. Essentially, there is not a general awareness of the importance of academic freedom within the population of most EU states. Hence, various actors have called for the creation of training on the protection of academic freedom for academic staff and University modules on academic freedom, such as the president of Ireland.²³

As it has not to date been a priority for the EU, academic freedom has not been monitored sufficiently even though it has been threatened in several respects. Autocratic governments in particular have used the scant protection and lack of emphasis placed on this freedom to their political advantage. The Central European University (hereafter, CEU) affair, which led to the Commission bringing proceedings against Hungary, is a prime example of how quickly action can be taken to impair academic freedom.²⁴ Hungary exploited the lack of legal development in this domain and argued that the EU had no jurisdiction as there was no EU definition of academic freedom. While the argument was not ultimately successful, this case highlighted the importance of academic freedom.²⁵

A key threat to academic freedom is political interference. Authoritarian populism in particular poses a major threat to the freedom of expression and research of academics and to the institutional autonomy of universities under their regime. This is not surprising considering that academic freedom enables the informed critique of power and encourages students to think critically.²⁶ The erosion of academic freedom by political entities is not a problem unique to Hungary, Poland or Greece.²⁷ In a 2017 report, Denmark ranked 24th in the European Union in freedom to research.²⁸ There appears to

²² Christian Ehrler, 'STOA Conference' (n2).

²³ Michael D Higgins, President of Ireland, 'President addresses conference on academic freedom' (8 June 2021) <<https://president.ie/en/diary/details/president-addresses-conference-on-academic-freedom>> accessed 5 May 2023.

²⁴ Vasiliki Kosta, Darinka Piqani, 'Where trade and academic freedom meet: Commission v Hungary' (2022) 59(3) Common Market Law Review 843 <<https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/59.3/COLA2022053>> accessed 1 March 2023.

²⁵ C-66/18 (n1) 74.

²⁶ Jannis Grimm, Ilyas Saliba (n18).

²⁷ Katrin Kinzelbach, Staffan Lindberg, Lars Pelke, Janika Spannagel (n10).

²⁸ Nanna Balslev (n14).

have been a growth of anti-intellectualism in Denmark and other EU Member states.²⁹ In the Danish context, this growing mistrust and resentment towards academics has flourished following a change in government supported by the populist Danish people's party.³⁰ Danish researchers in migration law have reported that migration has become heavily politicized and that a large proportion of migration academics have received threats.³¹ This research highlighted the fact that academics in this field are reluctant to engage in public debate out of fear of the consequences.³² Yet, Denmark is ranked 19th among EU member states with an Afi index of 0.91 despite the aforementioned issues, demonstrating the deficiencies in the monitoring system.³³

This example highlights a key consequence of a deterioration of academic freedom, which is self-censorship. Self-censorship can affect the academic community in various ways; academics may refrain from researching certain topics for fear of the repercussions and students may refrain from expressing opinions that they believe will not be well received. The nefarious aspect of self-censorship is it is largely invisible, while flagrant attacks on academic institutions obtain larger publicity. Self-censorship has a chilling effect and is hard to detect and quantify, thus harder to rectify and protect against.

The internationalization and growing commercialization of universities has also posed challenges to academic freedom.³⁴ College boards are increasingly replicating corporate boards with audits, appraisals, and targets which diminish self-governance and academic autonomy.³⁵ The pressure of obtaining tenure and receiving funding nationally and internationally to support this business model can lead to self-censorship and avoidance of controversial research topics.³⁶ There are several recent salient examples of attacks on academic freedom across the EU whether against individual academics, minority groups or fields of study such as gender studies or migration, highlighting the multifaceted nature of this freedom and the need to create an approach that tackles the

²⁹ Garbi Schmidt, 'Boundary Work: Investigating the Expert Role of Danish Migration Researchers' (2020) 5(28) Global Studies in Culture and Power <<https://www.tandfonline.com/doi/full/10.1080/1070289X.2020.1748347>> accessed 15 February 2023.

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

³³ Peter Maassen, Dennis Martinsen, Mari Elken, Jens Jungblut, Elisabeth Lackner (n5) 56.

³⁴ Mattieu Burnay, 'Authoritarianism and Marketization in Higher Education: Implications of China's Rise' (2022) 26 The International Journal of Human Rights 1761.

³⁵ Mark Olssen, 'Academic freedom, institutional autonomy and democracy: the incursions of neoliberalism in Handbook on Academic Freedom' [2022] Edward Elgar Political Science and Public Policy Collection 126.

³⁶ Mattieu Burnay (n33).

three dimensions of academic freedom.³⁷ Political interference can constitute a threat to academic freedom by determining which academic fields qualify as scientific and restricting their development accordingly. Such interference could stem from the government itself or from proposals of specific political parties intending to control the 'guarding of academic freedom within to outside academia'.³⁸

In a nutshell, the study by Maassen et al. identifies political and governmental interferences and increasing civil society and private sector threats to academic freedom as the main threats to academic freedom.³⁹

III. How does authoritarian populism and self-censorship affect the rule of law?

A triangular relationship exists between the rule of law, democracy, and fundamental human rights. As Carrera, Guild, and Hernanz note 'these three criteria are inherently and indivisibly interconnected and interdependent on each of the others, and they cannot be separated without inflicting profound damage to the whole and changing its essential shape and configuration.'⁴⁰ It is unsurprising that authoritarian populists resent the role of universities and institutions in researching and disseminating knowledge and understanding and developing and encouraging independent thinking and expression since these clearly pose a threat to autocratic regimes. Autocrats such as Orbán, who may initially view academic freedom as a problem to be quashed can also use it as a tool for oppression, to advance and legitimize their worldview by infiltrating university boards and eliminating or refusing to recognize courses that do not fit into their political agenda, whether gender studies, migration studies, LGBTQ+ education etc.

What effect does this have on the rule of law? Censorship as well as self-censorship chip away at democracy and free speech. When governments begin to undermine the rule of law in their jurisdiction it takes informed individuals to notice these policy changes in their domain and to speak out and act against such agendas. The following phrase

³⁷ Emilien Houard-Vial, 'Growing Concern Inside French Academia due to controversy about 'Islamism-leftism'' (Centre for Research on Extremism, 17 March 2021) <<https://www.sv.uio.no/c-rex/english/news-and-events/right-now/2021/concern-inside-french-academia.html>> accessed 12 February 2023; Esa Väliö, 'Science communicators intimidated: researchers' freedom of expression and the rise of authoritarian populism' [2021] Journal of Science Communication <https://jcom.sissa.it/sites/default/files/documents/JCOM_2004_2021_A08.pdf> accessed 9 February 2023; Colleen Flaherty, 'When Public Scholarship is a Crime' (*Inside Higher ED*, 28 November 2017) <<https://www.insidehighered.com/news/2017/11/28/american-professor-denmark-says-shes-being-targeted-immigration-officials-delivering>> accessed 10 February 2023.

³⁸ Peter Maassen, Dennis Martinsen, Mari Elken, Jens Jungblut, Elisabeth Lackner (n5) 172.

³⁹ *ibid* 171.

⁴⁰ Sergio Carrera, Elspeth Guild, Nicholas Hernanz, 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism' (*CEPS paperbacks*, 23 November 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2360486> accessed 18 February 2023.

summarises well the correlation between authoritarian politics and self-censorship: 'when the best and brightest thinkers of our society are silenced in such a way, the personal freedoms of all are at risk, as the ideas and dogmas of authoritarian rulers become the only ideas available, unchallenged by a silent majority too afraid to speak out. When intellectual dissent is quelled, democracy is quietly eroded.'⁴¹

2. Legal and policy basis/bases for the EU to act

There are several EU legal sources, both primary and secondary, which are related to academic freedom. The primary law of the EU is the Treaty of the European Union (TEU), the Treaty of the Functioning of the European Union (TFEU), the Charter of Fundamental Rights (CFR), and the fundamental principles developed by the Court of Justice of the EU.⁴²

Article 6 of the TFEU sets out the supporting competence of the EU in relation to education, vocational training, youth, and sport.⁴³ On the other hand, article 4 of the TFEU represents the shared competence of the Union in relation to research.⁴⁴ Articles 179–190 TFEU are the relevant legal bases in connection with the shared competence of the Union in research areas, while articles 165 and 166 of the TFEU serve as a legal basis for adopting supporting actions for the development of quality education in the form of incentive measures and recommendations of the European Parliament, the Commission, and the Council.⁴⁵

Article 2 TEU identifies the protection of the rule of law, democracy, and human rights as foundational EU values.⁴⁶ Academic freedom underpins these values. The political mechanism created by the EU to protect the common values of the EU, including the rule of law, has its legal basis in Article 7 of the TEU.⁴⁷

When it comes to the Charter of Fundamental Rights (CFR), Article 13 protects the freedom of arts and scientific research, and academic freedom, while Article 14 guarantees the right to education.⁴⁸ However, the Charter can only be used against Member States when they are implementing EU law, as stated in Article 51(1) CFR.⁴⁹ The

⁴¹ David Wolfe, 'The International Fight to Defend Academic Freedom' (*Trinity News*, 6 August 2021) <<https://trinitynews.ie/2021/08/the-international-fight-to-defend-academic-freedom/>> accessed 21 February 2023.

⁴² Charter of Fundamental Rights of the European Union [2009] OJ C364/01; Treaty of the European Union [2009] OJ C326/13; Treaty of the Functioning of the European Union [1958] OJ L326/47.

⁴³ Treaty of the Functioning of the European Union [1958] OJ L326/47, art 6.

⁴⁴ *ibid* art 4.

⁴⁵ *ibid*, art 165, 166, 179–190; Council Recommendation (EU) of 5 April 2022 on building bridges for effective European higher education cooperation [2022] OJ L160/1. The principle of academic freedom is highlighted throughout the whole document and specifically states a foundation for creating a common governance arrangement and connects the importance of academic freedom to EU's funding.

⁴⁶ Treaty of the European Union [2009] OJ C 326/13, Art 2.

⁴⁷ *ibid*, art 7.

⁴⁸ Charter of Fundamental Rights of the European Union [2009] OJ C364/01, art 13, 14.

⁴⁹ *ibid*, art 51(1).

CJEU ruled on Articles 13 and 14(1) CFR for the first time in C-66/18 *Commission v. Hungary*.⁵⁰ Therein, the CJEU identified academic freedom as a fundamental right of the EU, and recognized both the institutional and individual dimensions of academic freedom. Furthermore, it was established in the same case that when Member States perform their obligations under the GATS and other international agreements to which the EU is a party to, they are implementing Union law, and thus the CFR could be applied.⁵¹ This means that when there is a substantial link to international trade, even in education-related cases, the exclusive competence of the Union is triggered.

3. Actions by EU institutions to date

The extent of EU action regarding academic freedom has been limited. While academic freedom is generally regarded as a fundamental right, the contours of this right remain ill-defined and underdeveloped within the context of the European Union.⁵²

Despite its importance, academic freedom has not been given the legal attention or development it requires at EU level.⁵³ This lack of action and the persistent ambiguity as to what it means and requires has resulted in academic freedom not being prioritized by EU institutions, and its role in maintaining the rule of law within the EU has been underestimated and underutilized. Autocracy and populism pose a major threat to academic freedom, but equally academic freedom poses a major threat to the maintenance of these regimes and thus is a vital tool for protecting the rule of law.⁵⁴ It should be understood in the same way as a free press and an independent judiciary, in other words as an integral right without which free societies could not survive or thrive.

One of the most significant EU developments in relation to academic freedom is Case C-66/18, *European Commission v Hungary*.⁵⁵ In April 2017, discussions were held in the European Commission about the Hungarian Higher Education Law, and that law was perceived by the Commissioners as an “attempt to close down the Central European University”. Thus, the Commission sent a letter of notice to Hungary, and on February 1st, 2018, it initiated infringement proceedings which ultimately led to a decision of the CJEU.

⁵⁰ C-66/18 (n1) 244.

⁵¹ *ibid* para 213 and 277; Vasiliki Kosta, Darinka Piqani (n23); Charter of Fundamental Rights of the European Union [2009] OJ C364/01, art 51(1); General Agreement on Tariffs and Trade [1948].

⁵² Jogchum Vrielink, Paul Lemmens, Stephan Parmentier, Leru Group on Human Rights (n3); Jogchum Vrielink, Koen Lemmens (n3).

⁵³ Rome Ministerial Communiqué, ‘Statement on Academic Freedom’ (Annex I, EHEA, Rome, 19 November 2020) <http://www.ehea.info/Upload/Rome_Ministerial_Communique.pdf> accessed 27 February 2023.

⁵⁴ In the European Parliament Recommendation on the *Defence of academic freedom in the EU's external action*, there is an emphasis on explicit recognition of the importance of academic freedom, public recognition of the attacks on academic freedom and a range of other responses on how to tackle the vulnerability of academic freedom. When it comes to the EU's external action, academic freedom is part of the policy objectives in the EU Action Plan on Human Rights and Democracy. European Parliament Recommendation of 29 November 2018 to the Council, the Commission and the Vice-President of the Commission/ High representative of the Union for Foreign Affairs and Security Policy on *Defence of academic freedom in the EU's external action* [2018] 2117 (INI).

⁵⁵ C-66/18 (n1).

This provided the first case in which the CJEU utilized Article 13 of the CFR, which expressly requires respect for academic freedom.⁵⁶ The CJEU's interpretation of Article 13 CFR is a significant development because the provision's language and explanatory memorandum are sparse, with the memorandum mentioning only freedom of thought and expression. The CJEU's interpretation clarifies the scope of Article 13 and recognizes the intricate relationships between the individual rights of academics, students, and faculty, and the institutions' rights and autonomy.

This judgment also recognized the third dimension of academic freedom, namely the need for state protection of this right, with reference to the 1997 UNESCO recommendation Concerning the Status of Higher Education Teaching Personnel and Council of Europe Recommendation 1762 (2006).⁵⁷ The judgment has provided a more nuanced understanding of academic freedom that incorporates the three dimensions of this right at an EU level. The CJEU additionally addressed Article 14(3) and Article 16 CFR regarding the freedom to found and establish educational institutions and conduct a business.⁵⁸ Since it was not clarified whether institutions classify as a 'non-profit' or 'for-profit' educational institutions, the CJEU was able to analyze the Hungarian legislation without this specification, thereby developing another legal avenue to challenge actions that harm academic freedom. In this case, it was sufficient that the national legislation at issue was capable of endangering the academic pursuits of the CEU requiring merely the capacity to harm.⁵⁹ While the case was a major development for the future of academic freedom, unfortunately, the impact of the decision was lessened by the fact that before the ruling was handed down the CEU had already moved operations to Vienna.⁶⁰ This forced departure from Hungary has raised questions about the high threshold for interim measures and whether cases of this nature should be expedited to counteract the speed with which autocracies can pass laws that enable a rule-by-law system as opposed to a legal system supported by the rule of law.

A secondary development in relation to academic freedom is the European Parliament's Forum on Academic Freedom. This initiative was established by STOA.⁶¹ The intention behind this initiative is to create a discussion forum to monitor academic freedom and

⁵⁶ *ibid* para 244; Charter of Fundamental Rights of the European Union [2009] OJ C364/01, art 13.

⁵⁷ 'Recommendation Concerning the Status of Higher Education Teaching Personnel' (General Unesco Conference, Paris, November 1997) <<https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel>> accessed 1 March 2023; Council of Europe Recommendation on Academic Freedom and University Autonomy COE(2006)0001762. These two documents show recognition of the second dimension of academic freedom, which is the institutional one.

⁵⁸ Charter of Fundamental Rights of the European Union [2009] OJ C364/01, art 14(3), 16.

⁵⁹ Vasiliki Kosta, Darinka Piqani (n23) 844.

⁶⁰ CEU, 'CEU to Open Vienna Campus for US Degrees in 2019; University Determined to Uphold Academic Freedom' (Central European University News, 25 October 2018) <www.ceu.edu/article/2018-10-25/ceu-open-vienna-campus-us-degrees-2019-university-determined-uphold-academic> accessed 1 March 2023.

⁶¹ European Parliament Forum for Academic Freedom (n2).

compile systematic independent and regular reports. The aim is to create a dialogue between the EU Parliament and other stakeholders and to produce an independent annual report about the state of academic freedom in the EU, to enhance the protection of academic freedom.⁶² The impact of this development has yet to come to fruition and will depend greatly on the efforts of the Parliament to engage with the relevant stakeholders and other EU institutions. This forum should provide the EU institutions with a better picture of the state of play in academic institutions across the European Union, much like with the rule of law reports and the justice leaderboard.⁶³ It is what the EU institutions do with this data that will determine its efficacy and lasting impact in regard to academic freedom. Additionally, Members of the European Parliament have sent a letter to the Parliament's Committee on Constitutional Affairs to encourage the committee to adopt a motion for resolution to amend the treaties to include protection for the institutional and individual aspects of academic freedom.⁶⁴

Several legal developments have contributed to academic freedom in the EU.⁶⁵ Firstly, Regulation 2021/817 was enacted in May 2021 and it established the EU Erasmus+ Programme for education and training, youth, and sport.⁶⁶ Recital 64 of the same Regulation states that respect by the countries receiving funds under the Programme of the right to academic freedom should be ensured in line with Article 13 CFR. Secondly, Regulation 2021/695 establishes Horizon Europe, which is a Framework Programme for research and innovation. A key requirement of the Programme, according to Recital 72 of that Regulation, is the promotion of academic freedom in any country seeking to benefit from its funding, in accordance with Article 13 CFR.⁶⁷ Thirdly, the European Democracy Action Plan was published on the 3rd of December 2020 by the European Commission.⁶⁸ Paragraph 4-3 of the action plan states that academic freedom is at the core of all higher education policies developed at EU level.⁶⁹

⁶² Kurt Deketelaere, 'In the media: in defence of freedom' (LERU, 7 december 2022) <<https://www.leru.org/news/in-defence-of-freedom>> accessed 10 March 2023; *ibid*.

⁶³ Commission, '2022 Rule of Law Report' (Annex to Communication) COM (2022) 500 final; Commission, 'EU Justice Scoreboard 2022: ten years of monitoring the effectiveness of justice systems' (European Commission, Brussels, 19 May 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3146> accessed 9 March 2023.

⁶⁴ Rachel Magee, 'MEPs follow up on promise to defend academic freedom' (*Research Professional News*, 3 February 2023) <<https://www.researchprofessionalnews.com/rr-news-europe-regulation-2023-2-meps-follow-up-on-promise-to-defend-academic-freedom/>> accessed 9 March 2023.

⁶⁵ Parliament and Council Regulation (EU) 2021/817 of 20 May 2021 establishing Erasmus+: The Union programme for education and training youth and sport and repealing Regulation (EU) No 1288/2013 [2021] OJ L189/1; Parliament and Council Regulation (EU) 2021/695 of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and innovation, laying down its rules for participation and dissemination, and repealing Regulations (EU) No 1290 and (EU) No 1291/2013 [2021] OJ L170/1; Commission, 'Communication to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions On The European Democracy Action Plan' COM (2020) 790 final.

⁶⁶ *ibid* Regulation 2021/817.

⁶⁷ Regulation 2021/695 (n65).

⁶⁸ Commission, European Action Plan (n56).

⁶⁹ *ibid*.

The Council of the European Union, on the other hand, has addressed academic freedom in the Marseille Declaration on International Cooperation in Research and Innovation in 2022.⁷⁰ In this declaration, academic freedom is included as part of key principles that guide global research and innovation. The freedom of scientific research is highlighted, in the same vein as the Bonn Declaration on Freedom of Scientific Research. This declaration provides a shared definition of the freedom of scientific research and the role of governments protecting it.⁷¹ However, it does not define academic freedom.

The European Higher Education Area is an international collaboration on higher education comprising 49 countries and the European Commission. It has published a statement calling for the creation of a common understanding of academic freedom as a human right and not just a value.⁷² Furthermore, it is currently in the process of developing indicators of academic freedom based on their statement on academic freedom.

It is too early to speak of the lasting impact of these actions on academic freedom, however, it is clear that they have provided a basis for developing further action within the EU's existing competence.

To summarise: the topic of academic freedom has not received much attention at the EU level to date, which has resulted in a relatively underdeveloped understanding of this concept. Nevertheless, the recent *Hungary v Commission* decision has brought attention to the deficiencies in this area and has helped to clarify the scope of academic freedom. The decision has highlighted that a nuanced and comprehensive understanding of academic freedom requires recognition of its three dimensions.

4. Gap analysis: Scope and Necessity for further Action

As outlined in Part 1, the protection of academic freedom, or lack thereof, directly impacts the rule of law and the state of democracy. Despite this, efforts to protect the rule of law have predominantly focused on themes like judicial independence, media freedom, anti-corruption, and academic freedom has featured very little.⁷³ There are four dimensions to this problem. First, academic freedom has received little publicity; second, no clear definition of academic freedom has been adopted or agreed at the EU level; third, the level of protection for academic freedom has not been given sufficient attention in candidate countries during the EU accession process nor has it been monitored by the EU institutions within Member States; and fourth, EU institutions have

⁷⁰ Marseille Declaration on International Cooperation in Research and Innovation (R&I, Council of EU Conference, Marseille, 8 March 2022) <<https://presidence-francaise.consilium.europa.eu/media/xilkhxzg/marseille-declaration.pdf>> accessed 1 March 2023.

⁷¹ Scholars at Risk (n15).

⁷² European Higher Education Area, 'Rome Ministerial Communiqué' (2020) Annex I <<https://eha2020rome.it/pages/documents>> accessed 4 May 2023.

⁷³ Commission, '2022 Rule of Law Report' (Annex to Communication) COM (2022) 500 final.

arguably underutilized existing competencies that could have been invoked to address academic freedom.

Beginning with the problem of publicity, the lack of attention at EU level to academic freedom has resulted in few political and legal initiatives to protect and further academic freedom. In comparison, academic freedom has featured frequently in the work of the Council of Europe and the United Nations. The Committee of Ministers of the Council of Europe produced a recommendation on academic freedom within academic research and the Parliamentary assembly prompted the Committee of Ministers to be more active in this domain.⁷⁴ UNESCO created the Recommendation concerning the Status of Higher-Education Teaching Personnel, which discussed all three dimensions of academic freedom. This recommendation built an international understanding of this theme and created much-needed publicity.⁷⁵ These recommendations are not legally binding but have made academic freedom a priority and a focus for international protection. The CEU affair brought much-needed attention to the importance of academic freedom at EU level and highlighted how quickly this freedom can be eroded.⁷⁶ The European Parliament Forum provides a prime opportunity to build publicity around academic freedom and to encourage debate from and with civil society. The importance of this freedom is evident, and action is required to generate publicity to build understanding and promote legal and political initiatives in this domain.

Secondly, the lack of an agreed and comprehensive definition of academic freedom at the EU level is a crucial gap that needs to be rectified. The lack of a definition fuels the risk of inconsistent standards of academic freedom at the EU level. Some Member States have specific provisions in their constitutions while other member states have no such protections.⁷⁷ As recognized by LERU, even where there is national legal protection, the approaches differ greatly with some countries focusing on the individual aspect of academic freedom and others on the institutional aspect. There is no shared understanding, and this is problematic as often academic freedom is misunderstood as being merely an offshoot of freedom of expression.⁷⁸

The aforementioned UNESCO recommendation, while not legally binding, has helped to promote an international consensus on what academic freedom entails and what responsibilities it creates. The ICCPR and ICESCR do not enshrine an express right to academic freedom but have emphasized its role in the guarantee of free speech and the right to education. Article 13 CFR, which is the strongest protection of this right at the EU level, merely states this right shall be respected and its explanatory memorandum recognizes that the right primarily derives from the right to freedom of thought and

⁷⁴ Council of Europe Recommendation (n57).

⁷⁵ 'Recommendation Concerning the Status of Higher Education Teaching Personnel' (n57).

⁷⁶ C-66/18 (n1).

⁷⁷ Jogchum Vrielink, Paul Lemmens, Stephan Parmentier, Leru Group on Human Rights (n3); Jogchum Vrielink, Koen Lemmens (n3).

⁷⁸ *ibid.*

expression. Considering the complexity of this right, the textual basis provides Member States no indication of the scope of academic freedom. Fortunately, the CJEU has implicitly recognized all three dimensions of academic freedom. The broader lack of public understanding and oversimplification of academic freedom could be remedied by creating a common system of monitoring based on detailed indicators which is built from engagement with civil society, as is recommended below.

Thirdly, there has been no monitoring of academic freedom at EU level.⁷⁹ As stated in Part 1, the principal monitors for academic freedom are the AFI and the Scholars at Risk Academic Freedom Monitoring Project. Both of these monitors have weaknesses that prevent a robust statistical depiction of the state of academic freedom, and further they are not EU-specific. The lack of monitoring of Member States means that Member States cannot be held accountable where they fall behind or fail to maintain an adequate level of academic freedom. The lack of proper monitoring is also a missed opportunity for highlighting the importance of protecting academic freedom at the EU level.

It is necessary to take action as a number of Member States have regressed in this domain. Take for example the degradation of the freedom to research in Denmark mentioned in Part 1.⁸⁰ The European Parliament Forum on Academic Freedom is the first step taken at the EU level to examine the protection of academic freedom in the Member States. Whether this forum will fill this gap will depend on whether it can overcome the inherent challenges that other monitoring bodies have faced in monitoring academic freedom and whether the forum garners enough publicity to encourage and prompt both EU and state action. There is as yet no sign of the Forum engaging with the Fundamental Rights Agency (FRA). Cooperation between the Forum and the FRA would encourage input from civil society.

A gap also exists in monitoring the protection of academic freedom in candidate countries pre-accession. Academic freedom is an overarching fundamental right and a true indicator of a free and democratic society. The Copenhagen Criteria require at a minimum level the existence of free and democratic institutions and the guarantee of fundamental human rights. Thus the level of academic freedom in candidate countries should be monitored pre-accession. As an example, Turkey is in the bottom 10% in the AFI rankings with status E while Ukraine is in the bottom 20–30% with status D.⁸¹ While these candidates are not yet in any way close to completion of the accession process, the state of academic freedom in these states is alarming and these concerns should be raised in the negotiating process.

Lastly, EU institutions have underutilized existing competencies and structures within existing EU bodies that could protect academic freedom. While academic freedom is

⁷⁹ Gergely Kováts, Zoltán Rónay (n7); European Parliament (n6).

⁸⁰ Nanna Balslev (n14).

⁸¹ Katrin Kinzelbach, Staffan Lindberg, Lars Pelke, Janika Spannagel (n10).

expressly protected under Article 13 CFR, this right binds Member States only when they are implementing EU law within the meaning of Article 51(1) of the CFR, which has been seen to include obligations under international treaties to which the EU is a party.⁸² The CJEU demonstrated in *Commission v Hungary* that the EU standard of academic freedom binds Member States when they act within the scope of EU law, for example when they restrict freedom of establishment.⁸³ The Commission, in response to a parliamentary query on what tools are available to protect academic freedom at the EU level, stressed that Member States remain responsible for the organization of education systems and harmonization is excluded in the field of education under Article 165 TFEU.⁸⁴ This reflects the attitude that matters relating to academic freedom is primarily an educational issue and consequently should be managed by Member States domestically. It has been suggested that this approach, which assumes the weakness of EU tools and competences in this domain is exaggerated, and that the EU institutions in fact could use existing competencies in scientific research, freedom of establishment, and freedom of services to create a minimum floor of protection for academic freedom.⁸⁵ While links can be created between existing competencies and aspects of academic freedom to widen the scope of action under Article 13 CFR, it must nonetheless be acknowledged that there are aspects of academic freedom that cannot be linked to EU law and therefore will not be protected at an EU level.⁸⁶

The Fundamental Rights Agency and their Fundamental Rights Platform (FRP) are underutilized existing resources in the sphere of academic freedom. The FRA is specialized in collecting and analyzing data on fundamental rights. Academic freedom is not a focus on either the platform or the FRA but if these resources were developed in accordance with the recommendations below, their expertise and insight into civil society would be beneficial to devising a monitoring system for academic freedom.

5. Recommendations

I. The Fundamental Rights Agency should:

(i) Invite organizations involved in reporting, monitoring, and protecting academic freedom to join the Fundamental Rights Platform and

(ii) Engage with these organizations to advise on monitoring academic freedom

⁸² C-66/18 (n1); Charter of Fundamental Rights of the European Union [2009] OJ C364/01, Art 13, 51(1).

⁸³ C-66/18 (n1).

⁸⁴ European Parliament, 'Answers given by Ms Gabriel on behalf of the European Commission' (Parliamentary Question, European Parliament, 18 October 2021) <https://www.europarl.europa.eu/doceo/document/E-9-2021-003927-ASW_EN.html> accessed 9 March 2023.

⁸⁵ European Parliamentary Research Service, 'Interview with Professor Kurt Deketelaere on academic freedom' (European Science-Media Hub, 23 November 2022) <<https://sciencemediahub.eu/2022/11/23/interview-with-prof-kurt-deketelaere-on-academic-freedom/>> accessed 9 March 2023.

⁸⁶ Charter of Fundamental Rights of the European Union [2009] OJ C364/01, Art 13.

As outlined in Article 10 of the Council's regulation on the FRA, the FRP serves as a civil society network for exchanging information and initiating dialogue and cooperation on fundamental rights issues. However, the FRP currently does not include civil society groups focusing specifically on academic freedom, and the FRA to date has not focused particularly on this freedom, despite its crucial importance in promoting intellectual inquiry and free expression. One of the groups of actors with whom the FRP cooperates is “universities” and **we recommend that this category be broadened to “Academic and Research Institutions” to encompass a wider range of institutions and organizations.** This way, actors that cover different elements of academic freedom will be connected through the FRP. The Council of Europe should be also considered as the CoE has been active in tackling academic freedom-related problems and additionally conducts general monitoring activities. Hence, synergies could be created between the monitoring bodies on academic freedom and other Council of Europe initiatives on monitoring, to build a link and attract further attention.⁸⁷

As the FRA seeks thematic input from NGOs and CSOs through the FRP, **we recommend that the FRA proactively invites organizations that protect and monitor academic freedom, such as the European Universities Association, to join the FRP.** These organizations produce reports and data that contribute to monitoring academic freedom which would provide a significant pool of data. Effective gathering, pooling, and verification of relevant information would be furthered by the **FRA inviting these organizations to form a working group**, based on Article 4 (2)(d) of the terms of reference of the FRP. These working groups are created on an *ad hoc* basis where needed. It is clear from the current erosion of academic freedom at the EU level that such a working group would be a positive source of support in the FRA’s and the EU’s work on the issue more generally.⁸⁸ Actors in this working group would have to comply with the conditions stated in Article 2 of the FRP’s terms of reference, for instance, that the actors have fundamental rights-related operations within the EU and that they have experience and capacity with regard to the promotion and protection of fundamental rights.⁸⁹

Through the working group and the Academic and Research Institutions group, these organizations’ data on challenges to and attacks on academic freedom in different member states would be pooled and publicized. This information on academic freedom would be regularly shared with the FRA. **We recommend that the FRA cooperates actively and shares the information with the European Parliament’s Forum on Academic Freedom.** This would ensure that relevant and consistent information is made part of the annual monitoring and assessment of the level of academic freedom. **The**

⁸⁷Scholars at Risk, ‘Academic Freedom Policymaking at the Council of Europe’ (Scholars at Risk) <<https://sareurope.eu/sar-resources/council-of-europe/>> accessed 8 April 2023.

⁸⁸ Katrin Kinzelbach, Staffan Lindberg, Lars Pelke, Janika Spannagel (n10).

⁸⁹ FRA, ‘Decision of the Director’ (European Union Agency for Fundamental Rights, INST/001/2020) <https://fra.europa.eu/sites/default/files/fra_uploads/fundamental_rights_platform_-_terms_of_reference_directors_decision_030620.pdf> accessed 9 March 2023.

FRA should also cooperate with the EP Forum on Academic Freedom to create indicators for monitoring. In doing so it should also consult with the relevant NGOs and CSOs, which have the required expertise. Cooperation between the FRA and the European Parliament Forum on Academic Freedom would allow for a more comprehensive understanding of the state of academic freedom in the EU, leading to more effective policies and interventions to protect this fundamental right.

II. The European Commission should assess the protection of academic freedom in candidate countries during the accession process. This assessment should take place under the three negotiating chapters of Judiciary & Fundamental Rights, Education & Culture, and Science & Research.

The Commission should give academic freedom a more prominent role in the accession process, based on the Copenhagen Criteria and specifically on Article 13 CFR.

The **Copenhagen Criteria** establish conditions that candidate countries must meet in order to join the EU, including stable democratic institutions, rule of law, protection of human rights, and acceptance and integration of the *Acquis Communautaire*. Academic freedom, as we have argued above, is an important aspect of fundamental rights and the rule of law, and is critical to democracy. Hence, it should be monitored pre-accession by the Commission and post-accession by the European Parliament Forum on Academic Freedom. The Commission, as Guardian of the treaties, is best placed to inform candidate states of the role of academic freedom and its importance at the EU level.

Academic freedom should be integrated into pre-accession monitoring under three negotiating chapters as part of the revised enlargement methodology. The relevant chapters include **Judiciary & Fundamental Rights, Education & Culture, and Science & Research.**

Scrutiny of recent reports on candidate states Turkey and Albania indicates that while mention is made of freedom of expression, and occasionally of restrictions on academic activities, there is no explicit reference to academic freedom as a fundamental right guaranteed by the Charter, nor to the various ways in which it is under threat.⁹⁰ As a fundamental right guaranteed by the CFR and as a primary indicator of a free society and democracy, academic freedom should be a prominent feature in the assessment of fundamental rights. Considering Turkey is in the bottom 10% according to the AFI, this concern should be a major theme under this negotiating chapter.⁹¹

We note from recent country reports that the Education & Culture chapter focuses largely on the quality of education, rates of enrollment, adapting education and training to the labor market, and preventing discrimination, while the Science & Research

⁹⁰Commission, '2022 EU Enlargement Policy: Albania 2022 Report' SWD (2022) 322 final, 59, 98; Commission, '2022 EU Enlargement Policy: Türkiye 2022 Report' SWD (2022) 333 final.

⁹¹Katrin Kinzelbach, Staffan Lindberg, Lars Pelke, Janika Spannagel (n10).

chapter predominantly focuses on funding and participation in research initiatives and programs like Horizon Europe. Scrutiny of academic freedom should be integrated into these chapters. The themes currently examined by the Commission in the Chapter on Education & Culture relate closely to the institutional aspect of academic freedom. Similarly, the chapter on Science & Research provides an opportunity to focus on the protection of researchers, academics, and the allocation of funding for research.

We recommend that the Commission in its pre-accession monitoring and the European Parliament Forum on Academic Freedom in its monitoring should act consistently and use the same indicators of academic freedom in their work.

III. The Europe Parliament Forum on Academic Freedom should:

(i) Work alongside the European Commission, Fundamental Rights Agency and the Fundamental Rights Platform to create a common method of monitoring academic freedom, and

(ii) Invite the European Parliament to issue a recommendation defining academic freedom

Building on Recommendations 1 and 2, the European Parliament Forum on Academic Freedom should **create an institutional channel between the Forum, the FRA (including the Fundamental Rights Platform) and the Commission.** The FRA's expertise in the collection and analyzing of data, and in the development of indicators concerning fundamental rights, coupled with their access to the Platform's pool of knowledge and insight into civil society, should be utilized to create a common method of monitoring academic freedom.⁹² The quality of the information gathered from the platform will be dependent on the expansion of the 'university' group within the Platform as advised in the first recommendation. The Forum should publicize the work of the Platform within their reports to encourage more organizations to join to create a larger pool of information on academic freedom. By encouraging organizations that work to monitor and protect academic freedom to join the platform, there will be more information and data available for the forum to create a monitor that is truly representative of the state of play of academic freedom within the EU.

The Commission and the Forum should collaborate to create a common monitoring system for academic freedom based on a unified understanding of what constitutes academic freedom at the EU level. This uniform standard will create a smooth transition between monitoring under the accession conditionality and internal monitoring through the Forum. Synergy is needed in order to ensure assessment under homogenous indicators to create consistency, cohesiveness, and continuity, not only between the Commission and the Forum but between all institutions involved in monitoring academic

⁹²FRA, 'Fundamental Rights Indicators' (European Union Agency For Fundamental Rights, 25 July 2011) <<https://fra.europa.eu/en/project/2011/fundamental-rights-indicators>> accessed 12 March 2023.

freedom. This is highlighted in the study by Gergely Kováts and Zoltán Rónay which recommends creating a synergy between the monitoring methods of the European Higher Education Area (EHEA), the European Education Area (EEA), and the European Research Area (ERA).⁹³

The Forum should encourage the European Parliament to issue a recommendation on academic freedom that includes a definition of academic freedom. This definition should encapsulate the three dimensions of academic freedom recognized by the CJEU and should reflect how academic freedom is conceptualized in the academic freedom monitor.⁹⁴ The EP has previously relied on the UNESCO Recommendation and Lima Declaration definitions which primarily focus on the individual dimension.⁹⁵ The EP could expand these definitions by placing more emphasis on the institutional element and by including the third dimension of academic freedom; the role of the state to promote and protect academic freedom.

Overall, these definitional and monitoring actions should help to establish the necessary basis for strong follow-up and enforcement. Firstly, monitoring is vital to demonstrate and track the current challenges to academic freedom across the EU and the lack of adequate current protection thereof. Secondly, a clear definition of academic freedom is a requisite to help guide all concerned actors, including politicians, human rights activists and judges, whose role in the enforcement and upholding of academic freedom is crucial.

⁹³Gergely Kováts, Zoltán Rónay (n7) 66; European Higher Education Area, 'Rome Ministerial Communiqué' (2020) Annex I <<https://eha2020rome.it/pages/documents>> accessed 4 May 2023.

⁹⁴C-66/18 (n1).

⁹⁵'Recommendation Concerning the Status of Higher Education Teaching Personnel' (n57); Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (68th General Assembly of World University Service, Lima, September 1988) <<https://www.hrw.org/legacy/reports98/indonesia2/Borneote-13.htm>> accessed 24 February 2023.

PROTECTION OF NGOS

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Executive summary

These recommendations were prepared by the Our Rule of Law Academy Working Group on Protection of NGOs and civic space, consisting of Silvia López Lapuente, Natalia Maria Podstawka, Isabela Assis, and Marianne Wetter; mentored by Ms. Márta Pardavi and Dr. Joelle Grogan, make the following recommendations:

- The European Parliament jointly with the European Commission should **reform the Transparency Register** to enhance transparency in the EU. They should follow the Interinstitutional Agreement 2021 by requiring further transparency from all EU interest representatives, especially in relation to their EU funding and main financial sources, for instance through an independent auditing system financed by the EU. The associated Code of Conduct should explicitly prevent any abuse of funding. Furthermore, it should be mandatory for interest representatives to indicate their meetings not only with the main institutions but also with regular MEPs and permanent representations of Member States.
- The European Commission should, as of next year, **make the Financial Transparency System (FTS) more user-friendly** as well as improve access to the information within the system by including more data that is already provided to the EU but not published, or found on many different platforms. The current version of the FTS is not easy to use and thus, conflicts with the principles of transparency, accessibility of information, and freedom of expression. Accordingly, as the FTS does not require nor provide sufficient clarity concerning the use of EU funding, the prevention of corruption, money laundering, or terrorist funding is not ensured.
- The European Commission should set up internal guidelines dedicated to Civil Society Organisations (CSOs) within the EU, to **provide an internal framework on CSOs' freedoms**, as well as conciliate the EEAS external guideline for Human Rights Defenders for third countries with CSOs that are HRDs inside the EU. It must follow international, regional, and EU frameworks for protecting CSOs. This could be a powerful tool reminding EU institutions and MS of their responsibilities towards CSOs as well as implementing principles of legality and proportionality.
- The European Commission should **make use of the European Statute of Association proposal** and make it an object of its initiative as of next year. This would improve the standardization of administrative procedures across Member States and facilitate NGO cross-border action as well as funding. Finally, the Commission should also consider potential tax implications that may arise from cross-border transactions and **provide guidance on how national philanthropy tax laws could harmonize** the treatment of domestic and foreign EU-based public benefit organizations and their donors.

1. The nature of the problem

The Rule of Law is a core and fundamental value of the European Union, alongside human dignity, freedom, democracy, and equality. Enshrined in Article 2 of the TEU, these values are or should be common to all Member States. Unfortunately, these values are under threat by recent authoritarianism trends inside the EU. A key factor in this problem is the degradation of the space for civil society in the EU.

The EU recognizes the important role of Civil Society Organisations (CSOs) in the good governance of the EU (art 15 TFEU). Indeed, CSOs in all their forms (especially non-governmental and not-for-profit organizations) aim at serving the general interest and promoting democratic values such as the rule of law. They work as mediators between the state and citizens, especially minority groups, and are often at the forefront of condemning actions, including state actions, that menace the rule of law. CSOs are also key to promoting checks and balances of the State's activities. Therefore, they are essential in upholding the values set out by Art 2 of the TEU and promoting accountability in the Union.

Due to this watchdog-like role, CSOs face continuous pressure, threats, and restriction across the EU by regimes with authoritarian intentions. Cases such as Poland's politicization of NGO funds, Stauffer and Persche, and Greece's Registration Regulations and criminalization of HRDs are examples of state interferences that are being justified under the guise of transparency goals which are actually used to hinder the work of NGOs through legal harassment and excessive burdens.

Moreover, the Hungarian Lex-NGO¹ and the recent Georgian bills² (Georgia is aspiring to EU candidate country status) both were State attempts to discredit and marginalize critical NGO voices by labeling NGOs as "agents of foreign influence" (a term that is similar to Russia's "foreign agent" law) if more than 20% of their income was from cross-border funding and carrying draconian penalties for failure to comply.¹ Rules like these have severe consequences as they hamper cross-border actions and solidarity between EU citizens, which the climate and refugee crisis, the Covid-19 pandemic, and more recently the war in Ukraine have demonstrated the dire need for,

We cannot forget that many CSOs play a full part in the economic life and development of the internal market by engaging in some economic activity on a regular basis. Moreover, unlike corporations/companies, CSOs do not have yet an EU statute of association to regulate cross-border philanthropy.

Sadly, the Qatargate corruption scandal has only fuelled the growing mistrust of states

¹ Judgement of 18 June 2020, *European Commission v Hungary (Lex-NGO)*, C-78/18, ECLI:EU:C:2020:476, <https://curia.europa.eu/juris/liste.jsf?num=C-78/18> (accessed 10 March 2023).; Human rights watch, 'Reject Measure Restricting Freedom of Expression and Association' (Georgia: 'Foreign Agents' Bill Tramples on Rights, 7th March), <https://www.hrw.org/news/2023/03/07/georgia-foreign-agents-bill-tramples-rights> (accessed 9 March 2023).

toward Civil Societies and may lead to further repressive actions.² Some EU Member States may use this case as an argument in favor of even more restrictive CSO laws, drawing examples from its neighboring countries (i.e. Russia and recently, Georgia).

In contrast, the 2021 report from the EU Fundamental Rights Agency (FRA) on civil society highlighted the lack of transparency as an obstacle to civic space.³ Although the 2022 FRA report found positive steps taken by Member States to promote a more conducive environment for civil society development and strengthen cooperation between public authorities and CSOs, it also revealed a lack of adequate information and trust between civil society and public authorities.⁴ The Court of Auditors also highlighted the issue of transparency in the implementation of EU funds by NGOs in its 2018 report.⁵ It also stated that more work is required in this area as it lacked sufficient transparency.

The EU has recognized the importance of transparency, democracy, and the rule of law and has made it a priority on the European Council agenda for 2019–2024. However, practical measures need to be taken to prevent scandals such as Qatargate. On the one hand, we see MSs restricting access to funds, or funding government-organized NGOs, which may give legitimacy to transparency laws. However, transparency laws cannot be weaponized against CSOs. That is why finding common ground between member states and NGOs is crucial.

One such case we find in the proposed Democracy Package from the Commission, that will require new transparency obligations from media publishers, advertising agencies, political parties, and foundations, amongst other corporations. The Commission must take care to not legitimize threats imposed by Member States on CSOs through unnecessary and restrictive “transparency” obligations. The main takeaway is that transparency is welcomed within civil society, but it is not a matter of legitimizing NGOs' work but rather sharing results and being accountable to society.

In summary, the threats to Europe's civic space are significant and impact all aspects of society. CSOs work with various stakeholders, including citizens, the judiciary, and the media, to provide important information and reports on violations of the rule of law. They also promote mechanisms of checks and balances and uphold the values of the EU and international law. Therefore, the risks to civic space affect not only CSOs but also the broader society.

² Marc Daou, 'Corruption, cash and confessions: Who are the key suspects in the Qatargate scandal?' [2023] France24, <https://www.france24.com/en/europe/20230121-corruption-cash-and-confessions-who-are-the-key-suspects-in-the-qatargate-scandal> (accessed on 28 February 2023).

³ European Union Agency for Fundamental Rights, 'Protecting civic space in the EU – Key findings and FRA opinions' (European Union Agency for Fundamental Rights, 19 August 2022) <https://fra.europa.eu/en/publication/2022/protecting-civic-space-eu-key-findings-and-fra-opinions>. (accessed on 26 February 2023).

⁴ European Union Agency for Fundamental Rights, 'Protecting civic space in the EU' (European Union Agency for Fundamental Rights, 22 September 2021) <https://fra.europa.eu/en/publication/2021/civic-space-challenges>. (accessed on 26 February 2023)

⁵ European Court of Auditors, 'Special report no 35/2018: Transparency of EU funds implemented by NGOs: more effort needed' (European Court of Auditors, 18 December 2018) <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=48587>. (accessed on 9 March 2023).

2. Legal and policy basis/bases for the EU to act

The EU has legal instruments to protect civic space when acting within the area of transparency and protection of NGOs. Such actions are in line with the objectives present in the Treaty on European Union (TEU) i.a. in Article 2 TEU naming the EU values; Article 3 (except section 4) about promoting and working on peace, EU's values, and the well-being of the EU citizens; and Article 11 (1) and (2) calling for freedom of expression and open and transparent dialogue.

In addition, similar objectives can be found within the Treaty on the Functioning of the European Union (TFEU) in Article 15 and Article 16 (1) and in the Charter of the Fundamental Rights of the European Union (CFR) under Article 8(1), Article. 11, Article 12 and Article 42.

Regarding the Transparency Register, the 2021 Interinstitutional Agreement sets a conditional approach based on the principles of transparent and ethical interest representation which has its legal basis within Article 295 of TFEU.⁶ It is in line with the aforementioned improvement of transparency and accountability within the Register by making some conditions mandatory for organizations to access the EU institutions and decision-making process.

Regarding the Financial Transparency System, the main legal source is Article 38 of the Financial Regulation 2018/1046 on the protection of natural persons with regard to the processing of personal data and the free movement of such data. The article allows provides information on recipients and other information regarding the funds financed from the EU budget. Additionally, despite the aforementioned objectives which support the legal involvement regarding the development of the website, there are other legal bases that could be considered. For example, Article 325 TFEU aims at combating fraud, Article 338 TFEU to provide statistics regarding the budget or Article 298 TFEU when looking at issues from an administrative perspective. Accordingly, if the above would be found insufficient then it is possible by voting unanimously to use Article 352 TFEU in conjunction with Article 323 TFEU to allow the changes.

In addition, Regulation 2020/2092s, which sets a general regime of conditionality for the protection of the Union budget, could be of use as well.⁷

Moreover, the guidelines for article 114 TFEU indicates that this article could be used as a legal basis as such a measure protects the internal market of the EU. This was illustrated in the *Lex-NGO* Case where the CJEU ruled that too demanding transparency rules and disproportionately imposing responsibilities on CSOs violate the free movement of capital (Article 63 TFEU) as well as articles 7, 8, and 12 of the Charter. Accordingly, Article

⁶Transparency Register, <https://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en> (accessed 10 March 2023); *Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register* [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021Q0611\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021Q0611(01)) (accessed 10 March 2023).

⁷ 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 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2020.433.01.0001.01.ENG> (accessed 10 March 2023).

64 (2) TFEU could be considered as well.

Regarding the association statute, it is possible to use Article 114 TFEU as well. What is more, Article 50 TFEU and 53(1) TFEU could be considered by arguing that the statute would benefit self-employed EU citizens working independently within the sector of civic space.

Finally, we welcome the Council's Conclusion on March 10th, 2023, on the role of civic space in protecting and promoting fundamental rights in Europe. Stance 9 of the conclusions invite MSs to “safeguard and promote an enabling environment for CSOs and human rights defenders so that they are able to pursue their activities in line with Union values without unjustified interference by the State as required by EU- and international standards”. This continues on through n.º 13 and 14 to call upon MS to protect civic space by ensuring no restrictive registration or tax measures hinder the work of CSOs, as well as protect CSOs from smear attacks. On n.º 20, the Council invites the Commission to “Protect CSOs and human rights defenders by continued efforts to foster and protect democracy, the rule of law, and fundamental rights across all relevant policy areas, including by ensuring coherence between the Union’s approach to protecting human rights defenders externally and internally”.

3. Action(s) by EU institutions to date and their impact/effect

The European Union has introduced several measures to protect NGOs and civic space, including the Transparency Register, the Financial Transparency System, the EU ProtectDefenders, and the proposal of a European Association Statute, which we examine in turn.

First, the purpose of the **Transparency Register** is to show what interests are being represented at the EU level, by whom, on whose behalf, and the resources devoted to such interest representation activities.⁸ It has several key features including a public website where interested representatives voluntarily register and update information about their activities at the EU level; a code of conduct governing how they should interact with EU institutions; and a complaint mechanism that allows anyone to trigger an administrative inquiry into alleged cases of non-observance of the code of conduct. The profiles include information on their identity, contact information, goals, activities carried out with institutions, the nature of the activity (commercial or non-commercial), and financial data.

Although registration is voluntary, the Interinstitutional Agreement on a mandatory Transparency Register requires registration to request some activities, such as accessing the European Parliament premises for individuals representing the organization, being invited to speak at Parliament's committee hearings, participating in thematic briefings for interest representatives organized by the General Secretariat of the Council and meeting Commissioners.⁹ These activities are fundamental for interest representatives who aim at influencing European Union policies. Therefore, the Transparency Register appears as a first step towards further transparency; however, the instrument could be further improved.

A further important measure is the **Financial Transparency System**, which provides the names of the beneficiaries of funds awarded by the Commission every year. It shows the beneficiaries of the European Union budget directly administered by the Commission's departments, staff in the EU delegations, or through executive agencies, as well as the European Union budget implemented indirectly by international organizations or non-EU countries and the European Development Fund. The data includes the beneficiary, specifically who receives the funds, the purpose of the expenditure, where the beneficiary is located, the amount and type of expenditure, which responsible department awarded the funding, which part of the EU budget it comes from, and the year when the amount was booked in the accounts. This system falls under the General Data Protection Regulation¹² which ensures the fundamental right to privacy, providing a

⁸ *Transparency Register*,

<https://ec.europa.eu/transparencyregister/public/homePage.do?redir=false&locale=en>. (accessed 10 March 2023).

⁹ *Interinstitutional Agreement of 20 May 2021 between the European Parliament, the Council of the European Union and the European Commission on a mandatory transparency register* [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021Q0611\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021Q0611(01)). (accessed 10 March 2023).

safe balance with the aim of further transparency.¹⁰

From a broader perspective, the European Union has established a mechanism called **EU ProtectDefenders**, which offers grants for urgent measures, temporary relocation, capacity building, training, and reports on HRD violations and threats.¹¹ The European Instrument for Democracy and Human Rights (EIDHR) also offers direct financial support to Civil Society Organisations, promoting democracy, the rule of law, and respect for human rights and fundamental freedoms. Moreover, the EU external action has a very practical guideline for its representatives when in contact with HRDs in third countries.¹² Additionally, at a regional level, the OSCE ODIHR has created a Guideline for protecting Human Rights Defenders, which provides States with a tool to implement human rights commitments while supporting HRDs.¹³

Finally, the European Union is currently working on the **European Statute for Associations** and Non-Profit Organisations. While the European Commission drafted legislation in the 1990s, it did not become law due lack of consensus mainly on the matter of which legal form associations should adopt because of differing traditions of law.¹⁴

The current proposal has gone through public consultation and the European Parliament has made recommendations about it.¹⁵ The proposal covers cross-border associations and tries to remove difficulties that NPOs face, such as the lack of a European legal basis, barriers to cross-border funds, and different inconsistent administrative procedures in each Member State. The proposal creates a minimum standard for the conditions and procedures governing the formation, governance, registration, and regulation of so-called European Associations; it harmonizes certain aspects of the legislation of Member States; and it facilitates certain operations such as the transfer of main headquarters offices. Such Regulation could serve as a critical step towards consolidating and facilitating the status of NGOs through the creation of a European Association Authority, which could ensure that the Regulation is consistently applied, and a digital e-Registry of European Associations at the Union level. The e-Registry would simplify bureaucratic procedures and make it easier for associations to work across borders.

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data <https://eur-lex.europa.eu/eli/reg/2016/679/oj> (accessed 10 March 2023).

¹¹ *EU ProtectDefenders* <https://protectdefenders.eu/> (accessed 10 March 2023).

¹² The European Instrument for Democracy and Human Rights https://www.eeas.europa.eu/delegations/kyrgyz-republic/european-instrument-democracy-and-human-rights-eidhr_en (accessed 10 March 2023); EU guideline on Human Rights Defenders [2008], https://www.eeas.europa.eu/sites/default/files/eu_guidelines_hrd_en.pdf (accessed 2 March 2023)

¹³ OSCE ODIHR Guideline for Human Rights defenders <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders> (accessed 2 March 2023).

¹⁴ Proposal of European Association statute <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1993:236:FULL&from=EN> (accessed 10 March 2023).

¹⁵ European Parliament resolution of 17 February 2022 with recommendations to the Commission on a statute for *European cross-border associations and non-profit organisations* (2020/2026(INL)) https://www.europarl.europa.eu/doceo/document/TA-9-2022-0044_EN.html (accessed 11 March 2023).

4. Gap analysis: scope and necessity for further action

The Transparency Register already sets up many useful transparency requirements however it is not compulsory for interest representatives to fulfill all of them, including the financial data category. Many organizations do not publish any complementary information such as the grants received and the total amount of EU grants for the closed and current years.

Additionally, organizations representing a non-commercial interest are not obliged to give their lobby budget to ensure transparency. This can lead to confusion between the lobbying budget of big companies, which must be disclosed because of the commercial interest, and the total budget of non-commercial organizations, impacting their legitimacy.¹⁶

Trade associations and church and faith-based associations or confederations influencing the EU policy-making process fall into an unsatisfactory grey area since they are not required to indicate their biggest source of income.¹⁷

The registrants must comply with the Code of Conduct, but this does not explicitly refer to the prohibition of using illegal financial sources or the embezzlement of funds.

Until now, there is no requirement to indicate exchanges with regular members of the European Parliament or lower-tier staff, which can be problematic following the Qatargate issues. There is also no obligation to register meetings with permanent representations of Member States which in turn extensively lobby in Brussels. Some States have remedies to that effect.

Many other informative websites on EU funding are available such as the Financial Transparency System, the website on Funding and Tender opportunities, and the “Your Europe” EU funding programs. However, their interfaces are not always accessible as relevant information may be scattered between several platforms and are sometimes lacking

The Financial Regulation 2018/1046, which is the basis for the Financial Transparency System, allows the publication of relatively extensive data on the recipient, but the website is not very user-friendly and does not provide all the data provided in the Regulation.

For instance, it is not easy to obtain data in relation to EU sub-granting to NGOs and the use of such sub-grants. The websites are often limited to the name of the recipient and the received sum of money.

¹⁶ ALTER-EU email to Commissioner Jourova “Please take action on revised EU Transparency Register”, 2 February 2022, https://www.alter-eu.org/sites/default/files/documents/220202%20letter%20transparency%20register%20implementation_0.pdf (accessed 10 March 2023).

¹⁷ The Good Lobby “The EU makes the Transparency Register mandatory but we expected better”, 17 May 2021, <https://www.thegoodlobby.eu/2021/05/17/the-eu-makes-the-transparency-register-mandatory-but-we-expected-better/> (accessed 10 March 2023).

They present graphs that are not clear nor easily understandable, and the mobile version display is confusing due to inadequate programming.

Tenders Guru is a great example of an EU initiative that facilitates transparency within the Member States and shares knowledge to prevent fraud.¹⁸ However, this platform is not easy to find online as it requires the exact name of the project and it misses links to connect with other relevant websites.

The EU mechanisms protecting and promoting NGOs essentially adopt an external approach. For example, the EEAS guideline on human rights defenders focuses on NGOs in third countries. This shows that the EU seems to run at two levels when it comes to foreign and domestic-based NGOs.

The OSCE ODIHR guideline proposes that States have both positive and negative obligations in protecting HRDs, but the EU has not yet set up such obligations upon Member States and the guideline is only politically binding. The absence of such duties has led to certain States severely restricting interactions with CSOs (e.g. Hungary, Poland, and Greece). Additionally, the ProtectDefenders mechanism reports gather European civil society with Central Asian CSOs.

Unlike other international organizations, the EU has not yet created a statute for European associations and NGOs. The EU acknowledges the existence of "enterprises" and "bodies of public authority", but non-profit associations do not belong to either of these categories. As a result, the "third sector" is not duly taken into account or is misrepresented in the policy and legislative framework and in its implementation. **European not-for-profit associations should also benefit from the freedom of movement of persons, services, and capital.**

In 2001 and 2002, the Statute for a European Company and the Statute for a European Cooperative were adopted, but the Statute for a European Association was declined. Currently, the Commission is working on proposing such a statute. Non-profit organizations lack a legal form at the Union level to put the representation of civil society interests on an equal footing with that of commercial undertakings and economic interest groups. It is nevertheless undeniable that due to the unconventional nature of the funding of such organizations, an adapted Statute is necessary.

As associations, and especially NGOs, are cross-border actors they have needed this legal provision for a long time. In the absence of harmonization, they have faced the diverging administrative procedures or policies of each Member State, which may have negatively affected them and dissuaded them from extending their activities across the Union.

¹⁸ Tenders Guru – 2023 RECORD Project official website <https://tenders.guru/> and https://antifraud-knowledge-centre.ec.europa.eu/library-good-practices-and-case-studies/good-practices/tenders_guru_en (accessed 10 March 2023)

5. Recommendations

As of this year, the European Parliament jointly with the European Commission should **reform the Transparency Register** to include such policies as:

1. The registrant should provide all the financial data required by the dedicated section of the Transparency Register and must indicate the total amount of EU grants.
2. All legal entities, including those representing a non-commercial interest, shall declare their annual lobby budget.
3. All legal entities, including trade associations and Church and faith-based associations or confederations influencing the EU policy-making process, must indicate their biggest source of income.
4. The following provisions should be added to the Code of Conduct: *"They must: [...] (q) Refrain from misusing public money; and opposing corruption, bribery, and other financial improprieties."*
5. An obligation for interest representatives to indicate their meetings with regular Members of the European Parliament and lower-tier staff such as assistants from the Parliament and the Commission.
6. The obligation to register applies to access to permanent representations of each EU Member State.

The Commission, as of next year, should **develop and modernize the Financial Transparency System**, while taking into account digital inclusion, by:

1. Providing easy access via multiple electronics to relevant information regarding the EU funding with dispatch.
2. Making the website visually clear and user-friendly.
3. Making relevant, meaningful, and practical information easily accessible by including: (a) links to profiles of the recipient within the Transparency Register or their official website with respect to privacy.
(b) clear indication via which EU program a particular amount of money was received.
(c) information whether sub-granting was present within the particular funding and if yes, to whom, how much, and regarding what action or aim.
(d) information on whether a particular funding was audited and if yes, providing a general list of undertaken actions.
4. Giving access to comparative information by providing graphics and statistics.
5. Making the responsibility to provide the information on the website a competence of the relevant EU authority.

The Commission should **create an Internal Guideline for Protecting Human Rights Defenders**, especially Civil Society Organizations:

1. In line with the Council's Conclusion n.º 20 from March 10th, 2023.
2. Taking into account core principles of the freedom of assembly, expression, and others enshrined in the EUCFR, the ECHR, the OSCE ODIHR guidelines on HRDs and implementing the recommendations of the Expert Council on NGO law of the

Council of Europe (2007/14).

3. Providing a framework for EU institutions and Member States to follow when working with CSOs or drafting legislation that affects CSOs and promoting public consultation.
4. Creating a direct focal point for HRDs, either through the FRA or ProtectDefenders or even establishing a CSO version of the European Board for Media Services.
5. Developing guidelines on the allocation of funds for NGOs at an EU and national level (e.g. following the Common Provisions Regulations) to guarantee that funds are allocated in a fair and transparent manner.
6. Addressing threats to civic space (e.g. SMEAR campaigns, anti-SLAPP laws, and physical or digital threats to CSOs) by arbitrary, unnecessary, and discriminatory government and EU intervention.
7. And developing a 3-year Assessment Plan on the implementation of the guideline and the need for further action either through directive or regulation.

The Commission and European Parliament should take consider the following points when adopting the proposal of the **European Statute of Associations**:

1. The existing Statute of a European Company.
2. Harmonization of CSO-related administrative procedures and policies at a domestic level.
3. Addressing the issue of CSO transactions of funds and money across borders
4. Creating a blueprint for national philanthropy tax laws that are adequate for foreign and national EU-based public benefit organizations and their donors.

PROTECTING THE EU BUDGET

Policy proposal by Mariagiovanna Grano, Franci
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Executive summary

The Our Rule of Law Academy Working Group on Protecting the EU Budget, consisting of Mariagiovanna Grano, Francisca Németh-Trocado, and Bárbara Coquim Serra; mentored by Dr. Thu Nguyen and Dr. Matteo Bonelli, make the following recommendations:

- The Commission should be better assisted by an independent expert body during the preliminary assessment phase of the Conditionality Regulation. Pressure and responsibility should be alleviated from the Commission in establishing whether the conditions stipulated in the Conditionality Regulation are met. Such assessments should, instead, be carried out by a competent body, which, upon finding that the conditions are met, must alert the Commission. Upon receiving such signals, the Commission should have an obligation, immune from political pressure, to trigger the procedure outlined in the Conditionality Regulation.
- The Commission should ensure the effectiveness of remedial measures proposed by the Member States concerned. Firstly, the Commission should assess, to a greater extent, remedial measures based both on their adequacy as well as their effectiveness. Secondly, the Commission should establish a monitoring mechanism by equipping independent bodies with the competence to continuously review the implementation and application of the remedial measures. These two steps would ensure that remedial measures are not only adequate on paper, but effective in practice.
- The Commission should reconsider the steps that follow the suspension of payment of funds from the EU budget under the Conditionality Regulation. Once the Member State concerned has implemented remedial measures that adequately and effectively address the concerns of the Commission, disbursement of the suspended funds should not take place at once. Rather, disbursement should be gradual, and contingent upon genuine and continuous progress. This is necessary to ensure that the measures have a long-lasting effect and thus protect the EU budget and the rule of law in the long term. This proposal does not require a change in the relevant legal framework; instead, it is intended to shape the Commission's practice.
- The multiple stages of conditionality currently endorsed under the Recovery and Resilience Facility Regulation should be replicated under the Common Provisions Regulation in view of the next Multiannual Financial Framework. By doing so, the Common Provisions Regulation could become an important instrument for protecting the EU budget via rule of law principles, in substitution of the Recovery and Resilience Facility Regulation, whose time scope is limited.

1. The nature of the problem

1.1 General Functioning of EU Budget

Since its dawn, the European project has entailed pooling resources together. Although the objectives of the Union have changed significantly over the decades, today's EU budget is underlined by this same rationale. By pooling resources together, transnational issues faced throughout the EU can be tackled.¹ Sharing prosperity and solidarity, leading the fight against climate change, and creating opportunities for EU citizens are all aims that the budget intends to contribute to.² Ultimately, it serves as a tool to ensure that Europe remains a democratic, peaceful, prosperous, and competitive force—at least theoretically.³

Unlike national budgets, the EU budget is mainly dedicated to investment.⁴ As a result, the EU adopts long-term spending plans, known as Multiannual Financial Frameworks (MFFs), that run for a period of 5–7 years, and set out the EU's spending priorities and limits. The current MFF runs from 2021 until 2027, and boasts a budget of €1.211 trillion.⁵ The largest share of the budget is dedicated to helping to strengthen economic, social, and territorial cohesion in the EU.⁶ Based on the MFF and the budget guidelines for the coming year, the annual budget is decided jointly by the Commission, the Council, and the Parliament.⁷

The MFF is now further boosted by a temporary recovery instrument, namely NextGenerationEU, which adds an additional €800 billion to the budget in order to cope with the immediate economic and social damage caused by the coronavirus pandemic.⁸ At its heart is the Recovery and Resilience Facility,⁹ which is intended to provide grants and loans to promote reforms and investments in EU Member States, at a total value of €723.8 billion.¹⁰

Three-quarters of the budget expenditure is jointly managed by national authorities and the Commission (shared management), 18% is managed by the Commission and its agencies (direct management), and 8% is managed by other international organizations, national agencies, or non-EU countries (indirect management). The NextGenerationEU funds channeled through the Recovery and Resilience Facility are implemented in direct

¹ Commission, 'EU Budget at a Glance' (2019) 6.

² EU Budget at a Glance (n 1) 5.

³ EU Budget at a Glance (n 1) 5.

⁴ EU Budget at a Glance (n 1).

⁵ Commission, 'EU Budget Policy Brief: The Evolving Nature of the EU Budget' (2021) 10.

⁶ EU Budget Policy Brief: The Evolving Nature of the EU Budget (n 5) 16.

⁷ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 314.

⁸ Commission, 'EU Budget Policy Brief: The EU as an Issuer: The NextGenerationEU Transformation' (2022) 4.

⁹ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L67/17 (Recovery and Resilience Facility Regulation).

¹⁰ EU Budget Policy Brief: The EU as an Issuer: The NextGenerationEU Transformation (n 8).

management. However, regardless of the management classification, the Commission bears the ultimate responsibility for implementing the budget, ensuring that every euro spent is recorded and accounted for.

1.2 Link between budget and the rule of law

The Treaty on European Union (TEU), specifically Article 2 therein, identifies democracy and the rule of law as cornerstones of the Union. Although the EU budget is supposedly a tool to ensure that Europe remains democratic, recent trends have brought this into question. In fact, the misuse of EU funds has contributed to the erosion of democracy in some Member States.

At the moment, the EU provides some of the largest transfers of funds to those exact governments that most prominently act against democratic values. For example, Poland, being the largest recipient of Cohesion Funds, is due to receive €75 billion out of a total of €392 billion allocated for the period 2021–2027.¹¹ Meanwhile, Hungary is the largest recipient of EU funds per capita, and more than 95% of all public investments in Hungary in recent years have been co-financed by the EU.¹² The correlation is thus clear: the backsliding Member States are those who receive the most amount of money from EU funds. In an environment where there is a lack of transparency and accountability, autocrats divert EU money to their own efforts to stay in power.¹³ Through European funds, these governments are able to sustain themselves and create a narrative that guarantees their power while, simultaneously, adopting backsliding policies, including centralization of political power, control of the state apparatus, management of the electoral process, and the weakening of independent media and civil society.

Importantly, it must also be borne in mind that the vast majority of EU funds come from every taxpayer in the EU. Accordingly, it is the money stemming from the people that is being used to deteriorate democratic institutions and values. This renders it even more pertinent to ensure that funds received by Member States are dedicated to the goals they are intended to achieve, and directly or indirectly, benefit the people.

2. Legal and policy basis/bases for the EU to act

In order to understand the current legal framework endeavoring to protect the EU budget from rule of law violations, it is important to identify the relevant legal sources and policy

¹¹ Commission, 'Available Budget of Cohesion Policy 2021–2027' <https://ec.europa.eu/regional_policy/funding/available-budget_en> accessed 2 March 2023.

¹² Christian Keszthelyi, 'Hungary's economy heavily depends on EU funds' (*Budapest Business Journal*, 31 March 2017) <https://bbj.hu/economy/hungarys-economy-heavily-depends-on-eu-funds-study-finds_13088> accessed 2 March 2023.

¹³ Roger Daniel Kelemen, 'The European Union's authoritarian equilibrium' (2020) 27(3) *Journal of European Public Policy* 481.

documents. There are three main instruments that render disbursement of funds conditional upon rule of law compliance, namely the Common Provisions Regulation, the Recovery and Resilience Facility Regulation, and the Conditionality Regulation.

2.1 Common Provisions Regulation

The Common Provisions Regulation (CPR) was established to govern eight EU funds whose delivery is shared with Member States and regions.¹⁴ Together, they represent a third of the EU budget. The CPR currently regulates the administration of European Structural and Investment Funds (ESIFs).

In 2018, the Commission released its proposal for a new CPR covering the period 2021–2027.¹⁵ In December 2020, an agreement was reached between the European Parliament and the Council on the final wording of the Regulation.¹⁶ A key objective of the CPR is administrative simplification, meaning the acceleration of the delivery of public support in the real economy. The largest share of this budget is allocated to promote a more competitive, greener Europe, closer to citizens by fostering the sustainable and integrated development of all types of territories and local initiatives.¹⁷ These funds, albeit indirectly, are an important mechanism for States to consolidate their public institutions as well as to invest in public services necessary for the rule of law.

The Regulation has several objectives, including the rule of law-related goals, such as the improvement of the institutional capacity of public authorities and the promotion of efficient public administration. Member States set out their priorities for investment and the way in which they are to be implemented, in line with the objectives of the Regulation. The Commission then negotiates "partnership agreements" with the Member States, which allows it to make suggestions and identify shortcomings in the national plans. Accordingly, while each Member State chooses its own investment priorities based on its own needs, the

¹⁴ The 8 funds covered by this common regulation are: European Regional Development Fund (ERDF), European Social Fund Plus (ESF+), Cohesion Fund, Just Transition Fund (JTF), European Maritime, Fisheries and Aquaculture Fund (EMFAF), Asylum and Migration Fund (AMIF), Internal Security Fund (ISF), Border Management and Visa Instrument (BMVI).

¹⁵ Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down Common Provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument', COM (2018) 375 final.

¹⁶ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L231/159 (Common Provisions Regulation).

¹⁷ Common Provisions Regulation (n 16) art 5.

final program is a joint creation of the Commission and the Member State, and should endorse the objectives of the Regulation, including principles connected to the rule of law.

The Regulation indirectly allows the Commission to suspend the covered funds if a Member State does not uphold the rule of law. Article 97 provides that payments of those funds may be suspended in the event of, *inter alia*, a serious deficiency or a matter that puts at risk the legality and regularity of expenditure. To act on it, the Commission, in addition to proposing amendments to the programs submitted by the Member States,¹⁸ monitors progress in program execution.¹⁹ Moreover, the Commission has foreseen a control mechanism to ensure that Member States act on complaints raised regarding the application of funds. This mechanism gives citizens the possibility to submit complaints to the Commission.²⁰

The CPR also establishes so-called ‘enabling conditions’, the fulfillment of which is a necessary requirement for Member States to obtain reimbursement of expenditure under the ESIFs.²¹ This instrument is intended to ensure that the prerequisites for efficient and effective spending are in place *before* the disbursement of funds and remain operative *throughout* the entire financial period.²² The CPR draws a distinction between horizontal and thematic enabling conditions: whereas the former is applicable to all specific spending objectives, the latter is only relevant to the European Regional Development Fund, the European Social Fund Plus, and the Cohesion Fund. These enabling conditions relate to various policy areas, ranging from public procurement and state aid rules to gender equality and fundamental rights. In particular, one of the horizontal enabling conditions now requires that Member States put in place effective mechanisms to ensure all CPR programmes are implemented in compliance with the EU Charter of Fundamental Rights.

In the event of non-fulfillment of the enabling conditions, the Commission cannot reimburse the related expenditure submitted other than for technical assistance and for fulfilling the enabling conditions.²³ In line with the applicable rules, a failure to fulfill an enabling condition does not, however, entail any suspensions of payments of pre-financing.

2.3 NextGenerationEU – Recovery and Resilience Facility Regulation

The NextGenerationEU is a temporary recovery tool that now coexists alongside the EU budget, and has at its epicenter the Recovery and Resilience Facility (RRF).²⁴ In order to be

¹⁸ Common Provisions Regulation (n 16) art 19.

¹⁹ Common Provisions Regulation (n 16) art 41.

²⁰ Common Provisions Regulation (n 16) art 69(7).

²¹ Common Provisions Regulation (n 16) art 15 and Annexes III and IV.

²² Marco Fiscaro, ‘Beyond the Rule of Law Conditionality: Exploiting the EU Spending Power to Foster the Union’s Values’ (2022) 7 *European Papers* 697, 699.

²³ Common Provisions Regulation (n 16) art 15(5).

²⁴ Recovery and Resilience Facility Regulation (n 9).

eligible to receive funds under the RRF, Member States must draft a National Recovery and Resilience Plan (NRRP) outlining how they are going to invest the funds.²⁵ Moreover, NRRPs must include the relevant milestones and targets, in line with the country-specific recommendations under the European Semester.²⁶ Member States should submit their request for loans before 31 August 2023.²⁷ Then, the request must be approved by 31 December 2023.²⁸ The milestones included in the NRRPs need to be implemented by August 2026.²⁹ Consequently, Member States have a limited time to fulfill the often very extensive reforms.

As the NRRPs must be presented to the Commission and subsequently approved by the Council with a qualified majority vote through an implementing decision,³⁰ the NextGenEU scheme makes use of conditionality-like tools.³¹ Once the NRRPs are approved, the allocated grants and loans are only disbursed after the Member States have implemented their relevant reforms and investments. The Commission will approve the payment only if it decides, after an opinion of the Economic and Financial Committee,³² that the Member State concerned is making adequate progress in achieving its plan. As a result, the actual disbursement of funds will be contingent upon fulfillment of specific milestones and tasks, and it may be suspended if the Member State in question breaches EU macro-economic requirements.³³ If this occurs, the Member State will be given 6 months to take the required action, otherwise, its grants will be reduced.³⁴ In a similar vein, the Commission may fully terminate the agreement and ask Member States to reimburse any pre-financing already received if they have not taken any concrete steps toward implementing their plan 18 months after the Council approved their NRRP.³⁵

Therefore, the budget conditionality under the RRF refers to the macroeconomic conditionality that has been created after the financial and sovereign debt crisis. Nonetheless, the Commission has used the RRF also as a tool for rule of law enforcement.

²⁵ Recovery and Resilience Facility Regulation (n 9) art 17.

²⁶ Recovery and Resilience Facility Regulation (n 9) art 18.

²⁷ Recovery and Resilience Facility Regulation (n 9) art 14.

²⁸ Recovery and Resilience Facility Regulation (n 9) art 14.

²⁹ Recovery and Resilience Facility Regulation (n 9) art 20.

³⁰ The Commission carries out an assessment of the plans. Then, if the assessment is positive, it makes a proposal for an implementing decision to the Council according to Recovery and Resilience Facility Regulation (n 9) art 20.

³¹ The RRF Regulation contains conditionality clauses in Articles 10 and 20. The conditionality in art 10 relates to non-compliance with recommendations in the course of an excessive imbalance procedure under the Six-Pack-Regulation (EU) No 1176/2011, assistance in case of balance of payment problems under Regulation (EC) No 332/2002, and non-compliance with macro-economic adjustment programmes under Two-Pack-Regulation (EU) No 472/2013. Art. 20 of the RRF governs the procedure.

³² Recovery and Resilience Facility Regulation (n 9) art 24(4).

³³ Recovery and Resilience Facility Regulation (n 9) art 24(6).

³⁴ Recovery and Resilience Facility Regulation (n 9) art 24(8).

³⁵ Recovery and Resilience Facility Regulation (n 9) art 24(9).

Indeed, the RRF is linked to the recommendations under the European Semester, and some of them address rule of law deficiencies. Thus, NRRPs may include specific milestones and targets aimed at remedying such deficiencies.

Moreover, NRRPs must demonstrate that “the arrangements proposed by the Member State” will help “prevent, detect and correct corruption, fraud and conflicts of interests when using the funds provided under the Facility”.³⁶ Hence, the objective is to defend the EU’s funding principles against threats posed by the Member States, who are also enacting divisive and contentious changes.

2.4 Conditionality Regulation

After much deliberation between the Commission, the Parliament, the Council of Ministers, and the European Council from 2018 until 2021, the Conditionality Regulation entered into force in January 2021.³⁷ On the basis of Article 322(1)(a) TFEU, the Regulation establishes a horizontal conditionality mechanism that makes Member States’ access to funds from the EU budget conditional on respect of the principles of the rule of law. Thus, the Regulation has as its objective the protection of the Union budget in case of breaches of the principles of the rule of law in a Member State. It establishes two main conditions that must be fulfilled for the EU to suspend or reduce funds to Member States: firstly, there must be a breach of the rule of law in a Member State; and secondly, this breach must affect or seriously risk affecting the sound financial management of the EU budget or the protection of the Union’s financial interests in a sufficiently direct way.³⁸ Provided that these conditions are met, and unless other procedures set out in Union legislation allow for more effective protection of the Union budget, the Commission must send a written notification to the Member State concerned with its findings.³⁹ Thereafter, the Member State concerned must provide the required information, may make observations on the findings, and may propose the adoption of remedial measures to address the findings of the Commission.⁴⁰ The Commission, after taking these submissions into account, can decide to submit a proposal for an implementing decision of appropriate measures.⁴¹ Subsequently, the Commission’s proposal must be submitted to the Council,⁴² which shall adopt the implementing decision within one month, or, in the event of exceptional circumstances, within two months. Finally,

³⁶ Recovery and Resilience Facility Regulation (n 9) art 19(3)(j).

³⁷ 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 [2020] OJ L433/1 (Conditionality Regulation).

³⁸ Conditionality Regulation (n 37) art 4(1).

³⁹ Conditionality Regulation (n 37) art 6(1).

⁴⁰ Conditionality Regulation (n 37) art 6(5).

⁴¹ Conditionality Regulation (n 37) art 6(6).

⁴² Conditionality Regulation (n 37) art 6(9).

the Council, acting by a qualified majority,⁴³ may amend the Commission's proposal and adopt the amended text by means of an implementing decision. This implementing decision can contain any of the measures for the protection of the EU budget that the Commission deems appropriate, such as the suspension of payments, the prohibition of entering into new legal commitments, or the suspension of the disbursement of installments in full or in part.⁴⁴

The Regulation differs from other mechanisms in that, firstly, it establishes a general regime covering all EU funds,⁴⁵ as opposed to pertaining to specific funds, like the Common Provisions Regulation and the RRF. Secondly and most importantly, whereas the other mechanisms are not directly intended to protect the budget from rule of law violations only, the Conditionality Regulation is specifically tailored to tackle this issue.

3. Actions by EU institutions to date and their impact/effect

3.1 Vis-à-Vis Hungary

3.1.1 Conditionality Regulation

On 27 April 2022, the Commission triggered the Conditionality Regulation for the first time, against Hungary.⁴⁶ Pursuant to Article 6 of the Regulation, the Commission sent a written notification to Hungary setting out the factual elements and specific grounds on why it believed that the conditions for adopting measures to protect the EU's financial interests due to rule of law infringements were met. The findings highlighted, in particular, issues concerning the public procurement system in the country; a high rate of single bidding procedures and low intensity of competition in procurement procedures; issues related to the use of framework agreements; issues in the detection, prevention, and correction of conflicts of interest; and concerns related to the use of EU funding by public interest trusts.⁴⁷

In June 2022, Hungary replied to the notification, and further information was later provided by the Hungarian authorities. The Commission considered that the first reply and the additional letters did not contain adequate remedial measures and, on 20 June 2022, sent a

⁴³ Conditionality Regulation (n 37) art 6(11).

⁴⁴ Conditionality Regulation (n 37) art 5. The types of measures proposed by the Commission depend on the management system of the budget at stake, and must adhere to the principle of proportionality.

⁴⁵ Communication from the Commission Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget [2022] OJ C123/12 (Conditionality Regulation Guidelines), para 25.

⁴⁶ Thomas Wahl, 'Commission Triggers Conditionality Mechanism against Hungary' [2022] Eucrim 106.

⁴⁷ Commission, 'Proposal for A Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary' COM (2022) 485 final (Proposal for Implementing Decision against Hungary), para 1(5).

letter to inform Hungary of its intention to propose to the Council to suspend funds. At the end of July 2022, following the additional observations made by Hungary, the Commission sent a letter to inform the Member State, once again, of the measures that it intended to propose to the Council. On 22 August, Hungary criticized this procedure and contested the proportionality of the measures.

In September 2022, the Commission presented a proposal calling for suspending 65% of obligations for three operational programs under the cohesion policy to Hungary, amounting to €7.5 billion.⁴⁸ On 30 November 2022, the Commission renewed its proposal. Some EU Member States, seeking to salvage unanimous support among EU Member States for Ukraine and the global minimum tax, pressed the Commission to water down its recommended punishment for Hungary.⁴⁹ Eventually, on 15 December 2022, the Council decided to adopt an implementing decision,⁵⁰ reducing the suspension of funds from €7.5 billion to €6.3 billion, effectively giving the Hungarian government an additional €1.2 billion in 2021-2027.⁵¹ Hungary is now obliged to inform the Commission by 16 March 2023, and every 3 months thereafter, of the implementation of the 17 remedial measures to which Hungary committed, including establishing an Integrity Authority and Anti-Corruption Task Force, and addressing public procurement irregularities.

3.1.2 Recovery and Resilience Facility

As far as the RRF is concerned, Hungary can receive €5.8 billion in grants and €9.6 billion in loans to alleviate the economic crisis caused by the Covid-19 pandemic.⁵² Before the Commission releases the first tranche, the Hungarian government must first implement the milestones and rule of law reforms outlined in its plan. In particular, the Commission has identified a set of 27 “super milestones” which must be satisfied before any disbursement.⁵³ Among these milestones, there is a comprehensive set of institutional reforms to promote the rule of law. These reforms effectively cover the country-specific recommendations

⁴⁸ Proposal for Implementing Decision against Hungary (n 47).

⁴⁹ Jacob Funk Kirkegaard, ‘The EU’s latest bargain with Hungary’s Orban unlocks aid to Ukraine’ (Peterson Institute for International Economics, 22 December 2022) <<https://www.piie.com/blogs/realtime-economics/eus-latest-bargain-hungarys-orban-unlocks-aid-ukraine>> accessed 2 March 2023.

⁵⁰ Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [2022] OJ L325/94 (Implementing Decision against Hungary).

⁵¹ Council, ‘NextGenerationEU: Member states approve national plan of Hungary’ (Press release, 12 December 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/nextgenerationeu-member-states-approve-national-plan-of-hungary/>> accessed 2 March 2023.

⁵² Commission ‘Country Overview: Hungary’ <https://ec.europa.eu/economy_finance/recovery-and-resilience-scoreboard/country_overview.html?country=Hungary> accessed 2 March 2023.

⁵³ NextGenerationEU: Member states approve national plan of Hungary (n 51).

addressed to Hungary in relation to the rule of law and also serve to safeguard the financial interests of the Union. By stepping up the fight against corruption, encouraging competitive public procurement, and bolstering the judiciary's independence, they are also expected to improve the economy's efficiency and resilience.

On 12 May 2021, Hungary submitted its NRRP. As part of a compromise deal, on 30 November 2022, after proposing to the Council to withhold funds from Hungary under the Conditionality Regulation, the Commission formally endorsed the Hungarian NRRP.⁵⁴ The final decision on the approval was taken by the Council on 15 December 2022.⁵⁵ However, as of right now, no grants nor loans have been allocated to the Member State.

3.1.3 Common Provisions Regulation

On 22 December 2022, the Commission adopted a Partnership Agreement with Hungary. The Agreement, worth a total of €22 billion for the period of 2021-2027, will help the country implement EU priorities. In particular, it includes a detailed roadmap to improve Hungary's administrative capacity and tackles challenges such as transparency of, and competition in, public procurement; prevention, detection, and correction of corruption; fraud and conflict of interest; and capacity building of beneficiaries of Cohesion Policy funding and partners.⁵⁶

3.2 Vis-à-Vis Poland

3.2.1 Recovery and Resilience Facility

Poland is the fourth biggest beneficiary of the RRF, after Italy, Spain and France. EU support for implementing Poland's NRRP amounts to €23.85 billion in grants and €11.51 billion in loans, for a total of €35.36 billion.

Poland submitted its NRRP on 3 May 2021. The plan includes milestones related to important aspects of the independence of the judiciary. In particular, this implies a comprehensive reform of the disciplinary regime applicable to Polish judges. Given that effective judicial protection is essential, the Polish NRRP milestones set out reforms strengthening the independence and impartiality of courts. Such reforms are supposed to remedy the situation of judges affected by the decisions of the Disciplinary Chamber of the Supreme Court in disciplinary and judicial immunity cases.

⁵⁴ Commission, 'Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary' COM (2022) 686 final (Proposal for Implementing Decision for approval of Hungary's RRP).

⁵⁵ Implementing Decision for Hungary's RRP (n 54).

⁵⁶ Commission, 'EU Cohesion Policy 2021-2027: Investing in a fair climate and digital transition while strengthening Hungary's administrative capacity, transparency and prevention of corruption' (Press release, 22 December 2022).

On 1 June 2022, the Commission approved Poland's plan.⁵⁷ This decision resulted in a significant wave of criticism from Members of the European Parliament, legal experts, and some Commissioners, concerned with the Polish government's highly-controversial judicial system.⁵⁸ However, the approval comes as the Commission wants to show unity and solidarity with Poland since it has played a key role in the bloc's response to Russia's invasion of Ukraine.⁵⁹

On 17 June 2022, the Council adopted its implementing decision on the approval of Poland's plan.⁶⁰ The Council's decision emphasized milestones that need to be achieved by Poland. The milestones are (1) the disbandment and replacement of the Disciplinary Chamber; (2) the reforming of the disciplinary regime; and (3) the review of disciplinary decisions already taken by the new Chamber.

Currently, no grants, nor loans have been allocated to the Member State.

4. Gap analysis: scope and necessity for further action

Making access to EU funds conditional upon adherence to EU values is a relatively new phenomenon. Although other mechanisms, such as the Common Provisions Regulation, have been in place for longer, the Commission has been more active under the recently adopted Conditionality Regulation, and the RRF framework. Their relatively short lifespan thus far renders their evaluation difficult, especially taking into consideration that eliminating the threat of rule of law breaches to the EU budget may require widespread changes in the political and legal system of a Member State, which may, in turn, take a longer period of time. Despite, and simultaneously as a result of this, potential pitfalls can already be detected. Most of these pitfalls, and the related recommendations, concern the Conditionality Regulation, including its application and effectiveness.

4.1 Lack of Prompt Action by the Commission

Currently, the initiation of the procedure under the Conditionality Regulation hinges on the pro-activeness of the Commission to a considerable extent. The Commission is responsible for continuously and consistently investigating whether the conditions stipulated in the Regulation are fulfilled. It must carry out a thorough qualitative assessment on a case-by-case basis, taking due account of specific circumstances and contexts, in order to

⁵⁷ Commission, 'Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland' COM (2022) 268 final (Proposal for Implementing Decision for approval of Poland's RRP).

⁵⁸ Eszter Zalan, 'EU approved Poland's recovery fund despite criticism' *EUobserver* (Brussels, 1 June 2022) <<https://euobserver.com/rule-of-law/155113>> accessed 2 March 2023.

⁵⁹ Zalan (n 58).

⁶⁰ Council, 'NextGenerationEU: ministers approve the assessment of Poland's national plan by the European Commission' (Press release, 17 June 2022).

identify and assess breaches of the principles of the rule of law.⁶¹ As prescribed in the Conditionality Regulation Guidelines, the Commission must apply a comprehensive, proactive, risk-based, and targeted approach in order to ensure the Regulation's effective application.⁶² Accordingly, the Commission bears exclusive responsibility for the initiation of the procedure set out in the Regulation and places it under significant pressure to ensure that rule of law violations affecting the Union budget are eliminated. Although the Commission, as the Guardian of the Treaties, is naturally the institution bearing the biggest responsibility for this, this can hinder the effective application of the Regulation, and thus the effective protection of the budget through the rule of law.

This is even more the case considering the politicization of the rule of law as a subject matter in the EU, which places the Commission under significant political pressure when attempting to apply the Conditionality Regulation. Such pressure can exploit the discretion the Commission enjoys in triggering the procedure, and hinders effective and timely action. This was seen in practice when the Commission was hampered from triggering the Conditionality Regulation against Hungary due to the European Council's conclusions in July 2020. This meant that despite the Regulation coming into force in January 2021, the Commission was only able to officially trigger the Regulation in April 2022.

4.2 Lack of Effectiveness of Remedial Measures

Another shortcoming of the Conditionality Regulation is its inability to ensure that the remedial measures introduced by Member States are both adequate and effective in addressing the concerns outlined by the Commission. The Conditionality Regulation introduces the concept of remedial measures, which are reforms the Member State concerned can adopt to address the findings set out in the Commission's notification.⁶³ In essence, these measures are intended to rectify the breaches of the rule of law that affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union,⁶⁴ as identified by the Commission. The Commission takes into account the remedial measures, if any, proposed by the Member State concerned when deciding whether to submit a proposal for an implementing decision on appropriate measures to the Council.⁶⁵ If the Commission considers that the remedial measures proposed do not adequately address the findings in the Commission's notification, it submits a proposal for an implementing decision on the appropriate measures to the Council.⁶⁶ Against this background, the adequacy of remedial measures,

⁶¹ Conditionality Regulation Guidelines (n 45) para 54.

⁶² Conditionality Regulation Guidelines (n 45) para 8.

⁶³ Conditionality Regulation (n 37) art 6(5).

⁶⁴ Conditionality Regulation (n 37) art 4(1).

⁶⁵ Conditionality Regulation (n 37) art 6(6).

⁶⁶ Conditionality Regulation (n 37) art 6(9).

which pertain to, in particular, their appropriateness to remedy the shortcomings identified by the Commission, are of pivotal importance in the conditionality regime.

However, there seems to be a lacuna relating to the effectiveness of such measures. Indeed, there is a fundamental difference between ‘adequacy’ and ‘effectiveness’: whereas adequacy refers to whether the remedial measures are ‘fit for purpose’, effectiveness relates to whether the remedial measures can and will have the desired effect of mitigating the rule of law violation and its effects on the EU budget. Although a measure can only be effective if it is adequate, it can be adequate without being effective. Despite the Conditionality Regulation and the Guidelines implying that a remedial measure will be deemed adequate if it can be reasonably concluded that the situation leading to the adoption of the measures has been remedied,⁶⁷ there are no other indications that the Commission assesses, to a sufficient extent, whether the remedial measures are effective in practice and in the long-term. Beyond this, there are no mechanisms in place that would even allow for such an assessment. By contrast, the RRF Regulation explicitly states that the Commission assesses, *inter alia*, the effectiveness of NRRPs, and within this, assesses whether the NRRP is expected to have a lasting impact on the Member State concerned, and whether the arrangements proposed are expected to ensure effective monitoring and implementation of the NRRP.⁶⁸

This shortcoming can jeopardize the ability to protect the budget through the elimination of rule of law breaches: without ensuring the effectiveness of remedial measures and merely assessing them based on their adequacy, the Commission risks endorsing measures that superficially seem to attain their objective, but do not lead, *de facto*, to the desired change. In other words, without assessing the effectiveness of remedial measures, the EU budget cannot be effectively protected either. For example, Member States may push for reforms in order to obtain funds, and these could be deemed adequate or sufficient on paper, but in practice, may not lead to substantial change in eliminating the risk to the budget.

4.3 Lack of Long-Term Impact

Another problem that may arise, which is closely connected to the effectiveness of remedial measures, is the Commission’s inability to act in the event that such remedial measures turn out to be ineffective in correcting rule of law deficiencies and ultimately protecting the EU budget in the long run. Pursuant to the current regime, insofar as remedial measures are deemed adequate, the Commission will not propose an implementing decision to the Council, and the Member State will receive the funds. This mechanism thus introduces a single layer of conditionality.

⁶⁷ Conditionality Regulation (n 37) art 7(2); Conditionality Regulation Guidelines (n 45) para 83.

⁶⁸ Recovery and Resilience Facility Regulation (n 9) art 19(3)(g) and (h).

However, this may not be sufficient to ensure that the reforms implemented by the Member States concerned are long-lasting, and protect the EU budget in a consistent manner. The immediate disbursement of EU funds upon a review of the remedial measures on paper may fail to remedy the threat to the budget. This is the case in particular where remedial measures, upon implementation and application, do not lead to the desired change. The Commission is not sufficiently equipped to tackle such a circumstance; the only tool it can resort to is to restart the procedure under the Conditionality Regulation again.

5. Recommendations

The gaps identified in the previous section call for several changes in the current legal framework. In light of this, four recommendations are proposed, three of which aim to strengthen the Conditionality Regulation and one which intends to bolster the CPR for the next MFF.

5.1 Assisting the Commission in Applying the Conditionality Regulation

Although it is recognized that the triggering of the Conditionality Regulation must, by virtue of its mandate as Guardian of the Treaties as well as its obligation under the Regulation, be carried out by the Commission, the identification of whether the conditions are fulfilled (the so-called “preliminary assessment” phase) could and should envisage the involvement of another body, specialized in detecting rule of law violations and threats to the EU budget, to a more significant extent.

Thus, the Commission should (re)assess the creation of a new independent body to detect rule of law violations. This would serve to strengthen the Commission’s role in protecting the EU budget, as such a body would be the Commission’s main assistance in detecting infringements of the rule of law and would make its intervention prompt and more effective.

Accordingly, although the ultimate triggering would still, naturally, be the mandate of the Commission, the responsibility to detect rule of law violations could be dispersed to another competent body. Once this independent expert body finds that the conditions stipulated in the Conditionality Regulation are fulfilled, it could alert the Commission to trigger the procedure immediately. This would reduce the responsibility, and in turn, the discretion, conferred on the Commission to carry out the procedure.

Several advantages could flow from attributing a wider role to an independent body in order to establish whether the conditions are fulfilled, signaling this directly to the Commission, and reducing the margin of discretion the Commission possesses. Firstly, this could ensure a timelier detection of rule of law breaches and connected threats to the EU budget. Secondly, and ancillary to this, it could ensure a timelier application of the Conditionality

Regulation: as soon as the signals are received, the Commission would have an obligation to trigger the procedure. Thirdly, this could render the application of the Regulation less susceptible to political pressure, which presents the main obstacle against virtually any effort to enforce the rule of law. Although it is recognized that the threat to politicization will not be completely eliminated, it must also be acknowledged that complete elimination is an impossible endeavor. Against this background, maximizing the involvement of independent bodies and minimizing the discretion and political susceptibility of the Commission could present the necessary paradigm shift to mitigate politicization to the extent possible.

5.2 Ensuring the Effectiveness of Remedial Measures Before, During, and After Implementation

Both the adequacy and the effectiveness of remedial measures must be ensured in order to realize the goal of the Conditionality Regulation: the genuine protection of the EU budget from violations of the rule of law. The current system consists of the Commission finding the remedial measures proposed by the Member State adequate based on its appropriateness to achieve the objective pursued, and thus refraining from proposing implementing measures to the Council; or, alternatively, the Commission finding the measures inadequate or insufficient, and proposing implementing measures to the Council. However, in addition to this, it is recommended for the Commission to have a comprehensive mechanism in place that allows for an assessment of the effectiveness of such measures. This could be a two-layered process.

First step: During the assessment of the Commission regarding the adequacy of the remedial measures proposed, the effectiveness of the measures should also be taken into account. This can be done, in particular, by placing the remedial measures in the legal and political context of the Member State concerned. This can serve as an indicator of whether, after implementation, the remedial measure will indeed achieve the desired result, or whether it is adequate merely on paper.

Second step: The Conditionality Regulation as well as the Commission Guidelines on the Conditionality Regulation state that “after the adoption of the measures by the Council, the Commission will regularly monitor the situation in the Member State concerned”.⁶⁹ The Commission does this by relying on evidence submitted by the Member State. However, in order to accurately assess the progress made, the introduction of a mechanism that enables the Commission to monitor first-hand the effectiveness of remedial measures is recommended. Such a mechanism could take shape in various forms, but the present proposal highlights two. In any event, an independent EU body should be equipped with the competence or specific mandate to oversee the implementation of remedial measures. This

⁶⁹ Conditionality Regulation (n 37) recital 24; Conditionality Regulation Guidelines (n 45) para 80.

monitoring or supervisory role could either be fulfilled by an already existing body, such as the European Anti-Fraud Office or the Fundamental Rights Agency, whose competences could be extended to monitor the concerned Member State's progress in the implementation of the remedial measures, and evaluate the effectiveness of the measures in place. Given that such bodies are specialized in specific areas, the Commission would have to equip a variety of different bodies to oversee the implementation and effectiveness of different types of remedial measures. In the alternative, the creation of an entirely new body is promoted that is multi-faceted in its ability and expertise to exercise supervisory competence in all relevant fields that remedial measures encompass. Either one of these two options would result in an effective monitoring system.

The advantage of having such a mechanism would be to ensure, through continuous monitoring for a given period of time, that the remedial measures implemented by the Member State concerned are realizing the effects they are intended to. Consistent updates to the Commission regarding the extent to which the rule of law deficiencies and the related threat to the EU budget are effectively addressed would be provided. Such a monitoring system would also be proportionate and preserve the balance struck by the Conditionality Regulation between the independence of the Member State concerned for rectifying its own breaches on the one hand, and EU approval and supervision on the other. Indeed, the remedial measures would still be proposed by the Member State, with the approval of the Commission, with the important addition that a supervisory body would oversee the effectiveness of the measures the Member State concerned committed itself to.

5.3 Making the Lifting of Measures under the Conditionality Regulation Conditional upon Progress

Given its inability to take action in the event that the corrective measures prove ineffective in addressing the rule of law deficiencies and ultimately protecting the EU budget in the long run, the Commission should reconsider the steps that follow the suspension of payment of funds from the EU budget.

As established in the current framework, whenever the Commission detects some rule of law breaches seriously hindering the EU budget, it must send a written notification to the Member State concerned with its findings. The Member State concerned must provide the required information, may make observations on the findings, and may propose the adoption of remedial measures to address the findings of the Commission. The Commission, after taking these submissions into account, can decide to submit to the Council a proposal for an implementing decision of appropriate measures. The Council, acting by a qualified majority, may amend the Commission's proposal and adopt the amended text by means of an implementing decision.

Once funds are suspended following this process, the Member State concerned must prove it is making adequate progress in remedying the relevant rule of the law-related issue(s) in order to receive its funds. If the Commission finds that the progress is sufficient, it submits to the Council a proposal for an implementing decision lifting the measures initially adopted.

However, it is strongly recommended by this proposal not to lift all measures at once. In order to make the mechanism truly conditional, only a part of the funds initially suspended should be made available to the Member State concerned. The amount shall be assessed by the Commission in a way that it is appropriate and proportionate to the progress made by the Member State. Between three to six months from the first disbursement, at the request of the Member State concerned, or on its own initiative, the Commission should reassess the situation. If the Commission determines that further progress has been made, then it should release an amount of funds that is, again, appropriate and proportionate to such progress. On the contrary, if the assessment is negative, the Commission should address to the Member State concerned a reasoned decision, inform the Council thereof and no further funds shall be made available. This process should be repeated until all the funds initially suspended are released.

This proposal does not require a change in the relevant legal framework; instead, it is intended to shape the Commission's practice. Indeed, Article 7(2) of the Conditionality Regulation appears to already endorse this approach as it states, *inter alia*, that “[w]here the Commission considers that the situation leading to the adoption of measures has been remedied *in part*, it shall submit to the Council a proposal for an implementing decision adapting the adopted measures”.

5.4 Strengthening the Multiple Stages of Conditionality in the Common Provisions Regulation for the Next MFF

As analyzed in Section 2, the RRF is implemented via different stages of conditionality. Indeed, Member States must draft a NRRP outlining how they are going to invest the funds. The Commission must then assess each plan and, in case of positive assessment, it must endorse it by proposing it to the Council, which in turn must approve such plan as well. Nevertheless, national governments do not obtain funds immediately after the approval of their NRRPs: they must first implement the milestones and rule of law reforms outlined in the plans. Therefore, the Commission approves disbursement only if it decides that Member States are making adequate progress in achieving their plans. Moreover, along the way, grants may be suspended if the Commission establishes that the milestones set out in the Council implementing decision have not been satisfactorily fulfilled and,⁷⁰ eventually, reduced in case the Member State concerned does not take the necessary measures within

⁷⁰ Recovery and Resilience Facility Regulation (n 9) art 24(6).

a specific amount of time from the suspension.⁷¹ The Commission may also fully terminate the agreement and ask Member States to reimburse any pre-financing already received, if they do not demonstrate tangible progress in the implementation of their NRRPs within 18 months after the adoption of the Council implementing decision.⁷²

Due to this multiple-stages-of-conditionality structure, the RRF appears to be effective in ensuring that reforms are implemented at the national level in a way that truly remedies the relevant rule of law-related issue(s) in the long run. Moreover, this mechanism creates a paramount link between the implementation of measures at the national level and the disbursement of funds. However, the RRF's time scope is relatively limited as the milestones included in the NRRPs need to be implemented by August 2026. After this deadline, there will be no instrument with a comparable design.

For this reason, it is worth considering revising the CPR framework, whose eligibility horizon for the structural funds extends until the end of 2029⁷³ and which is likely to be extended with the approval of the new MFF in 2028, on the footprint of the RRF. The CPR already contains provisions making compliance with fundamental rights and, even if indirectly, rule of law principles a pre-condition to qualify for EU funding. Furthermore, the Regulation also contains provisions that guarantee that the prerequisites for efficient and effective spending remain operative for the duration of the entire financial period. In light of this, Article 97 lists a number of conditions that, if met, lead to the suspension on funds.

Despite these stages being already in place, the resulting conditionality mechanism is still not as detailed and effective as the one under the RRF. Thus, in view of the next MFF, the stages contained in the RRF that are not yet present in the CPR, such as the ability to suspend and reduce funds in case of inadequate progress, or the termination of the agreement altogether, should be replicated in the CPR framework. This would serve to strengthen the conditionality mechanism and ensure the effective protection of the EU budget.

6. Conclusion

The recommendations set out in this proposal are intended to strengthen the Conditionality Regulation in numerous ways. Firstly, the creation of an independent body equipped with the task to identify whether the conditions are fulfilled is a way to assist the Commission in carrying out the suspension procedure. Secondly, in order to ensure that the remedial measures are effective in remedying rule of law deficiencies in the long-term, establishing a monitoring mechanism is paramount. Thirdly, making the disbursement of funds gradual,

⁷¹ Recovery and Resilience Facility Regulation (n 9) art 24(8).

⁷² Recovery and Resilience Facility Regulation (n 9) art 24(9).

⁷³ Common Provisions Regulation (n 16) art 63.

and contingent upon genuine and continuous progress is a vital way to ensure the protection of EU funds. The final recommendation concerns replicating the design of the RRF into the CPR, so that a mechanism with multiple stages of conditionality outlasts the current MFF.

PROTECTING NATIONAL DEMOCRACIES

Policy proposal by Jan Bruczko, Sophie Litterst, Jakub Kozumplík and Lilia Leiciu

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Executive summary

The Our Rule of Law Academy Working Group on protecting national democracies, consisting of Lilia Leiciu (26), Sophie Litterst (25), Jakub Kozumplík (21), and Jan Bruczko (18), mentored by Dr. Cassandra Emmons and Professor Sébastien Platon, make the following recommendations:

- The European Parliament should, before the next European Parliament elections, amend Rule 235(3) under the European Parliament Rules of Procedure, stating that a group of at least 50 citizens may submit a reasoned request on starting the verification by the Authority on the compliance with democratic values **directly** to the committee responsible.
- The European Commission should, before the next European Parliament elections, amend Article 10 (3) of Regulation no. 1141/2014 in a way that allows European citizens to lodge a request to the Authority directly following the procedure for European citizens' initiative.
- The European Commission should, before the next European Parliament elections, adopt a resolution stating that if a democratic process through which the Heads of State or Government are elected does not meet democratic standards, a systematic infringement procedure under Article 258 TFEU can be executed under the substantial bases of Article 2 TEU in conjunction with Article 10 (2) second sentence TEU.
- The European Parliament should further adopt a resolution stating that if in a given Member State, the democratic process through which the Members of the European Parliament have been elected does not meet democratic standards, a systematic infringement under Article 258 TFEU can be executed on grounds of a violation of Article 2 TEU in conjunction with Article 10(2) TEU first sentence Article 39 of the Charter of Fundamental Rights.
- The European Parliament should, before the next European Parliament elections make use of Art 10. Protocol (No 1) on the role of national Parliaments in the European Union to enforce inter-parliamentary conferences with specific emphasis on the preservation and maintenance of the democratic values of the Union.

1. The nature of the problem

After the invasion of Ukraine by Russia, protecting democratic values from violent attacks was the dominant theme of 2022. It became the number one priority of the geopolitical and normative order.¹ Still, now, the state of play across the European Union with regard to the protection of national democracy varies widely among the Member States. In recent years there has even been an increase in democratic backsliding in certain Member States.² Democratic backsliding refers to the gradual erosion of democratic norms and institutions within a country.³ According to international observers from the OSCE, Hungary's Parliamentary elections in 2018 and 2022 were competitive and properly conducted, but suffered from a significant issue: a pervasive overlap between the ruling coalition and the government.⁴ This created an uneven playing field, falling short of international standards and obligations. Similarly, the campaign for the 2022 Polish presidential elections took place in a polarized and biased media landscape, where the public broadcaster failed to provide balanced and impartial coverage and instead acted as a campaign tool for the incumbent.⁵ The EU has been monitoring these developments closely and has taken action in some cases: The European Commission has launched several infringement proceedings against Hungary and Poland over their attempts to undermine the rule of law. However, some argue that the EU has not been proactive enough in defending democratic values and institutions in its Member States.⁶

But to improve the protection of the most important asset of the EU's citizens, we must first define what we perceive as a "democracy".⁷

Democracy is a form of governance that encompasses several crucial elements. The following selected elements shall be focused on for the purpose of this policy proposal. Firstly, it involves the right of citizens to rule on behalf of all people, which is a fundamental aspect of a democratic system.⁸ Secondly, democracy involves accountability, which is the notion that elected officials should be answerable for their actions and decisions to the people they represent.⁹ Additionally, democracy is characterized by a limited time of election periods and regular elections, which ensures

¹ Youngs R, "European Democracy Support Annual Review 2022", Carnegie Europe (30.01.2023) <<https://carnegieeurope.eu/2023/01/30/european-democracy-support-annual-review-2022-pub-88818>> accessed 9 March 2023.

² European Commission, "2021 Rule of Law Report: The Rule of Law Situation in the European Union" (2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1634551652872&uri=CELEX%3A52021DC0700>> accessed 9 March 2023.

³ Kriszta Kovács, "Hungary's Orbánistan: A complete Arsenal of Emergency Powers", *Verfassungsblog* (06.04.2016), <<https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>, DOI: 10.17176/20200406-131348-0> accessed March 13 2022.

⁴ ODIHR Election Observation Mission Final Report, Hungary, 3 April 2022; ODIHR Limited Election Observation Mission Final Report, Hungary, 8 April 2018.

⁵ ODIHR Special Election Assessment Mission Final Report, Poland, 28 June and 12 July 2020.

⁶ R. Daniel Kelemen (2022) The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools, *Journal of European Integration*, DOI: 10.1080/07036337.2022.2152447; R. Daniel Kelemen (2020) The European Union's authoritarian equilibrium, *Journal of European Public Policy*, 27:3, 481-499, DOI: 10.1080/13501763.2020.1712455

⁷ European Commission, Communication on the European democracy action plan (03.12.2020) 2.

⁸ European Commission, Communication on the European democracy action plan (03.12.2020) 1.

⁹ Mark Warren, "Accountability and Democracy", *The Oxford Handbook of Public Accountability*, Mark Bovens (ed.) et al. (01.05.2014) 39-54.

that citizens have a say in their government on a regular basis.¹⁰ Moreover, democracy guarantees the right to participate in elections and be elected, as outlined in Article 20(2)(b) TFEU, and the principle of equality before the law, which means that individuals are treated equally regardless of their status.¹¹ This includes conditions for the opposition. Furthermore, democracy entails free, fair, and secret elections: this means that citizens must be free to vote for their preferred candidates without fear of retaliation and that the electoral process is conducted in a fair and transparent manner.

Nevertheless, statistics show that certain Member States of the EU do not fight the battle of the erosion of democratic values as needed. For instance, with regard to the fairness of parliamentary elections, Hungary did not follow up on prior recommendations made by the Office for Democratic Institutions and Human Rights (ODIHR) to improve in this regard. The recommendations from the final reports on the 2014 and 2018 elections were less than satisfactory.¹² Unfortunately, the recent recommendation on the 2022 parliamentary elections shows that the situation is not improving and the need for establishing a fair field of play during the elections prevails, as the recommendations keep addressing the same problems.¹³

Ever since the Law and Justice Party came into power in Poland in the year of 2015, its leaders began stripping the country of its democratic performance. This happened through measures like dismantling its opposition, silencing independent media outlets, and escalating the rule of law crisis by dismissing judges who would not deliver advantageous verdicts. As a result, statistics from Nations in Transit show that since the new government was elected, Poland has been in a constant democratic decline, lowering Poland's Democracy Score from 7 to 4.54..¹⁴

These threats to the protection of national democracy also affect other rule of law related themes, such as the independence of the judiciary, the freedom of expression and association, and the fight against corruption.¹⁵ For example, restrictions on media freedom can limit the ability of journalists to investigate and report on corruption, while attacks on the independence of the judiciary can undermine the ability of the legal system to hold corrupt officials accountable.¹⁶

¹⁰ Paula Becker, Dr. Jean-Aimé a. Raveloson, "What is Democracy" (08.2008) 7.

¹¹ Human Rights Centre, University of Iceland, The Right to Participate in Society, <<https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-participate-in-society>> accessed March 9, 2023.

¹² OSCE. (n.d.), Guidelines on Freedom of Peaceful Assembly (12.03.2023) 39.

¹³ *ibid.*

¹⁴ Dr. Anna Wójcik, Miłosz Wiatrowski, Freedom House, "Nations in Transit 2022, Poland", <<https://freedomhouse.org/country/poland/nations-transit/2022>> accessed 13 March, 2023.

¹⁵ European Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan", COM/2020/790 final (03.12.2020).

¹⁶ *ibid.*

2. Legal and policy basis/bases for the EU to act

The Union can only act within the limits of the competencies conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Under Article 10 of Protocol 1 interparliamentary conferences may be organized to debate specific topics, such as common foreign and security policies, but also other topics which are deemed fit even though they are not explicitly mentioned in the Article as the examples set are not enumerative.¹⁷

The European Parliament can amend the Rules of Procedure under Article 232 TFEU by a majority vote of its Members. The Rules of Procedure are functionally connected to Regulation No. 1141/2014 which is based on the articles mentioned below.

Article 10(4) TEU and Article 12(2) Charter states that political parties at the European level contribute to forming European political awareness and to expressing the political will of the citizens of the Union. Articles 11 and 12 of the Charter state that the right to freedom of association at all levels, as in political and civic matters, and the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers, are fundamental rights of every citizen of the Union.

Article 224 TFEU states that the European Parliament and the Council shall lay down the regulations governing political parties at the European level.

Based on the aforementioned Articles of the Treaties, Regulation No. 1141/2014 was adopted. It governs the registration, funding, and sanctioning of European political parties. Article 6 of the Regulation establishes an Authority which is responsible for registering the parties, controlling and, if warranted, imposing sanctions upon them.

Article 3 (especially its 1st para., subpar. c) of the Regulation states inter alia, that a political alliance shall be entitled to apply to register as a European political party if it observes, in particular in its program and activities, the values on which the EU is founded, as expressed in Art. 2 TEU. In case this condition is not met, the party shall not be registered and may as a sanction be ex-post deregistered by the Authority.

Article 294 TFEU allows an amendment to Regulation no. 1141/2014 via the ordinary legislative procedure. An alternative is further provided for in Article 225 TFEU which allows the Parliament to lodge a request to the Commission to initiate the legislative procedure.

The Commission has the competence to start infringement procedures against Member States that have failed to fulfill obligations under the Treaties following the procedure under Art. 258 TFEU.

¹⁷ Conferences on different topics have been held, including the European Parliamentary Week, see <https://www.europarl.europa.eu/committees/en/relations-with-national-parliaments/conferences>.

3. Action(s) by EU institutions to date and their impact/effect

EU institutions have taken several actions to protect and regulate the compliance of Member States with democratic values. These actions have had varying degrees of impact on the situation in different EU Member States. For many years the protection of the EU values was concentrated on the protection of the rule of law. Hence, this section will address some of the existing instruments which, although not designated, are capable of strengthening national democracies.

The European Commission has established a **Rule of Law Framework** that allows it to monitor and assess the state of the rule of law in EU Member States.¹⁸ This framework enables the Commission to identify potential rule of law concerns early on and engage with Member States to address them. The framework has been used in several cases, including the assessment of the state on the rule of law in Poland and Hungary.¹⁹ Although protecting democracy through the Rule of Law Framework was not the original purpose, it nevertheless creates this possibility. This is possible, provided that the democratic violations fall under the broadly interpreted rule of law concept. In the context of the Framework, the European Parliament has adopted multiple Resolutions on the situation in Hungary, urging the Commission to present a compliance mechanism on democracy.²⁰

In 2020, the Commission introduced the **European Democracy Action Plan**, which aims to strengthen democratic culture among citizens, including the key element of democracy on free and fair elections.²¹ In the context of this plan, the Commission has already proposed a Regulation on political advertising and a further recasting of the Regulation on funding of European political parties and foundations.²² In the proposed transparency Regulation, the focus lies on data protection and the prevention of behavioral profiling to target political messages. In addition, the Commission suggests increasing legal certainty in the existing European Political Parties Regulation by specifying definitions such as 'political parties' and 'revenue sources' to improve its application. The eye-catcher in this proposal is the obligation of European political parties to ensure compliance of every member of the political party with the values under Article 2 TEU. The implications of this mechanism are still unclear. Nevertheless, it has the potential to improve the involvement of European political parties in protecting democratic values.

Another instrument at the disposal of EU institutions is Article 7 of the Treaty on European Union (TEU). Article 7 TEU provides a mechanism for the EU to address serious and persistent breaches of the values on which the EU is founded, as defined in Article 2 TEU, including democracy, the rule of law, and human rights. This mechanism can be triggered by the European Parliament, the Council, or the European Commission

¹⁸ Communication from the Commission to the European Parliament and the Council 'A new EU framework to strengthen the Rule of Law' COM/2014/0158 final.

¹⁹ Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.

²⁰ European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)).

²¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan, COM/2020/790 final.

²² Proposal for a Regulation of the European Parliament and of the Council on the statute and funding of European political parties and European political foundations (recast); Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising, COM/2021/731 final.

and can lead to the suspension of a Member State's voting rights in the Council. Proceedings under Article 7(1) TEU have been initiated against Poland and Hungary for alleged violation of EU law and the rule of law principle.²³ So far, however, sanctions have not been imposed, nor has the latter mechanism under Article 7(2) TEU ever been triggered explicitly for serious breaches of democratic values.

The European Court of Justice (ECJ) has also affected the protection of democracies by specifying and extending the Member State's obligation in connection with democracy. The elaboration on the notion of the right to vote and stand as a candidate under the Treaty was at first sight, assessed in a purely domestic situation.²⁴ Moreover, the ECJ has created a precedent in applying the general principle of equality through the rights under the Charter.²⁵ The aforementioned judgments have the potential to empower the Commission to start infringement procedures and to increase compliance with democratic values among the Member States.²⁶

The EU has also used its **financial conditionality** to promote and protect national democracies. The Rule of Law Conditionality Regulation was introduced in 2020 to suspend financial flow into those Member States that have breached the rule of law principles.²⁷ The Commission has reasoned the proposal with the necessity to safeguard the financial interest of the Union and sound financial management of the budget of the Union.²⁸ Arguably this Regulation can be used for situations where the breach of democratic values are linked to the rule of law principles.²⁹ The instrument has great potential in pressuring Member States to comply with EU law and respecting democratic values.

Regulation no. 1141/2014 has introduced another body with legal personality – **the Authority**. The collegiate body was established for the purposes of registering, controlling, and imposing sanctions on European political parties and European foundations. To efficiently fulfill its tasks, the Authority was granted the power to deregister parties in case of non-compliance with the obligations under the latter regulation. Notably, the Authority has the power to check on 'constitutional loyalty' including conformity with democratic values.³⁰ This is a relatively new body that has not exercised its competence with regard to denying registration based on a violation of Article 2 TEU. Despite this, there were calls made upon the Authority to start the investigation which was to no avail since the powers of the Authority are procedurally

²³ European Commission Press Release, December 20, 2017 <Rule of Law: European Commission acts to defend judicial independence in Poland (europa.eu)>; Dimitry Vladimirovich Kochenov, 'The European Commission's Activation of Article 7: Better Late than Never?'; European Parliament Report A8-O250/2018; <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 | A8-O250/2018 | European Parliament (europa.eu)>.

²⁴ C-145/04 Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland ECR 2006 I-07917 [2006];

²⁵ C-650/13 Thierry Delvigne v Commune de Lesparre-Medoc, Prefet de la Gironde ECLI:EU:C:2015:648 [2015]

²⁶ Prof. Sébastien Platon 'The Delvigne judgment and the European franchise: going boldly... but perhaps not boldly enough', *Verfassungsblog* (2015).

²⁷ Council of the EU Press Release (12.12.2022) <Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary – Consilium (europa.eu)>.

²⁸ 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.

²⁹ Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, para 10. (2020).

³⁰ Giorgio Grasso, 'European Political Parties and the Respect for the Values on Which the European Union is Founded Between the European Legislation and the National Laws' *European Public Journal* (2021); See López de la Fuente, *supra* n.13, at 201.

severely limited.³¹

Most of the aforementioned enforcement mechanisms were introduced by the EU institutions quite recently. Thus it is almost impossible to assess the impact of the EU's actions on the issues of an exclusively democratic character. However, the political will of the EU institutions and some Member States to enforce the values enshrined in Article 2 TEU had a spillover effect on reevaluating the tools to strengthen democratic values. The presented instruments are insufficient and too complex to efficiently combat democratic backsliding. What is even more consequential is that the EU institutions have not used them to their full potential.

4. Gap analysis: scope and necessity for further action

The democratic deficit surrounding the policies and enactments of the Polish and Hungarian governments still seems to be met with insufficient international attention. Meanwhile, interparliamentary conferences are held twice every year, promoting intergovernmental discourse on topics regarding common foreign and security policy, including common security and defense policy.³² However, mediums to engage in cooperation and preservation of compliance with democratic values are insubstantial. Hence, it is of utmost necessity to create more attention around the issue.

Through strengthening the mechanism of interparliamentary cooperation, COSAC, parliaments could spread democratic culture within other European Member States, and through doing so, increase intercultural dialogue. This type of increased communication between the Parliaments of EU member states shall trigger an exchange of ideas, and encourage possible measures and implementation of new policies. It shall also place the countries that suffer from democratic backsliding under greater scrutiny of other member states, and hence, stimulate them to take action. Above all, it shall educate and raise awareness of the existent problems in national societies, propelling a change in voting appeals across heavily influenced demographics.

As set out by Annegret Eppler in the Journal of Legislative Studies, "the more congruence between the political level(s) of the INCO's parliaments and the level(s) of the executives of the respective organization exist, the more scrutiny activity can take place". More interaction through Interparliamentary cooperation, especially between subnational parliaments shall enforce stronger connections and obligations towards each other, which in consequence will serve to improve mutual standards in regard to democracy. A measure of using the TFEU protocol to go beyond discussions on foreign and security policy should also help set a benchmark for good practices and strengthen the ability to maintain them over a longer period.

Protecting National Democracies is a highly political and complex matter. It should be dealt with in different directions, such as promoting democratic culture, issuing necessary legislation, and ensuring an efficient enforcement mechanism. The latter is of major importance since Article 7 TEU has proven to be inefficient. The intergovernmental nature of Article 7 TEU in the form of required unanimity in the European Council undermines its practical significance. Where two or more countries

³¹ Alberto Alemanno et Laurent Pech, 'Holding European Political Parties Accountable – Testing the Horizontal EU Values Compliance Mechanism', *Verfassungsblog* (2019).

³² Art 10 Protocol (No 1) On the Role of National Parliaments in the European Union [2012] OJ 2 OJ L 326/47-326/390; 26102012/01.

are accused of a serious and persistent breach there is a danger of a deadlock, where violations will be tolerated for the guarantee not to become subject of the latter voting.

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Next to suffrage, public accountability forms the cornerstone of democracy. While ensuring public accountability in Member States domestically may be seen outside of EU competencies, it can be achieved through public scrutiny of the European Political Parties.³⁴ In accordance with the concept of democracy, it is necessary to obtain effective tools which would allow the citizens of the Union to take part in tackling the growing authoritarian tendencies among European political parties. Once elected it becomes easy for the party to stray into authoritarianism, cement its position and get rid of democratic accountability.

Such parties with authoritarian tendencies remain embedded in the bodies of the Union and therefore play a major role in the legislative processes and the very political direction the Union takes. This means that there are effectively autocrats co-ruling over the democratic Member States and imposing laws upon every citizen of the EU while abusing the principle of EU law primacy. Our recommendations offer a solution that would ensure the effective protection of the national democracies from authoritarians influencing the supreme law of the Union.

The current control mechanism that safeguards the political parties brings to mind a very intricate machine with such complex controls that it struggles to work efficiently. Implementing the recommendations below would fix the machine and allow it to operate in a desirable way.

By introducing an instrument that would allow European citizens to lodge a request to the Authority for verification of compliance by a specific European political party or European political foundation with the conditions laid down in point (c) of Article 3(1) and point (c) of Article 3(2), the parties would be kept accountable and the citizens would acquire a powerful control mechanism. Such an amendment would also increase European citizens' participation, help create a stronger sense of European citizenship and also combat the problem of the so-called democratic deficit of the European Union. Most importantly it would create an effective way to control the parties.

The existing instrument under Article 235(3) Rules of Procedure of the European Parliament opens a window for a group of citizens to address their concerns to the European Parliament on possible violations of democratic values. This procedure, however, has been shown to be unnecessarily complexed by different stages and multiple actors.³⁵ The simplification of the existent instrument under Article 235(3) Rules of Procedure of the European Parliament will also increase public scrutiny.

The problematic nature of the procedure laid down in Rule 235(3) has been illustrated in the article by Prof. Alberto Alemanno and Prof. Laurent Pech.³⁶ The reasoned opinion submitted by the Good Lobby was not forwarded by the President of the Parliament on

³³ Kim Lane Schepple 'Can Poland be Sanctioned by the EU? Not unless Hungary is sanctioned too' *Verfassungsblog*, (2016); Alexander Thiele 'Article 7 im Quadrat? Zur Möglichkeit von Rechtsstaats-Verfahren gegen mehrere Mitgliedsstaaten', *Verfassungsblog*, (2017).

³⁴ Regulation (EU, Euratom) 1141/11 of the European Parliament and the Council, (2014).

³⁵ Alberto Alemanno et Laurent Pech, 'Holding European Political Parties Accountable – Testing the Horizontal EU Values Compliance Mechanism', *Verfassungsblog* (2019).

³⁶ *ibid.*

rather arbitrary reasoning, stating that the group of citizens was not identifiable. As a consequence,

the reasoned opinion was neither investigated by the responsible committee nor was it voted on by the European Parliament. The power vested in one person, namely the President, to exercise the control mechanism on the admissibility of such reasoned opinions discredits the notion of democratic accountability. In addition, the lack of precise and definitive rules on the admissibility of the citizen's concerns is another factor that diminishes the functionality of the latter procedure. While acknowledging the necessity of some criteria on admissibility such as 'identifiability', the submission cannot be rejected on ever-changing grounds. Ergo, there must be an accessible standardized format of such reasoned opinions which would automatically trigger the Committee to investigate, provided the conditions are fulfilled.

Another underutilized tool in the battle for democracy are infringement procedures under Article 258 TFEU. In the past infringement procedures have been executed under Article 258 TFEU which has proven to be a valid tool to protect the rule of law in the Member States. Not so much has it proved to be a solid ground for infringement procedures being executed for the purpose of hindering democratic backsliding.³⁷ Though it serves as an effective procedural base, it must be supplemented by strong substantial bases to work its purposes. Infringement proceedings pursuant to Article 258 TFEU are usually initiated by the Commission in response to a particular and tangible breach of EU law committed by a Member State.³⁸ Although typical infringement proceedings hold significance, they tend to be too limited in scope to effectively tackle the systemic issues that arise from Member States that consistently fail to comply with EU law.³⁹ If a Member State poses a risk to the fundamental principles of the Treaties, it likely contravenes multiple specific provisions of EU legislation. However, under current practices, the Commission must prioritize its efforts, which results in the omission of several justified actions that it could have otherwise initiated.⁴⁰ Especially violations of the democratic principle of free and fair elections have not been prioritized by the Commission, thus supporting the democratic backsliding. To counteract this threat to national democracies, systematic infringement procedures should be executed by the Commission. This includes bundling individual infringement actions by a Member State to the point that the *"alleged infringements rise to the level of a systemic breach of basic values"*.⁴¹ This would improve the so far used practice in the sense that the Commission does not have to prioritize the infringements. Because in the end every small infringement action adds to the bigger picture and contributes to the backsliding of the cornerstone of the EU – Democracy.

³⁷ David Krappitz, Niels Kirst, Op-Ed: "An Infringement of Democracy in the EU Legal Order", EU Law Live (29.05.2020) 2.

³⁸ A. Fuerea, "Brief Considerations on the Principles Specific to the Implementation of the European Union Law", Lex ET Scientia International Journal 49 (2014) 21.

³⁹ Kim Lane Scheppele, "Systematic Infringement Actions", Reinforcing Rule of Law Oversight in the European Union (13.10.2016) 109.

⁴⁰ Pål Wennerås, "Making effective use of Article 260 TFEU", The Enforcement of EU Law and Values (OUP 2017), A. Jakab and D. Kochenov (eds) 2.

⁴¹ Kim Lane Scheppele, "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions", Princeton University (11.2013) 1.

5. Recommendations

- The Protocol (No 1) On the role of national parliaments in the European Union presents a lot of potential for the addition of conferences regarding the protection of national democracies within the Union. This could be done by increasing the frequency of meetings per year, together with enforcing the topics to cover the maintenance of democratic principles in EU Member States. The underperforming Member States in question would be forced to be more transparent in their domestic policies on the international front. This measure shall activate a paradigm that would highlight the autocracy of Poland and Hungary's regimes. As a result, they shall be forced to more lucid cooperation with other Parliaments, help counteract the attack on media freedom, and bring about more separation of powers in the domestic government.
- The European Parliament should, before the next European Parliament elections, amend Rule 235(3) under the European Parliament Rules of Procedure, stating that a group of at least 50 citizens may submit a reasoned request on starting the verification by the Authority on the compliance with democratic values **directly to the Committee responsible**. Direct access to the Committee will strengthen democratic accountability and may force the European political parties to be more diligent in their composition. Additionally, it will also have a positive impact on national democracies, since the citizens of affected Member States will be empowered to address the violations of the concerned Politicians through their seats in the European Parliament. As the erosion of democracy in the Member States can restrain public scrutiny, it is of utmost importance to enable it.

The rules on the identification of a group of citizens must be laid down and be accessible to the public. Clear and precise rules on admissibility will facilitate the examination by the concerned Committee, resulting in the reduction of the flow of inadmissible reasoned opinions.

Following the examination, the committee responsible **should** submit a proposal to follow up the request **directly** to the Parliament. The Committee decides by a majority of its members, representing at least three political groups. The President is informed of the Committee's findings. In case, upon the examination the responsible committee does not initiate the voting, **it should reason** its decision and communicate it to the group of citizens. The reasoning of the Committee must not be arbitrary. After the reasoned opinion was communicated to the Parliament, the Parliament shall, by a majority of the votes cast, decide on whether or not to lodge a request to the Authority for European political parties and European political foundations.

- Article 10 (3) of Regulation No. 1141/2014 should be amended in a way that allows European citizens to lodge a request to the Authority directly. An example of a possible amendment is as follows:

The European Parliament, the Council, the Commission **or not less than one million citizens who are nationals of a significant number of Member States following the procedure for European citizen's initiative**, may lodge with the Authority a request for verification of compliance by a specific European political party or European political foundation with the conditions laid down in point (c) of Article 3(1) and point (c) of Article 3(2). In such cases, and in the cases

referred to in point (a) of Article 16(3), the Authority shall ask the committee of independent eminent persons established by Article 11 for an opinion on the subject. The committee shall give its opinion within two months.

- For the reasons mentioned, the European Parliament should, before the next European Parliament elections, adopt a resolution stating that if a democratic process through which the Heads of State or Government are elected does not meet democratic standards, a **systematic infringement procedure** under Article 258 TFEU can be executed under the substantial bases of Article 2 TEU in conjunction with Article 10 (2) second sentence TEU.

The European Parliament should further adopt a resolution stating that if, in a given Member State, the democratic process through which the Members of the European Parliament have been elected does not meet democratic standards, a systematic infringement under Article 258 TFEU can be executed on grounds of a violation of Article 2 TEU in conjunction with Article 10(2) TEU first sentence Article 39 of the Charter of Fundamental Rights.

In comparison to the ordinary infringement procedure, a systemic infringement action would allow the Commission to signal to the Court of Justice a more general concern about deviation from core principles enshrined in Article 2 TEU. The advantage of bringing before the CJEU a case that presents evidence of a pattern of violations in a particular Member State is that it allows for a comprehensive and systematic examination of the situation, rather than addressing each individual infringement action separately. The Court can then assess the broader context and identify any systemic issues that may be contributing to the violations of democratic principles within the EU.⁴²

Such a systematic infringement procedure allows to tackle violations of the principle of free and fair elections with strong substantial bases: Adding Article 10 (2) TEU, in which the value of democracy finds specific expression, will guarantee an effective sanction for Member States not being democratically accountable to their citizens. This was affirmed by the CJEU in Junqueras (C-502/19): '[...] Article 10(1).

⁴² Kim Lane Scheppele, "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions", Princeton University (11.2013) 2.

LEGAL METHODS TO PROTECT THE RULE OF LAW

Policy proposal by Maciej Panek, Sofia Kurochka, Helene Abildgaard and Radu Cornea

Mentored by Professor Petra Bárd and Professor Daniel Sarmiento

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Executive summary

The Our Role of Law Academy Working Group on Legal Methods to Protect the Rule of Law, consisting of Maciej Panek, Sofia Kurochka, Helene Abildgaard, Radu Cornea, and mentored by Professor Petra Bárd and Professor Daniel Sarmiento , make the following recommendations:

- Implementation of a new universal mechanism for enforcing rule of law protection. Similarly to the Cooperation and Verification Mechanisms used in accession cases, upon a finding by the European Commission that a Member State engages in systemic violations of the rule of law, the Commission should be able to impose on that state a benchmark of (re)implementation measures repairing the damage done to the rule of law. If the Member State is found to not cooperate in good faith in repairing the damage after several Commission Reports on the issue, the Commission would then have the competence to suspend the obligation of Member States to recognize and carry out, under EU law, the judgments and judicial decisions of that problematic Member State, including European Arrest Warrants.
- Resolving the divergence in tests on judicial independence adopted by the ECtHR and the CJEU that lead to legal uncertainties and difficulties in implementing and enforcing EU law. To address this gap, the CJEU can consider stepping in the footsteps of the ECtHR and adopting a more holistic approach to the requirement of a court 'established by law'. This approach can encompass not only the legislation providing for the establishment of judicial organs and their competence but also the process of appointing judges and the participation of judges in the examination of the case.
- Establishing a Copenhagen Committee. The Committee must be able to keep track of Member States' original standards at the point of accession and monitor their development. Forming such a Committee will also contribute to defining and the enforcement of the principle of non-regression since the Committee will be tasked with archiving previous standards and monitoring new reforms. Information from the Committee's work can then be utilized in future Commission Guidelines or infringement procedures based on the principle of non-regression.
- Strengthening of cooperation with the Venice Commission. The body has consistently published reports on the rule of law issues in multiple backsliding European States, which are considered highly esteemed sources. The proposed Copenhagen Committee, and the Commission as a whole, should be acutely aware of the Venice Commission's Rule of Law Checklist and other publications. Furthermore, it is urgent to engage in an exchange of experience in monitoring and reporting breaches in Member States. Naturally, the cooperation should be conducted with fixing the current eligibility requirements in the Venice Commission in parallel. This further ensures that the expertise of the Venice Commission is not wasted and increases the quality of the Rule of Law reporting coming from the EU.

1. The nature of the problem

1.1 Current State of Play

The European Union is currently undergoing a rule of law crisis. More specifically, the crisis is affecting its Member States first and foremost, but the architectural design of the Union makes it so that such an encroachment on the values and standards guarded and promoted by the concept of the rule of law (such as judicial independence and impartiality, equality in law, or an autonomous prosecution service) has a spillover effect at the supranational Union level, damaging the confidence of the European citizens in the Union.¹ Moreover, the rule of law crisis affects the credibility of the European Union externally as well. Promoting respect for human rights and the rule of law has been at the forefront of the EU's foreign relations goals and aims, and is one of the most important soft power mechanisms in the Union's toolkit in forging cooperation with third countries. But harboring illiberal and autocratic regimes inside its borders casts serious doubts on the reliability and integrity of the Union in the eyes of its partners. Due to the above concerns, it is vital for the EU to act against the rule of law decline in the Member States. However, this presents a challenge for the EU: The Copenhagen Dilemma.² The EU imposes strict rule of law requirements for states wishing to accede to the Union but has much less influence in ensuring that the national legal and political structures post-accession remain at the same (high) standard.³ The dilemma describes the incapacitation of the EU to effectively influence the legal and political developments in its Member States when such matters fall outside the material scope of EU law following the State's accession to the Union.⁴ As will become observable in the present policy paper, several stopgap measures have been developed by the Court of Justice of the European Union (CJEU), such as the principle of non-regression. The principle was based on an extensive interpretation by the CJEU, claiming a connection between Article 49 TEU, concerning EU enlargement, and Article 2 TEU, on EU values. Nonetheless, the principle lacks precise substantive scope at the moment.

Problems with the rule of law are not confined to a single geographical area of the Union; threats to its principles and ideals can be found across older and newer Member States

¹ See for example R Daniel Kelemen, Tommaso Pavone, Cassandra Emmons, 'The Perils of Passivity in the Rule of Law Crisis: A Response to von Bogdandy' (*Verfassungsblog*, 26 November 2019) <<https://verfassungsblog.de/the-perils-of-passivity-in-the-rule-of-law-crisis-a-response-to-von-bogdandy/>> accessed 08 March 2023 for the argument that, due to the internal market, bad faith implementation of EU objectives and disregard for EU rules in a Member State negatively affect citizens and undertakings in other Member States as well.

² Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner, 'Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism' (Speech to EU Internal Affairs Council Luxembourg 22 April 2013) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_348> accessed 3 March 2023.

³ Dmitry Vladimirovich Kochenov and Aleksejs Dimitrovs, 'Solving the Copenhagen Dilemma' (*Verfassungsblog*, 28 April 2021) <<https://verfassungsblog.de/solving-the-copenhagen-dilemma/>> accessed 19 February 2023.

⁴ Ibid.

as well.⁵ Be that as it may, several countries exist in which the governments intentionally and continuously engage in the weakening of the rule of law, aiming to influence elections, judicial decisions, and prosecution choices, punish political opponents, and bestow legal and political privileges on their supporters. Bulgaria, Hungary, Poland, and several others are prime examples of such countries. Given the structural limits of this policy paper, the rule of law situation in two member states will be discussed in detail: Poland and Romania. Both have undergone worrisome regression when it comes to the status of the rule of law, but while in Poland the rule of law is seriously eroded,⁶ in Romania attempts are regularly made to undermine it and set it on a downward spiral.⁷ This difference, in how far on the rule of law regression scale the two mentioned Member States are to be found, provides an opportunity to observe how ruling governments engage in the dismantling of the rule of law.

1.2 Selected Problems in Certain Member States

Poland has long been headlining public discourse across the EU when it comes to the erosion of the rule of law by a country's government. Most recently, the country has found itself in a judicial battle of courts, between the CJEU and the European Court of Human Rights (ECtHR) on the one hand and national partial, politically influenced courts⁸ on the other, the latter choosing not to follow the rulings of the two European courts. Having to choose from several judgments, the ones mentioned below probably had the highest significance concerning ongoing disputes between Poland and European institutions. It is also important to emphasize that several relevant judgments delivered by the Polish Constitutional Tribunal are not final since Polish politicians have sent a letter claiming that Poland is not going to comply with further ECtHR judgments. For instance, in *P7/20*, the Polish Constitutional Tribunal (PCT) adjudicated on the execution of interim measures imposed by the CJEU, as a result of a preliminary question requested by the Supreme Court Disciplinary Chamber.⁹ The PCT ruled that such an act

⁵ See, for example, the threat drug gangs pose to the rule of law in the Netherlands in Priyanka Shankar, 'Are drug gangs threatening rule of law in the Netherlands?' *Deutsche Welle* (Amsterdam, 27 December 2022) <<https://www.dw.com/en/are-drug-gangs-threatening-rule-of-law-in-the-netherlands/a-63696546>> accessed 21 February 2023 and the recommendations of the European Commission to each Member State in Commission, 'Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Rule of Law Report' (COM2022) 500 final.

⁶ For an overview see Laurent Pech, Patryk Wachowiec, Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 13.

⁷ See Dan Tăpălagă, 'Alarming news about the Military Democracy in Romania of which you hardly hear anything about on TV' *G4Media* (16 April 2022) <<https://www.g4media.ro/alarming-news-about-the-military-democracy-in-romania-of-which-you-hardly-hear-anything-about-on-tv.html>> accessed 8 March 2023.

⁸ See Cain Burdeau, 'EU court blasts Polish official's political influence over judges' *Courthouse News Service* (16 November 2021) <<https://www.courthousenews.com/eu-court-blasts-polish-officials-political-influence-over-judges/>> accessed 8 March 2023.

⁹ Rick Lawson, "'Non-Existent": The Polish Constitutional Tribunal in a state of denial of the ECtHR Xero Flor judgment' (*Verfassungsblog* 18 June 2021) <<https://verfassungsblog.de/non-existent/>> accessed 13 March 2023.

contravened the principle of conferral, and is in clear violation of the principle of legality, enshrined in the Polish Constitution. The trial was initiated because of consecutive complaints about the Supreme Court Disciplinary Chamber, which, according to CJEU and ECtHR judgments, is not a legal court established by law.¹⁰ Another judgment concerned the denial of EU competences concerning adjudicating on the organizational system of courts in Poland.¹¹ The PCT upheld *inter alia* the competence of domestic courts to examine the legality of judges' appointments, which includes an examination of certain stages of the procedure. The characteristic feature of subsequent disputes between Poland, CJEU, and the Commission, is that the PCT is adopting a confrontational attitude instead of trying to reach a consensus. Summarizing this point, it is necessary to emphasize the parallel conflict with the ECtHR. What is upsetting in the mentioned cases is that Poland became the second member to undermine the jurisdiction of the ECtHR, after Russia.¹² Essentially, Poland denied the competence of the ECtHR to examine the legality of the judicial system, including that of the National Council of the Judiciary and of the PCT.

In Romania, national (lower) courts, coupled with civil society support, tried to act as a bulwark against governmental initiatives violating the rule of law. Between 2017 and 2019, a number of judicial reforms were implemented by the ruling coalition which aimed to place the country's judiciary and prosecution services under political control, and to decriminalize offenses related to corruption, such as abuse of office. Some of those changes were reverted in the face of massive street protests, but a number of them persisted or were joined by additional ones later on. The setting up of the Judicial Inspectorate is worth special mention, as it essentially amounted to a specialized prosecution service tasked with exclusive competence in relation to the illegal behaviour of judges and prosecutors. Using this specialized prosecution service, members of the ruling parties or relatives and acquaintances of them, managed to threaten and intimidate the judges and prosecutors dealing with their cases. The issue of the Judicial Inspectorate reached the CJEU which ruled in the *Asociația 'Forumul Judecătorilor din Româ (AFJR)* case that the specialized prosecution service did not meet the required independence parameters and was unjustifiable in relation to the sound administration

¹⁰ Wojciech Sadurski, 'The Disciplinary Chamber may Go – but the Rotten System will Stay' (*Verfassungsblog* 11 August 2021)

<<https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/>> accessed 13 March 2023.

¹¹ Jeffery Atik and Xavier Groussot "'Constitutional attack or political feint? – Poland's resort to lawfare in Case K 3/21' (*EU Law Live* 18 October 2021)

<<https://eulawlive.com/op-ed-constitutional-attack-or-political-feint-polands-resort-to-lawfare-in-case-k-3-21-by-jeffery-atik-and-xavier-groussot/>> accessed 13 March 2023.

¹² Claudia Ciobanu, 'Polish Government's Attitude to ECHR Seems Set to Follow the Russia Model' (*Reporting Democracy* (Warsaw, 16 March 2022)

<<https://balkaninsight.com/2022/03/16/polish-governments-attitude-to-echr-seems-set-to-follow-the-russia-model/>> accessed 7 March 2023.

of justice.¹³ However, the Romanian Constitutional Court (RCC) and the High Court of Justice and Cassation disregarded the CJEU ruling and found themselves at odds with the lower courts which complied with it. Unfortunately for the lower courts, noncompliance with the RCC's decisions represents a disciplinary offense that authorizes the Judicial Inspectorate to start investigating the lower court judges.¹⁴ This creates an absurd situation, in which Romanian judges that correctly deem the Judicial Inspectorate inexistent in light of the CJEU ruling are being threatened in turn by this unlawful prosecution service.¹⁵

2. Legal and policy basis/bases for the EU to act

2.1 General Bases for Union Action

In defending against the attacks on the rule of law that come in different shapes and forms, the European Union has a number of legal and policy bases it can use as a foundation for action. For the purposes of this paper, attention will be given to the legal tools for protecting the rule of law. EU primary law contains important provisions on the central place of the rule of law in the functioning of the Union (such as Article 2 TEU which codifies the Union's commitment to upholding the rule of law¹⁶ or Article 19 TEU providing for a Court of Justice, which, *inter alia*, operates on a principle of "independence beyond doubt"¹⁷) and a number of primary law provisions that also serve as possible enforcement avenues, such as Article 258 TFEU on infringement procedures or Article 260(3) TFEU on the special judicial procedure against non-compliance towards the finding that a Member State did not follow EU law. In addition, secondary Union law is indispensable in further safeguarding the rule of law across the Member States. Regulations (Article. 288(2) TFEU) and directives (Article 288(3) TFEU) are legal tools that under specific legal bases are used to block states that encroach upon the rule of law from receiving the benefits of being a Union member, such as funds from the EU budget (for instance, as it happened with the Rule of Law Conditionality Regulation under Article 322(1)(a) TFEU).

¹³ Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others* ECLI:EU:C:2021:393, para 213.

¹⁴ Madalina Moraru, Raluca Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația 'Forumul Judecătorilor din România' and Others*, and the follow-up at the national level' (2022) 18 *European Constitutional Law Review* 82, 104.

¹⁵ The two examples of Poland and Romania show just how important the independence of the judiciary is. An independent judiciary acts as a bulwark against rule of law erosion and is usually the preferred target for ruling governments that wish to damage a country's rule of law. Having impartial and independent judges is necessary since judges are "charged with the ultimate decision over life, freedoms, rights, duties and property of citizens" 'Basic Principles on the Independence of the Judiciary' Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan 26 August – 6 September 1985) (6 September 1985) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary>> accessed 08 March 2023.

¹⁶ According to the CJEU "compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State" Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97, para 126

¹⁷ Consolidated Version on the Treaty on European Union [2008] OJ C115/13 Article 19.

2.2 Competences of the Court of Justice of the European Union

The role of the Court of Justice of the European Union (CJEU) is to ensure the correct interpretation and application of primary and secondary EU law in the EU. In this section, we will focus on the two main judicial procedures that the CJEU is empowered to conduct – infringement procedures and preliminary references.

The Court gives a ruling in infringement proceedings against states or institutions that have not fulfilled their obligations under EU law. These actions are brought either by the Commission, after a preliminary procedure (Article 258 TFEU): giving an opportunity for the state to submit its observations and reasoned opinion; or by a Member State against another Member State after it has brought the matter before the Commission (Article 259 TFEU).

The preliminary reference procedure is conceived as a mechanism for cooperation between national judges and the Court of Justice that allows national courts to refer to the CJEU where they have doubts about the application of European law in order to ensure its uniform application in all Member States. In these cases, the CJEU is empowered to determine whether an organ can be regarded as ‘a court of a tribunal’ for the purposes of Article 267 TFEU when deciding the admissibility of the preliminary ruling request. The CJEU has developed a number of criteria necessary to take into account when assessing if a body is in fact a ‘court or tribunal’, which are whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.¹⁸ According to the recent ground-breaking judgments, Case C-64/16 *Portuguese Judges*,¹⁹ C-216/18 *LM*²⁰ and C-619/18 *Commission v Poland*,²¹ the Court of Justice added a further obligation for Member States, based on Article 19 TEU and directly related to the right to effective judicial protection and judicial independence.

In order to be able to assess whether a Member State’s judicial system conforms to the principle of a fully independent judiciary, the CJEU qualifies Article 19(1) TEU as giving ‘concrete expression to the value of the rule of law stated in Article 2 TEU’²² and in particular the value of the rule of law that all Member States must share. Therefore, under the principles of mutual trust and of sincere cooperation set out in Article 4.3 TEU, which also apply to national courts, Member States must ensure that respect is given to the principle of effective judicial protection and judicial independence in all “areas covered by EU law” simply because national courts are part of the European judicial system through, in particular, the preliminary ruling procedure. A relatively recent judgment

¹⁸ Case C-64/16 *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI: EU:C:2018:117, para 38; and Case C-54/96 *Dorsch Consult Ingenieuresellschaft mbH*, ECLI:EU:C:1997:413, para 23.

¹⁹ Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117.

²⁰ Case C-216/18 *PPU LM Minister for Justice and Equality* (Deficiencies in the system of justice), ECLI:EU:C:2018:586.

²¹ Case C-619/18, *Commission v Poland* (Independence of the Supreme Court), ECLI:EU:C:2019:531.

²² Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI: EU:C:2018:117, para 32.

concerned with judicial independence brought forward via the preliminary questions procedure is, *Repubblika*, to be discussed below.

In addition, the preliminary ruling procedure is sometimes used by judges of the national courts as a tool to discuss the issues undermining the judicial independence in the Member States, such as political influence on judicial self-governance, low salaries of judges, threats of disciplinary proceedings against judges, and other, such as in case C-564/19 *IS*²³ and joined cases C-558/18 and C-563/18 *Miasto Łowicz*.²⁴

2.3 The Principle of Non-Regression

The judgment of *Repubblika* by the CJEU in 2021 introduced a new tool for combating rule of law backsliding. The case concerned judicial reform in Malta and to what extent it infringed on judicial independence. According to the Court, Malta acceded to the EU, in accordance with Article 49 TEU for EU enlargement, with a previous procedure for appointing judges.²⁵ States thereby also committed to comply with and promote the values of Article 2 TEU on a voluntary basis.²⁶ As the principle of mutual trust between Member States is dependent on all States complying with the values of Article 2, where the rule of law which judicial independence is part of is included, it is of great importance that compliance by a Member State with the values laid down in Article 2 TEU is a precondition for the “enjoyment of all the rights serving from the application of the Treaties to that Member State”.²⁷ Consequently, a Member State may not introduce or amend its legislation with the effect of reducing the protection of the values of the rule of law below the level of protection afforded at the point of accession to the Union. Especially those which may impact the judiciary's independence.²⁸

The introduction of the principle of non-regression, as it stands today, has a wide scope. In line with the *Portuguese judges* case, the CJEU is using an extensive interpretation method in order to expand the competences of the EU in the area of judicial independence. Essentially, any legislative matter which has the potential to affect the adherence to the rule of law in a Member State can be in violation of the principle of non-regression. Furthermore, the principle has a strong temporal aspect. In order to be in conformity with the principle, Member States cannot reduce their rule of law standards below what they were at the time of accession to the Union, even if a certain reform would not be in violation of EU laws and standards. In the case of judicial independence, of concern is not whether the new legislation causes a reduction or interference with judicial independence. Instead, of significance is whether the new

²³ Case C-564/19, *Criminal proceedings against IS*, ECLI:EU:C:2021:949.

²⁴ Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki* ECLI:EU:C:2019:775.

²⁵ Case C-896/19, *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311, para 60.

²⁶ *Ibid*, para 61.

²⁷ *Ibid*, para 63.

²⁸ *Ibid*.

legislation causes a regression in the independence of the judiciary below the level which was present at the point of accession to the EU.

3. Action(s) by EU institutions to date and their impact/effect

3.1 CJEU Case Law

To this day, EU institutions have taken a number of actions against the rule of law backsliding in the Member States. It would be fair to say that judgments of the CJEU are the core of actions initiated against backsliding Member States. The CJEU adjudicated disputes involving states that violated the rule of law, standing firmly for the protection of the EU's fundamental values. In the *C-585/18 A.K.* case, the CJEU deterred the first attempts to annul the independence of the Polish judiciary. *A.K.* was concerned with the lowering of the age of retirement of judges, a move which directly violated EU non-discrimination law. However, in this instance, the CJEU went beyond the framing adopted in a similar Hungarian case, by recognizing the violation of the rule of law and judicial independence, and the corresponding primary sources of EU law.²⁹ The CJEU associated that issue with the ground-breaking *Portuguese judges'* case, which is based on Articles 2 and 19 TEU, and also Article 47 Charter of Fundamental Rights on effective judicial protection.

The CJEU is also highly engaged in the remedial work of the Polish Judiciary in the field of disciplinary proceedings (e.g. *C-791/19*), reorganization of the National Council of the Judiciary (*C-824/18 A.B. and Others*), and the CPT which was deeply politicized (pending proceedings).³⁰

Finally, it is necessary to refer to two particular cases with high significance, which have affected internal and external proceedings respectively. The first is *C-204/21 R*, discussing a Polish piece of legislation colloquially called the "muzzle law", which was supposed to confine judges in their right to control the validity of appointments. The law was held to be in breach of the Treaties. The CJEU stated in accordance with its previous judgments that courts are obliged to omit such limitations, additionally taking interim measures containing pecuniary fees. The second case is *C-216/18 PPU, LM (Celmer)*. In this case concerning a European Arrest Warrant (EAW), an Irish court requested a preliminary question: whether breaches of the rule of law in a specific Member State may sufficiently justify the non-execution of the EAW. The CJEU ruled that courts are allowed to scrutinize the judicature in the issuing Member State before complying with a request for surrender. The CJEU also envisioned a requirement to carry out a two-step

²⁹ 'Court of Justice rules Hungarian forced early retirement of judges incompatible with EU law' (*European Commission* 6 November 2012) <https://ec.europa.eu/commission/presscorner/detail/mt/MEMO_12_832> accessed 13 March 2023.

³⁰ -, 'Polish law excluding appeals in cases on appointment of Supreme Court judges may be contrary to EU law, says Court of Justice' (*EU Law Live* 2 March 2021) <<https://eulawlive.com/polish-law-excluding-appeals-in-cases-on-appointment-of-supreme-court-judges-may-be-contrary-to-eu-law-says-court-of-justice/>> accessed 13 March 2023.

test to check whether the suspect's right to a fair trial would be violated if surrendered. (The test was originally developed in *Aranyosi* in relation to prison conditions³¹). Although the CJEU has adopted a lower standard than the European Court of Human Rights in relation to the right to a court established by law (*Ástráðsson* test)³², it is going to remain useful in conducting subsequent actions.

3.2 ECtHR Case Law

The European Court of Human Rights (ECtHR) has also been active in the field of rule of law protection. In setting the stage for future EU action, it is useful to keep in mind Article 6 TEU (eventual Union accession to the European Convention on Human Rights and the guarantee of fundamental rights as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States).

The question of judicial independence is dealt with in the case law of the ECtHR under the heading of the right to a fair trial enshrined in Article 6 ECHR. Such a fair trial must be conducted before an 'independent and impartial tribunal established by law'. As a preliminary remark, it should be underlined that, according to the established case law of the ECtHR, despite the growing importance of the notion of the 'separation of powers' in its case law,³³ the Strasbourg court insists that it does not verify the compatibility of national law and practice with any theoretical constitutional concepts,³⁴ but always verifies whether in a given case the criteria for independence were met.³⁵

In *Ringeisen v Austria*, the ECtHR emphasized that judicial independence comprises both independence from the executive and from the parties. In its case law, the Court developed a four-prong test.³⁶ Thus, in *Luka v Romania*, the ECtHR ruled that, in order to establish whether a tribunal can be considered 'independent', regard must be had, inter alia, to the (1) manner of appointment of its members and (2) their term of office, (3) the existence of guarantees against outside pressures, and (4) the question as to whether the body presents an appearance of independence.³⁷ In the case at hand, the ECtHR did not rule out the possibility of lay judges (assessors in judicial panels), but required that such persons be free from outside pressure.

With regard to the relation between EU law and the ECHR, in *Bosphorus*, the ECtHR formulated the well-known presumption of equivalent protection of ECHR rights by the EU, according to which when a state implements its obligations arising from the

³¹ 'Aranyosi and Căldăraru' (*Judging the Charter*) < <https://charter.humanrights.at/caselaw/detail/13> > accessed 13 march 2023.

³² *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (ECtHR, 12 March 2019).

³³ *Stafford v The United Kingdom* App no 46295/99 (ECtHR, 28 March 2002), para 78.

³⁴ *Kleyn and others v The Netherlands*, Joined case App no 39343/98, 39651/98, 43147/98, 46664/99 (ECtHR, 6 May 2003), para. 193 and *Sacilor-Lormines v France* App no 65411/01 (ECtHR, 9 November 2006), para 59.

³⁵ *McGonnell v The United Kingdom*, App no 28488/95 (ECtHR, 8 February 2000), para 51 and *Henryk Urban and Ryszard Urban v Poland* App no 23614/08 (ECtHR, 30 November 2010), para 46.

³⁶ *Ringeisen v Austria* App no 2614/65 (ECtHR, 16 July 1971), paras 95–98.

³⁷ *Luka v Romania* App no 34197/02 (ECtHR, 21 July 2009), para 37

membership in the international organization, the State is presumed acting in compliance with the Convention, provided that protection of human rights in that international organization is equivalent to that provided by the Convention.³⁸ However, that presumption can be rebutted where the protection of the ECHR rights in the particular case is regarded as ‘manifestly deficient’. In *Avotins v. Latvia*, the ECtHR assessed the Bosphorus presumption and noted that if ‘a serious and substantiated complaint is raised before [domestic courts] to the effect that the protection of an [ECHR] right has been manifestly deficient and that this situation cannot be remedied by [...] Union law, [they] cannot refrain from examining that complaint on the sole ground that [they are] applying Union law’.³⁹

3.3 European Commission Action

Considering actions carried out by the European Commission, the guardian of the Treaties, in the scope of rule of law violations, it should be noted that an average European citizen probably would associate them with such words as late, naive, insufficient. Perhaps certain people might also add to this bundle the word “political”, which would be the most accurate to explain the subject, and thus should be the starting point of the next paragraph.

The political method and the dialogue approach were the guiding principles behind the activation of the Rule of Law Framework also known as the pre-Article 7 procedure and Article 7(1) TEU. As a group of authors firmly emphasized in relation to the mentioned actions, praises were inappropriate because “these two steps were absolutely warranted”.⁴⁰ But the actions in launching consecutive proceedings were sluggish. The Commission based its actions on dialogues, while the Polish ruling party was unwilling to engage in a meaningful discussion and was instead aggressively pursuing the implementation of acts aimed at capturing the judiciary. It took plenty of months to launch appropriate mechanisms against subsequent violations, e.g. it took 10 months to respond to the “Supreme Court Purge Law” from the date of adoption. By counting it up, it took a year on average to launch one proceeding in the years 2016–2021. Regarding infringement proceedings against Poland, the Commission waited until 2018, due to its misbelief that the conflicts can be resolved by a discussion. In addition, the Commission adopted a mistaken legal assumption about Article 19 (1) TEU, believing that it could not be a legal basis for an infringement proceeding.⁴¹ Despite that number, the Commission described its own actions as ‘determined’⁴². Moreover, it was excused by claiming that

³⁸ *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005), paras 155 and 156.

³⁹ *Avotiņš v Latvia* App no 17502/07 (ECtHR 31 January 2007), para 116.

⁴⁰ Laurent Pech, Patryk Wachowiec & Dariusz Mazur, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’ [2021] 13/2021 *The Hague Journal on The Rule of Law* <<https://link.springer.com/article/10.1007/s40803-021-00151-9>> accessed 8 March 2023.

⁴¹ *Ibid.*

⁴² Věra Jourová, Vice President of the European Commission for Values and Transparency, ‘Towards a Stronger EU. Democratic Resilience and Rule of Law’ (Speech at an online event of the RECONNECT research project headed by the Catholic University of Leuven, 2 February 2021) <<https://ec.europa.eu/commission/commissioners/2019-2024/jourova/announcements/speech-vice-presid>

there were not any proper tools to use, despite the suggestions on the sufficiency of the current toolbox, addressed by many scholars.⁴³ Nevertheless, there was a significant exception to the described tendency manifested in the Commission's initiative to connect the rule of law with the EU funds. Also, it is worth raising that the mentioned idea was expressed in a draft with stronger wording than the one finally agreed upon.

As a result of being armed with the Rule of Law conditionality mechanism and enactment of the Common Provisions Regulation⁴⁴, which sets the rules that have to be obeyed for receiving and using funds, the Commission has a powerful toolbox in a process of pursuing demanded reforms in backsliding Member States. By following the current situation it is highly possible that we will be seeing the next altercations between the European Commission and Poland, related to the latest ostensible changes in the judiciary, hence it is justified that we, as European citizens, may insist on firm reactions.

3.4 Council of the European Union Action

Another actor on the European stage of rule of law protection with much potential sway and relatively reduced actual action is the Council of the European Union. Its Annual Rule of Law Dialogue has been deemed an ineffective mechanism⁴⁵ and there are indeed doubts to be had about the potential of the Council to contribute to the protection of the rule of law in the EU's Member States when at least four of the veto-wielding members of the Council are countries with notorious rule of law backsliding (Poland, Hungary, Romania, Bulgaria).

3.5 Council of Europe Institutions' Actions

Venice Commission

The European Commission for Democracy through Law, known as the Venice Commission, is the advisory body of the Council of Europe responsible for constitutional affairs. Its role is to provide its Member States with legal advice and help them bring their legal and institutional structures into line with Council of Europe standards, inter alia as regards the rule of law. The Venice Commission first addressed the issue of the Rule of Law in a report adopted in 2011.⁴⁶ Subsequently, the Venice Commission developed a 'Rule of Law Checklist' as an instrument aimed at assessing both the presence of Rule of Law legal safeguards and the meeting of other benchmarks relating to the practice and to the implementation of laws in a given country.

ent-jourova-high-level-online-event-reconnect-research-project-headed-catholic_en> accessed 8 March 2023.

⁴³ Laurent Pech, Dimitry Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (Reconnect Policy Paper, June 2019) <<https://reconnect-europe.eu/news/policy-brief-june-2019/>> accessed 7 March 2023.

⁴⁴ -, 'Common Provisions Regulation (European Commission)' <https://commission.europa.eu/funding-tenders/find-funding/funding-management-mode/common-provisions-regulation_en> accessed 13 March 2023

⁴⁵ Ibid.

⁴⁶ Venice Commission, *Report on the Rule of Law* (CDL-AD(2011)003rev, 2011) para 69.

The Checklist aims to provide a tool for assessing a country's Rule of Law situation from the perspective of its constitutional and legal structures, the legislation in force and the existing case law.⁴⁷ It focuses on five core components of the Rule of Law, namely (1) Legality; (2) Legal certainty; (3) Prevention of abuse (misuse) of powers; (4) Equality before the law and non-discrimination; and (5) Access to Justice. The Checklist was developed to serve as a tool for a variety of actors who may decide to carry out an assessment of the Rule of Law in their jurisdiction.⁴⁸ In particular, the Checklist has been referenced in the case law of the CJEU and the Venice Commission's work has acquired increasing relevance in the EU's accession process, especially in the definition of the yardstick of political conditionality for the aspiring EU Member States.⁴⁹ As clarified in the Checklist document,

"It is not within the mandate of the Venice Commission to proceed with Rule of Law assessments in given countries on its own initiative; however, it is understood that when the Commission, upon request, deals with Rule of Law issues within the framework of the preparation of an opinion relating a given country, it will base its analysis on the parameters of the checklist within the scope of its competence".

Consultative Council of European Judges

The Consultative Council of European Judges (CCJE) was set up by the Committee of Ministers of the Council of Europe in 2000. Its areas of responsibility cover the independence, impartiality, and competence of judges. The CCJE has so far adopted a total of 23 opinions concerning judicial independence. In 2010, it adopted the Magna Carta of Judges (MCJ), which provides the guarantees of judicial independence, such as the allocation of appropriate human, material, and financial resources, involvement of the judiciary in all decisions affecting its functioning, especially concerning the organization of courts and procedural laws, and equality of arms for prosecution and defense.⁵⁰

⁴⁷ Venice Commission, *The Rule of Law Checklist* (CDL-AD(2016)007, 2016) para 24.

⁴⁸ *Ibid* para 27.

⁴⁹ See for instance CJEU, Case T- 240/16, *Jean-Louis Cougnon v Court of Justice of the European Communities* ECLI:EU:T:2003:290, para 63; Case T-245/15 *Oleksandr Viktorovych Klymenko v Council of the European Union* ECLI:EU:T:2017:792 at para 74.

⁵⁰ CCJE, *Magna Carta of Judges*, 2010, paras 5-12.

4. Gap analysis: scope and necessity for further action

As has become apparent, there exist a number of gaps in the current rule of law protection regime that require further action in order to be filled in.

4.1 Lack of a Universal Mechanism for Enforcing Rule of Law Protection

Firstly, **there is no universal mechanism for enforcing the rule of law protection besides infringement procedures and Article 7 TEU**, the first one being used too rarely in the last years, and the latter being ineffective.⁵¹ Contrastingly, one of the most effective mechanisms, the Conditionality Regulation, is limited to the existence of a genuine link between the rule of law problem and the EU budget or the financial interests of the EU.

4.2 Different CJEU and ECtHR Viewpoints

Additionally, **some discrepancies between the CJEU and ECtHR viewpoints relating to the rule of law protection appear to exist**. Both Article 6 (1) ECHR and Article 47 of the EU Charter indicate the ‘establishment by law’ as the first, most preliminary requirement for a court, and the guarantee of a fair trial. The requirement of a tribunal ‘established by law’ is at the heart of ECtHR’s approach to judicial independence. As was mentioned in Section 3.2, the ECtHR has held that the requirement of a court ‘established by law’ includes not only the legislation providing for the establishment of judicial organs, and their competence, but also the process of appointing judges, and the participation of judges in the examination of the case. If a court’s appointment process has irregularities, it cannot be considered a court that meets the criteria and methodology set out by the CJEU and the ECtHR. Therefore, such a court cannot initiate dialogue with the CJEU.

In the case of *Banco de Santander*, the CJEU suggested that the requirements of a ‘court’ under Article 267 TFEU are the same as under Article 19 TEU and Article 47 EU’s Charter.⁵² However, in *Getin Noble Bank*, the CJEU departed from its previous position. It refused to make an autonomous assessment of the ‘establishment by law’ of the judge constituting the referring body. It restricted this requirement to the existence of the institution itself (the Supreme Court), that is, to verify if the ‘court’ as such (as an institution), was established by law.⁵³

Despite its awareness of serious defects in the appointment of Supreme Court judges, the CJEU has adopted a highly formalistic presumption that a national court satisfies the requirements of a ‘court’ irrespective of its actual composition and accepted to answer a request for a preliminary ruling from Polish judge Mr. Zaradkiewicz. Yet, prior to delivering the ruling in C-132/20, the ECtHR explicitly stated that this person did not meet the requirements of a court established by law since he was appointed in a manifest breach of domestic law.⁵⁴ The CJEU refused to give the ‘court or tribunal of a

⁵¹ The ineffectiveness of article 7 TEU stems from its political nature. For Article 7 to be put into action it took years, and the envisioned unanimity for sanctions in paragraph (2) makes it essentially a paper tiger.

⁵² Case C-274/14 *Proceedings brought by Banco de Santander SA*, ECLI:EU:C:2020:17, paras 55–56.

⁵³ Case C-132/20, *BN and Others v Getin Noble Bank S.A.*, ECLI:EU:C:2022:235.

⁵⁴ *Advance Pharma v. Poland* App no. 1469/20 (ECtHR, 3 February 2022), para. 350.

Member State an EU law meaning anymore, with the presumption of lawful establishment by law, which contradicts the final decisions of national courts, its own case law, and Article 6(1) ECHR as interpreted by ECtHR.

If the CJEU fails to consider violations of judicial independence and fair trial rights or overlooks that the concerned body is not legally established (as per *LM, Sharpston*, and *Getin Noble Bank* case law), it may widen the gap between the Convention system and EU law. Member States cannot amend EU laws independently, leaving them in a difficult position to choose between their ECHR obligations and EU law. Such a scenario would cause significant damage to EU law and the multi-layered European system of fundamental rights protection.

4.3 Non-Regression Principle: Too Abstract

The non-regression principle is, at the moment, too abstract. The *Repubblika* case established the principle of non-regression. However, the principle remains fairly abstract and undefined. No further case law specifying a more defined scope or the nature of its application has been delivered by the CJEU. The Commission should take this to its advantage. In line with the infringement procedure set out in Articles 258 and 260, the Commission should deliver an opinion detailing the regression of a Member State's judicial independence, in light of the Member State's standards at the point of accession to the EU, and its nonconformity with the principle of non-regression. If the concerned Member State does not seek to remedy the Commission's concerns, the dispute should be brought before the CJEU. Firstly, as the principle currently stands, the legal analysis required would be fairly straightforward. Does the judicial reform in question reduce its independence and impartiality standards below what they were at the point of the Member States' accession to the EU. Secondly, if the application of the principle is not as simple as previously assumed, it compels the CJEU to give further clarification on how it wants the principle of non-regression to be applied. For instance, by providing its own legal framework for testing whether the principle has been infringed upon. As the principle stands now, the moment of accession is what matters, thereby resulting in an unfair application.⁵⁵ Member States have joined the EU with varying standards for judicial protection. For example, Greece was according to the Commission barely ready to accede to the Union.⁵⁶ Should Greece be permitted to regress to its previous standards while other Member States might be trapped with comparably higher standards for judicial protection? These abstract and inequitable aspects of the principle of non-regression need to be addressed by the CJEU.

⁵⁵ Mathieu Leloup, Dimitry Vladimirovich Kochenov, Aleksejs Dimitrovs 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*' (2021) Reconnect Europe paper 16/2021 <<https://reconnect-europe.eu/publications/working-papers/>> accessed 3 March 2023.

⁵⁶ Ibid.

4.4 The Copenhagen Dilemma

The EU has proven to be unable to effectively reshape the legal-political developments in the Member States falling outside the material scope of EU law post-accession date. Prior to officially joining the EU a state must comply with the accession criteria ("The Copenhagen Criteria"). Of relevance are the requirements for the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities".⁵⁷ Such a criteria in turn requires an aspiring Member State to transpose these values into concrete reform. However, nothing in the accession criteria demands any sort of follow-up procedure to ensure that all Member States continue to comply with the values prescribed by the Copenhagen Criteria. Stemming from this deficiency in the Copenhagen Criteria, the Copenhagen dilemma presents one of the greatest legal challenges for upholding the rule of law in the EU.

The Article 7 TEU procedure which was once labelled as a 'nuclear weapon',⁵⁸ has proven practically impossible for the EU to effectively use this tool.⁵⁹

It is of existential significance for the EU that it is not "getting into bed with the bad guys".⁶⁰ However, this has been and still is the EU's current position. Moreover, under threat is the principle of mutual trust and recognition which serve as the foundation for multiple EU legal networks that have been instrumental for the growth and maintenance of a thriving internal market. For example, national courts can comfortably also bear the label of EU courts, by allowing for the automatic recognition and enforcement of domestic judgments under the principle of mutual trust. Eventually, the national courts of some Member States will lose faith in the independence and impartiality of judgments coming from certain other Member States in which the rule of law has systematically been dismantled. As a result, the principle of mutual trust loses its practical relevance. Petra Bárd and Adam Bodnar's publication, has described the possible dire consequences of such an outcome in the context of the mutual recognition and enforcement of EU Arrest warrants. National courts may only refuse a surrender request on a case-by-case basis and not in general in case of national legislation for the

⁵⁷ Publication Office of the European Union, 'Accession criteria (Copenhagen criteria)' (*Eur-lex*, 16 August 2021) <<https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html>> accessed 19 February 2023.

⁵⁸ Jan-Werner Müller, 'Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission' (Verfassungsblog, 13 March 2013) <[://verfassungsblog.de/protecting-democracy-and-the-rule-of-law-inside-the-eu-or-why-europe-needs-a-copenhagen-commission/](https://verfassungsblog.de/protecting-democracy-and-the-rule-of-law-inside-the-eu-or-why-europe-needs-a-copenhagen-commission/)> accessed 19 February 2023

⁵⁹ The use of Article 7 presupposes that just one Member State is committing serious violations against the EU's common values listed in Article 2 TEU. Which in recent years, as demonstrated by the companionship of Poland and Hungary, is not the case. In addition, Article 7 is largely considered a last-resort or "nuclear option" by the President of the EU Commission as well as politically sensitive (Jan-Werner Müller, 'Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission' (Verfassungsblog, 13 March 2013) <[://verfassungsblog.de/protecting-democracy-and-the-rule-of-law-inside-the-eu-or-why-europe-needs-a-copenhagen-commission/](https://verfassungsblog.de/protecting-democracy-and-the-rule-of-law-inside-the-eu-or-why-europe-needs-a-copenhagen-commission/)> accessed 19 February 2023). Therefore, Article 7 is not the straightforward tool to address backsliding Member States

⁶⁰ Kochenov and Dimitrovs (n 3).

requesting jurisdiction systemically encroaching on the independence of the judiciary.⁶¹ This case-by-case assessment must be done in a two-step analysis; whether there were systemic or generalized deficiencies with regard to judicial independence and, in the affirmative, the enforcing court must determine the “impact of the respective deficiencies on the individual at the level of the requesting court”.⁶² This second requirement places a disproportionately high burden of proof on the suspect and has therefore been much more onerous to satisfy.⁶³ National courts are eventually left with an uncomfortable dilemma; between disregarding EU law, risking the fragmentation of EU law, or enforcing judgments within its own jurisdiction that are in direct conflict with human rights obligations stemming from Article 6 of the ECHR.⁶⁴

5. Recommendations

5.1 A New Universal Mechanism for Enforcing Rule of Law Protection

A new universal mechanism for enforcing rule of law protection should be implemented. Similarly to the Cooperation and Verification Mechanism used in the case of Romania, upon a finding by the European Commission that a Member State engages in systemic violations of the rule of law (such as systemic violations of judicial independence (art. 19(1) TEU), the Commission should be able to impose on that state a benchmark of (re)implementation measures repairing the damage done to the rule of law. If the Member State is found to not cooperate in good faith in repairing the damage after a number of Commission Reports on the issue, the Commission would then have the competence to suspend the obligation of Member States to recognize and carry out, under EU law, the judgments and judicial decisions of that problematic Member State, including European Arrest Warrants. This approach would also be consistent with the spirit of a number of CJEU decisions on mutual recognition, such as *Aranyosi and Căldăraru*, and *Ministry for Justice and Equality v LM*, in the sense that a biased and unfair justice system can act as a bar to the execution of a surrender request. Having the Commission deal with this issue would also mean that the implications of those faulty judgments, namely that a court from a Member State can issue a decision with widespread consequences on the rule of law compatibility of another Member State’s judicial system, would be lifted. Instead, the Commission would be competent to rule on such a finding, resolving the potential space for uncertainty or incorrect findings by Member States’ courts. This mechanism could be implemented under a Council

⁶¹ Petra Bárd and Adam Bodnar ‘The end of an era: The Polish Constitutional Court’s judgment on the primacy of EU law and its effect on mutual trust’ [2021] 15/2021 CEPS Policy Insights <<https://ssrn.com/abstract=4100091>> accessed 3 March 2023. See also Petra Bárd, ‘In courts we trust, or should we? Judicial independence as precondition for the effectiveness of EU law’ (2022) 28 European Law Journal 1.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

Regulation, using, for example, Article 70 TFEU as a legal basis.⁶⁵ Moreover, the European Parliament has already called for an EU mechanism on democracy, the rule of law, and fundamental rights, and scholars have provided expansive input on such a mechanism.⁶⁶

5.2 Stepping in the Footsteps of the ECHR

The issue of divergence in tests on judicial independence adopted by the ECtHR and the CJEU is a significant challenge, leading to legal uncertainties and difficulties in implementing and enforcing EU law. To **address this gap, the CJEU can consider stepping in the footsteps of the ECtHR and adopting a more holistic approach to the requirement of a court 'established by law'**. This approach can encompass not only the legislation providing for the establishment of judicial organs and their competence but also the process of appointing judges and the participation of judges in the examination of the case.

Furthermore, the CJEU can take into account the ECtHR's interpretation of Article 6(1) ECHR, which considers the requirement of a court 'established by law' as including not only the existence of the institution but also the actual composition of the court. The CJEU should also acknowledge the final decisions of national courts and its own case law when interpreting the concept of a 'court' or 'tribunal' of a Member State under EU law. Such an approach can ensure that EU law and the multi-layered European system of fundamental rights protection are not compromised while fulfilling Member States' obligations under the ECHR.

By adopting a more comprehensive approach to the requirement of a court 'established by law' and considering the ECtHR's interpretation of Article 6(1) ECHR, the CJEU can bridge the gap between the Convention system and EU law, promote legal certainty and ensure the protection of fundamental rights.

5.3 A Copenhagen Committee and formulating the principle of non-regression

Moreover, a Copenhagen Committee should be established in a manner that satisfies the Commission. The Committee must be able to keep track of Member States' original standards at the point of accession and monitor their development. This would also entail moving the Commission's Annual Rule of Law report to the competences of the Committee. Forming such a Committee will also contribute to defining and the enforcement of the principle of non-regression since the Committee will be tasked with archiving previous standards and monitoring new reforms. Information from the

⁶⁵ Petra Bárd, Sergio Carrera, Elspeth Guild, Dimitry Kochenov, Wim Marneffe 'An EU mechanism on Democracy, the Rule of Law and Fundamental Rights: Annex II – Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights' (European Parliamentary Research Service 2016), 130.

⁶⁶ 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 [2016] P8_TA(2016)0409.

Committee's work can then be utilized in future Commission Guidelines or infringement procedures based on the principle of non-regression.

Its composition should include a diverse panel of high-profile members, from different organizations, with strong experiences in the legal and political fields.⁶⁷ This Working Group believes that the Committee would function best as an independent body, completely separate from (potential) Commission influence, thereby preventing allegations of impartiality. This would result in the broadly perceived legitimacy of its findings. That requirement is crucial, as it was stated before in this paper, actions carried out by the Commission became too political in certain instances. In addition, rough Member States in turn also strengthen the evidential value of the Committee's findings. On the other hand, it may be necessary to place the Committee under the umbrella of the Commission. Some uncertainty exists as to whether the Commission would accept relinquishing its monopoly role as Guardian of the Treaty. If the EU Commission is serious about combating backsliding Member States it should be open to the involvement of new actors in it.

5.4 Strengthening Cooperation with the Venice Commission

Cooperation with the Venice Commission should be strengthened. The body has consistently published reports on the rule of law issues in multiple backsliding European States, which are considered highly esteemed sources.⁶⁸ This is exemplified by the Commission's adoption of similar definitions and criteria in its Rule of Law Framework.⁶⁹ In addition, the Venice Commission has developed a comprehensive Rule of Law Checklist. It was introduced in 2016, with the aim to

„assess both the presence of Rule of Law legal safeguards and the meeting of other benchmarks relating to the practice and to the implementation of laws in a given country“.

Not only is the Checklist appreciated for its extensiveness, but also because of the practical perspective on comprised matters. Therefore the proposed Copenhagen Committee, and the Commission as a whole, should be acutely aware of the Venice Commission's Rule of Law Checklist and other publications. Furthermore, it is urgent to engage in an exchange of experience in monitoring and reporting breaches in Member States. Naturally, the cooperation should be conducted with fixing the current eligibility

⁶⁷ Jan-Werner Müller, 'Protecting Democracy and the Rule of Law inside the EU, or: Why Europe Needs a Copenhagen Commission' (*Verfassungsblog*, 13 March 2013) <<https://verfassungsblog.de/protecting-democracy-and-the-rule-of-law-inside-the-eu-or-why-europe-needs-a-copenhagen-commission/>> accessed 19 February 2023.

⁶⁸ Manko Rafal 'Council of Europe standards on judicial independence' (*European Parliament*, 25 May 2021) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)690623](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690623)> accessed 3 March 2023.

⁶⁹ Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law' [2022] 14 *Hague Journal of the Rule of Law* <<https://link.springer.com/article/10.1007/s40803-022-00171-z>> accessed 3 March 2023.

requirements in the Venice Commission in parallel⁷⁰. This further ensures that the expertise of the Venice Commission is not wasted and increases the quality of the Rule of Law reporting coming from the EU.

⁷⁰ Pech and Kochenov (n 43).

POLITICAL METHODS TO PROTECT THE RULE OF LAW

Policy proposal by Álvaro Salgado Carranza, Olga
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Executive summary

The Our Rule of Law Academy Working Group on Political Methods to Protect the Rule of Law, consisting of Álvaro Salgado Carranza, Katie O’Sullivan, Olga Wolińska, and Enikő Pálincás, mentored by Professor Marlene Wind and Professor Jan Wouters, makes the following recommendations:

- Article 11(4) of the TEU should be altered so that the European Commission is required, rather than invited, to respond to a valid citizen’s initiative that fits within the framework of the Commission’s powers with the submission of a proposal. This requirement should be on the condition that this submission would not directly contradict the interests of the Union. This requirement should benefit currently valid and unanswered initiatives as well as future valid initiatives.
- The European Commission should propose an amendment to Article 2 of Regulation (EU) 2019/788 in their next periodical review of the functioning of the European Citizens’ Initiative. This amendment should establish that all EU citizens aged at least 16 years can support a Citizens’ Initiative.
- Next issue of the Rule of Law Report should be more vocal about the crisis faced by EU Member States. Moreover, investigation methods should be improved.
- To ensure the independent functioning of the College of the European Public Prosecutor’s Office, the appointment procedure of the European Prosecutors should be reformed so that the European Parliament has the powers to appoint Prosecutors. In order to do so, Article 16 of the Council Regulation (EU) 2017/1939 needs to be modified.

1. The nature of the problem

There are three types of political methods to protect the rule of law which currently have room for improvement. They are citizen inclusion methods, control methods and enforcement methods.

Citizen Inclusion

EU citizens' engagement with EU decision-making strengthens the EU because it makes citizens feel as though they are a part of the EU community and incentivize them to understand and support the EU's values. This results in citizens voting for these values in elections. Citizen engagement thus protects the rule of law. Inclusion is the mechanism that achieves this engagement.

Political elections can give us an indication of citizen engagement. In 2019, 50.66% of EU citizens eligible to vote took part in European Parliament elections¹. This was a commendable increase from the 42.61% turnout in 2014², however, it barely surpasses the halfway mark. As for citizens' perception of inclusion, in 2019 the Pew Research Centre found that 62% of citizens surveyed in 10 European nations believe that the EU does not understand the needs of its citizens³. Inclusion is also being stagnated by actions of increasingly autocratic countries e.g. the withdrawal of the Erasmus program from Hungary⁴.

Threats to citizens' participation in and engagement with the Union tarnishes citizens' desire and ability to call out democratic backsliding in their home countries. The inclusion of citizens in EU decision-making needs to be prioritized so that citizens' understanding of the Union is positive and educated. This will combat efforts made by backsliding governments in EU member states to separate citizens from the Union.

The Rule of Law Reports

In order to monitor the rule of law in the Member States in a more comprehensive way, the EU annually publishes the Rule of Law Reports. They focus on four key areas: the judicial system, the anti-corruption framework, pluralism in media, and other aspects associated with the checks and balances system. Each publication of the Rule of Law

¹ European parliament, '2019 European election results' (Europa.eu, 22 October 2019) <<https://www.europarl.europa.eu/election-results-2019/en/turnout/>>

² ibid.

³ Pew Research Center, 'Europeans Credit EU With Promoting Peace and Prosperity, but Say Brussels Is Out of Touch With Its Citizens' (Pew Research Center, 19 March 2019) <<https://www.pewresearch.org/global/2019/03/19/europeans-credit-eu-with-promoting-peace-and-prosperity-but-say-brussels-is-out-of-touch-with-its-citizens/>>

⁴ Euronews, 'Hungary ready to sue EU over cuts to Erasmus funding' (Euronews.com, 12 January 2023) <<https://www.euronews.com/my-europe/2023/01/12/hungary-ready-to-sue-eu-over-cuts-to-erasmus-funding>>

Reports is an effect of cooperation between the European Commission and the Member States.⁵

The Reports have pointed out that in many Member States, we can observe the process of “rule of law backsliding”. In the Reconnect Policy Brief from 2019, it is defined as “the process through which elected public authorities deliberately implement governmental blueprints that aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party”.⁶

Even though the Reports acknowledge problems with the rule of law, there is still ample room for improvement. The issue of backsliding that they address is highly political and some concerns are not voiced clearly enough purposefully in order to avoid scandals and accusations of bias towards certain Member States. Moreover, some critics claim that the reports are “merely stories of the current state of affairs” and that they do not measure progress/deterioration in the rule of law that has taken place over longer periods. It is especially alarming as in the process of the rule of law, backsliding small changes in the democratic system of a state may seem to be of minor importance. Nevertheless, as they accumulate they can pose a real threat to the rule of law. The descriptions in the Rule of Law Reports are somehow missing the bigger picture of these changes. It is a challenge that the European Union must face.⁷

Furthermore, we consider there is a need for strengthened analytical tools that allow for a more marginal analysis of political developments within States that may give rise to democratic backsliding⁸. The variables accounted for in indexes like Freedom House or Polity cannot adequately describe how autocratic regimes which act within the terms of the current legal frames that they set for the purpose of legitimizing their actions may encroach the actual substantive definition of democracy⁹. Being able to act beyond a merely formalistic definition of democracy and actually deploying an EU-specific control mechanism and measurement tool which is informed by the EU’s foundational values

⁵ European, Commission, ‘Rule of Law Report 2022: Commission issues specific recommendations to Member States’

<https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4467>

⁶ Pech, Laurent & Kochenov, Dimitry, ‘Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid. RECONNECT Policy Brief’ (June 2019) 1

⁷ LibertiesEU, ‘The EU Commission’s 3rd Rule of Law Report: Progress, But More Action Needed’ (14 July 2021)

<<https://www.liberties.eu/en/stories/eu-commission-third-rule-of-law-report-progress-but-more-action-needed/44372>>

⁸ Jakab, A., & Kirchmair, L. (2021). How to develop the EU justice scoreboard into a rule of law index: using an existing tool in the EU rule of law crisis in a more efficient way. *German Law Journal*, 22(6), 936–955.

⁹ Nardulli, P. F., Peyton, B., & Bajjalieh, J. (2013). Conceptualizing and measuring rule of law constructs, 1850–2010. *Journal of Law and Courts*, 1(1), 139–192.

described in Article 2 TEU would allow for a more legitimate, and more accurate analysis of the state of democracy in the Union and allow for the Rule of Law Reports to act on behalf of an objective depiction of how severely harmed democratic checks and balances are.

Enforcement

The willingness to enforce the fundamental values of the European Union, especially the protection of the rule of law, varies across the Member States. Therefore, the EU has in recent years initiated a number of tools and mechanisms to safeguard the rule of law; however, these tools have been criticized for their lack of effectiveness.

Consequently, The European Commission has also introduced a new mechanism, the Rule of Law Conditionality, to link the EU's budget to the respect of the rule of law. This was necessary because corruption and the rule of law crises are interlinked issues. Corruption can undermine democratic institutions and the trust of citizens in the rule of law. The system of rule of law, where laws are applied equally to everyone, even to those in power, ensures that there is accountability and transparency.

2. Legal and policy basis/bases for the EU to act

Inclusion mechanism: Citizens' Initiative

- Article 11(4) of the TEU establishes the EU's citizen inclusion mechanism: the Citizens' Initiative. It states that a citizens' initiative which is supported by 1 million EU citizens from a required number of member states can invite the Commission to submit an appropriate proposal to the Union.
- Article 1 of Regulation (EU) 2019/788 of the European Parliament and of the Council details the procedures and conditions relating to this invitation.
- Article 2(1) of this Regulation permits Member States to set the minimum age entitling a citizen to support an initiative at 16 years.

Control mechanisms: The Rule of Law Reports

- The rule of law is one of the European Union founding values that are included in Article 2 of the Treaty of the European Union.
- In its Communication of July 2019, the European Commission expressed the need to strengthen the rule of law across the EU Member states.
- The Political Guidelines of President von der Leyen promoted the idea of establishing a complementary rule of law mechanism. This includes the annual publication of the Rule of Law Reports.
- The EU Justice Scoreboard is part of the EU's Rule of Law toolbox and one of the key contributions to the European Semester, presenting an annual overview of the efficiency, quality, and independence of justice systems, assisting the Member States in improving the effectiveness of their national justice systems by providing objective, reliable, and comparable data.

Enforcement mechanisms: European Public Prosecutor's Office

- Article 86 of the Treaty on the Functioning of the European Union (TFEU) establishes the right of the Council to create a European Public Prosecutor's Office (EPPO).
- Council Regulation (EU) 2017/1939 lays down the rules and procedures of the EPPO.

3. Actions by EU institutions to date, and their impact/effect

Citizen Inclusion: The Citizens' Initiative

Since its commencement in 2012, the ECI has produced six answered citizens' initiatives which have garnered a variety of responses¹⁰. For example, the 'End the Cage' initiative resulted in a legislative proposal directly addressing the concerns of the respective initiative. 'Ban glyphosate and protect people and the environment from toxic pesticides' resulted in a proposal that tackled certain aspects of the initiative at the exclusion of others. 'Minority SafePack' was answered with a decision to not make a legislative proposal and instead continue using current legislation. Finally, the 'One of us' initiative was rejected in its entirety¹¹. As of March 2023, there are three initiatives that are awaiting a response from the Commission and two that are awaiting verification. These initiatives have been awaiting the next stage in the process for multiple years¹².

There are two main issues with the ECI that impede its mission to involve citizens in EU agenda-setting. The first is that there is an insufficient number of initiatives that reach one million signatures. The second is that once an initiative obtains one million signatures, there is nothing in place preventing the Commission from deciding to not submit a proposal on behalf of the initiative. Instead, the Commission can decide not to do so and explain why. This explanation does not have to fulfill any criteria to justify the lack of a submission¹³. In essence, there is no guarantee that the initiative will produce a legislative proposal if successful, a lack of successful initiatives, and a waiting period for

¹⁰ Alessandro Davoli, 'European Citizens' Initiative' (European Parliament, May 2022) <<https://www.europarl.europa.eu/factsheets/en/sheet/149/european-citizens-initiative#:~:text=European%20Citizens%E2%80%99%20Initiative%20The%20European%20Citizens%E2%80%99%20Initiative%20%28ECI%29,a%20legal%20act%20>>

¹¹ European Union, 'European Citizens' Initiative' (Europa.eu) <https://europa.eu/citizens-initiative/find-initiative_en?CATEGORY%5B0%5D=any&STATUS%5B0%5D=ANSWERED&SECTION=ALL>

¹² European Union, 'European Citizens' Initiative' (Europa.eu) < [Find initiative | European Citizens' Initiative \(europa.eu\)](#)>

¹³ Jasmin Hiry, 'European Law Blog' (The European Citizens' Initiative: no real right of initiative but at least more significant than a petition to the Parliament?, 5th February) <<https://europeanlawblog.eu/2020/02/05/the-european-citizens-initiative-no-real-right-of-initiative-but-at-least-more-significant-than-a-petition-to-the-parliament/>>

the initiative to pass all stages lasting several years. These circumstances deter citizens from having faith or participating in the ECI.

Rule of Law reports

So far the European Commission has published three Rule of Law Reports. The latest one published in 2022 addresses the state of affairs in EU Member States since July 2021. Moreover, it is the first time that it included a set of country-specific recommendations for strengthening the rule of law. Apart from that, just as in the previous edition, it examines four key areas of the rule of law.¹⁴ As already mentioned, those are justice systems, the anti-corruption framework, media pluralism and freedom, and other questions related to checks and balances. The reports indicate that even though there are countries that noted significant progress in terms of the rule of law, other Member States' concerns remain without improvement.

Currently, one of the main mechanisms employed since 2020 to inform the Rule of Law Reports is the EU Justice Scoreboard (EUJS)¹⁵. The data for the EUJS stem from the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, which uses 170 qualitative and quantitative indicators on efficiency and quality of justice revised by 47 experts from all Council of Europe Member States as well as national contact persons and other sources. Homogenous datasets are not engendered, and since information is heavily reliant on questionnaires answered by national correspondents of each Member State's governments, data objectivity is not guaranteed.¹⁶ Additionally, the current analysis by the EU Justice Scoreboard focuses on the efficient delivery of justice but does not capture the content of such a law itself. Currently, the tool analyses whether a justice system is capable of delivering justice, but does not evaluate whether the judiciary itself is independent or whether there has been any encroachment of citizens' rights beyond their formal access to courts.¹⁷

Enforcement methods: European Public Prosecutor's Office

The European Public Prosecutor's Office is a relatively new institution established by the European Union in 2017 to investigate and prosecute crimes that harm the EU's financial interests. Its preparatory phase only began in November 2020 and started operations on

¹⁴ European, Commission, 'Rule of Law Report 2022: Commission issues specific recommendations to Member States'

<https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4467>

¹⁵ European judicial systems: "Efficiency and quality of justice" CEPEJ Studies No. 26 (2019)

¹⁶ Framework for Commission Expert Groups: Horizontal Rules and Public Register, C(2010) 7649 final, SEC (2010) 1360 (Jan 10, 2010).

¹⁷ Jakab, A., & Kirchmair, L. (2021). How to develop the EU justice scoreboard into a rule of law index: using an existing tool in the EU rule of law crisis in a more efficient way. *German Law Journal*, 22(6), 936–955.

1 June 2021¹⁸, and as such, it is still in the early stages of conducting investigations and prosecutions.

Since its creation, the EU institutions have taken actions to protect and regulate the functioning of EPPO. These actions include: providing adequate funding and staffing and encouraging cooperation between the EPPO and national authorities to ensure that investigations and prosecutions are conducted efficiently.

4. Gap analysis: scope and necessity for further action

Citizen Inclusion Mechanism:

The Commission should be required to take initiatives seriously and the Union should focus on increasing the number of initiatives that reach one million supporters.

The Commission's decision-making regarding initiatives has been insensitive to the desires of citizens. Citizens' requests have been disregarded as the Commission deduced that a new legislative proposal was not necessary for part of the ban glyphosate initiative and all of the Minority SafePack initiative.¹⁹ Part of the ECI's purpose is to include citizens in agenda-setting.²⁰ Rejecting their heartfelt attempts at setting the agenda discourages citizens from democratic participation. If the attitude of the Commission was shifted so that it approached the initiative with the intention of taking legislative action in all cases except for where it would be explicitly outside its powers or against the interests of the Union, the ECI could publicize this and let citizens know that if they fit the criteria their proposals will be considered.

Just as the Commission currently works to educate citizens about what initiatives would not fit within the framework of the Commission's powers²¹, it could also work to educate citizens about why an initiative would be rejected due to its incompatibility with the EU's interests. This would allow citizens to revise their planned initiative to make it compatible before collecting signatures. This alteration would give citizens confidence in the initiative and would consequently increase citizen agenda-setting in the EU. Additionally, if citizens created a valid initiative that called for an end to democratic backsliding in the EU, the Commission would be mandated to submit a proposal.

¹⁸ European Public Prosecutor's Office, (eppo.europa.eu) <<https://www.eppo.europa.eu/en/news/1-june-2021-eppo-starts-operations-what-does-mean-you>>

¹⁹ European Union, 'European Citizens' Initiative' (Europa.eu) <https://europa.eu/citizens-initiative/find-initiative_en?CATEGORY%5B0%5D=any&STATUS%5B0%5D=ANSWERED&SECTION=ALL>

²⁰ Jasmin Hiry, 'European Law Blog' (The European Citizens' Initiative: no real right of initiative but at least more significant than a petition to the Parliament?, 5th February) <<https://europeanlawblog.eu/2020/02/05/the-european-citizens-initiative-no-real-right-of-initiative-but-at-least-more-significant-than-a-petition-to-the-parliament/>>

²¹ Article 11(4) Treaty of the European Union

Increasing the number of successful initiatives could also be achieved by creating a larger pool of potential supporters. Presently member states can choose to let citizens participate in the ECI at the minimum age of 16, but this is only permitted by Austria²². The vast majority of 16- and 17-year-olds with EU citizenship are excluded from their national decision-making processes (i.e., national and local elections). Consequently, involving them in the ECI would provide them with more agenda-setting powers in the EU than they have in their local constituencies. This would elevate their level of engagement with the EU community and would make participation in the ECI more likely. Allowing this age group to support initiatives would also introduce approximately 10 million more citizens who could support initiatives, increasing the likelihood that an initiative succeeds.²³

Rule of Law Reports:

To prevent rule of law backsliding we must create a society that is aware of its importance and has tools to support and correct the rule of law in EU Member States. The Rule of Law Reports are a valuable addition to mechanisms that were already present in the European Union. However, they can always be improved.

Generally, the Reports should be even more vocal about current rule of law challenges and openly point out cases of backsliding. More attention should be paid to reform efforts with a realistic assessment of their impact. The findings of the Reports, especially recommendations, should be able to have a direct impact on enforcement processes.

Human rights and other civil society groups should be given a more meaningful role during the process of investigating the state of the rule of law and publication of the Reports. This will enable a more comprehensive assessment of the problems as well as provide the EU with a broader picture of the current state of affairs. In order to facilitate this goal independent civil society groups should be provided with dedicated funding.

The reports should be made more available to the general public also at an early stage so that NGOs, independent commentators, professors, etc. can feed into the reports. Today the reports are far too dependent on what the designated governmental investigators 'think' of their own rule of law situation.

²² European Commission, 'Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative' (Europa.eu, 29 May 2018) <[https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2018\)157&lang=EN](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2018)157&lang=EN)>

²³ European Ombudsman, 'How can the European Citizens' Initiative be improved?' (Medium.com, 10 April 2018) <<https://medium.com/@EUombudsman/how-can-the-european-citizens-initiative-be-improved-d67e00067f32>>

Furthermore, the idea of “Rule of Law” as a contested concept, ingrained into our discussion about the protection of our democratic institutions and societies, fails to adequately display how to measure democratic backsliding and the interaction effects between the implicated mechanisms. Academics like Scheppele provide enumerations about the political desiderata lying behind what we describe as the rule of law: regularity and predictability, courthouses and judges’ training programs, legality, and equality under the law²⁴ However, our current systems for measuring how efficient a democracy is failing to appropriately capture the interaction effects between different variables and thus are incapable of signaling marginal democratic backsliding, the kind of which has given rise to what could best be defined as “autocratic legalism”²⁵.

Democratic measurements are political instruments that can gain influence when combined with State power (in this case, EU’s power). Building a new index that allows the EU to act in time and with sufficient legitimacy could dramatically increase the EU’s ability to intervene and deal with dissent on whether a country has undergone democratic backsliding. Furthermore, European authorities’ reliance on external indexes, mainly Freedom House²⁶, Bertelsmann Index, the World Justice Project, or Worldwide Governance Indicators, is deceptive, both because of their methodological and substantive drift away from the challenge presented by autocratic legalism; and because their external production implies a problem for EU’s legitimacy in basing its Rule of Law reports on measurements carried out by unaccountable institutions. For Rule of Law reports to gain the enforcement capacity that we have previously advocated, a firm and sustained methodological measurement capacity for detecting failures in national democracies must be ensured in their drafting. It is thus necessary to further enhance the EU Justice Scoreboard’s capacity to reflect those changes²⁷, perhaps building on the current indicators enshrined in the Venice Commission’s Rule of Law Checklist, composed of five core elements: (1) Legality; (2) Legal certainty; (3) Prevention of abuse or misuse of powers; (4) Equality before the law and non-discrimination; and (5) Access to Justice.²⁸ These five areas could constitute the guiding pillars for the new

²⁴ Scheppele, K. L. (2013). The rule of law and the frankenstate: why governance checklists do not work. *Governance*, 26(4), 559–562; and Scheppele, K. L. (2019). On being the subject of the rule of law. *Hague Journal on the Rule of Law*, 11, 465–471.

²⁵ Scheppele, K. L. (2018). Autocratic legalism. *The University of Chicago Law Review*, 85(2), 545–584.

²⁶ Bradley, C. G. (2015). International organizations and the production of indicators. *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law*, 27–74..

²⁷ Butler, I. (2013). *How to Monitor the Rule of Law, Democracy, and Fundamental Rights in the EU*. Open Society Foundations; and Jakab, A., & Kirchmair, L. (2021). How to develop the EU justice scoreboard into a rule of law index: using an existing tool in the EU rule of law crisis in a more efficient way. *German Law Journal*, 22(6), 936–955.

²⁸ European Commission for Democracy through law (Venice Commission) Rule of Law Checklist, adopted on March 2016: https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

methodological instruments under the EU Justice Scoreboard, combining these two otherwise tangential and ineffectively entangled detection tools.

European Public Prosecutor's Office:

The strengthening of the European Public Prosecutor's Office (EPPO) is essential in defending the rule of law in the European Union. It must be ensured that it operates independently and without political interference, meaning that the EPPO prosecutors and staff must be free from any external pressure or influence.

That is why the appointment procedure of the European Prosecutors in the College of the EPPO needs to be modified. The current procedure²⁹, where the Member States nominate three candidates, and then the Council selects and appoints one of those candidates, does not ensure the independence of these prosecutors. Instead, the European Parliament, which is the only directly elected body of the EU, should have the power to appoint the European Prosecutors. This process would better ensure that the selection of the Prosecutors is based on their qualifications, experience, and professional integrity, rather than on their connections in their own Member State.

5. Recommendations

- Article 11(4) of the TEU should be altered so that the European Commission is required, rather than invited, to respond to valid citizens by submitting a proposal. This requirement should be on the condition that this submission would not directly contradict the interests of the Union and be within the framework of the Commission's powers. This requirement should benefit currently valid and unanswered initiatives as well as future valid initiatives.
 - Article 11(4) should be changed to: "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of **requiring** the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties. **This requirement is on the condition that a submission would not interfere with the interests of the Union.**"
- The European Commission should propose an amendment to Article 2 of Regulation (EU) 2019/788 in their next periodical review of the functioning of the European Citizens' Initiative. This amendment should establish that all EU citizens aged at least 16 years can support a Citizens' Initiative.
 - This regulation would be changed so that it states that "every citizen of the Union **who is at least of the age of 16 shall have the right to support an initiative** by signing a statement of support, in accordance with this Regulation".
- The EU should take a more proactive stance to respond to rule of law deficiencies outlined in the Rule of Law Commission's Reports. The findings of the Reports,

²⁹ Article 16 (3) of the Council Regulation (EU) 2017/1939

especially recommendations, should be able to have a direct impact on enforcement processes such as Article 7 procedure, proceedings before CEJU, and the conditionality mechanism. They could also be linked more directly to funding schemes in the EU.

- Dedicated funding should be made available to support civil society efforts both in contributing to the report; in undertaking follow-up action, including through strategic litigation; and in promoting EU and national level discussions on rule of law trends and how to address them.
- The Commission may consider creating a summary of the Rule of Law Report, written using a language that will be more accessible to non-experts.
- To provide the Rule of Law reports with an objective measurement tool that is legitimate and capable of capturing the specific challenges faced by European Union's Member States in preventing democratic backsliding, the EU Justice Scoreboard should be developed into an index applicable and applied to the EU Rule of Law reports.
- Independent expert opinions should substitute current questionnaires being answered by national correspondents within the Ministries of Justice of the Member State to the Council of Europe, and a network of coordination including only the EU members, as separate and extricate from the CEPEJ's group, must be formed. Selection of experts should not depend on the evaluation of each Member State – rather, a selection focused on credentials like scholarly achievements or higher judicial positions when no doubts exist about the independence of the judiciary, should be deployed.
- A conceptual choice clearly defining what is understood by the “rule of law” needs to be made, both taking examples from World Justice Project, Bertelsmann Index, and the V-Dem program, as well as building on the current indicators from the Venice Commission's Rule of Law Index. Specific references to Article 2 TEU, the case law of the CJEU, and the most recent reports from the European Commission on the Rule of Law must guide this decision. The focus must shift away from the formal efficiency of the judiciary (availability of computers to national courts, for example) to the independence of the judiciary as assessed by independent experts, or whether recently passed laws have encroached rights of minorities, enlarged the Executive's power to evade legislative control, or allowed for criminal law reforms which endanger political dissent.
- To ensure the independence of this group of experts, random selection from a list constructed at the EU level, perhaps by means of the European Public Prosecutor's Office, is the path to follow. Each selected expert could recommend new ones, and country coordinators (again, perhaps relying on the EUPO's independent expert network we are proposing) could undertake this responsibility on the basis of predetermined criteria.

- Article 16 (3) of the Council Regulation (EU) 2017/1939 should be modified, to change the appointment procedure of the European Prosecutors. With the reason to ensure their independence, the European Parliament should have the powers to appoint European Prosecutors.

EUROPEAN POLITICAL PARTIES AND POLITICAL GROUPS

Policy proposal by Guillermo María Pierres Hernández,
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Executive Summary

The Our Rule of Law Academy Working Group on European Political Parties and European political groups, consisting of Guillermo María Pierres Hernández, Louise Amara van der Horst, Aristeidis Karvelas, and Annika Hanna Geschke; mentored by Dr. Aleksejs Dimitrovs and Dr. Wouter Wolfs, make the following recommendations:

- The European Parliament and the Council should, before the European Parliament elections in May 2024, amend Regulation 1141/2014 and establish an internal framework for Europarties and European political groups to expel their national member parties in case of violations of Article 3 (1)(c) and the ‘European values’ as constituted in Article 2 TEU. At present, no collective framework exists for Europarties and European political groups to expel their members if these violate such.
- Article 11.3 of Regulation 1141/2014 should be amended in order to grant the Committee of Independent Eminent Persons more binding decision-making power, so that the Committee achieves wider independence and the ability of directly interfering in the illegitimate activity of a Europarty or European political group. Its autonomy is currently limited by the Authority’s will, and its function is reduced to merely providing advice.
- The European Parliament and the Council should further amend Regulation 1141/2014 by replacing Article 3(1)(b) with the following text:

“its member parties must be represented by, in at least 12,5 percent of the Member States, members of the European Parliament, of national parliaments, of regional parliaments or of regional assemblies,

or it or its member parties must have received, in at least 12,5 percent of the Member States, at least three per cent of the votes cast in each of those Member States at the most recent elections to the European Parliament”. The current party threshold makes it difficult for new Europarties to register. A lower threshold would enable new Europarties to allow voters to hold Europarties responsible by improving the visibility and attention of Europarties and issues concerning them.

- Despite the possibility of deregistration in case of violation of the fundamental values (Article 10 of Regulation 1141/2014), the European Parliament should establish a system of sanctions to address cases of anti-democratic action. Europarties and/or political groups should lose part of their funding when their members undermine democratic values, and their financial loss should be increased with every new violation. This will reinforce compliance with Article 2 TEU values.

1. The nature of the problem

With the upcoming European Parliament (hereafter EP) elections in 2024, ensuring that the behavior of political parties is synchronized with the value of the rule of law is of the utmost importance. Far-right parties from autocratic regimes have been colluding with each other in the EP to get away with their democratic backsliding within the European framework.¹ We recognize three different types of repercussions: political repercussions, electoral repercussions, and financial repercussions.

These three types of effects are not independent of each other but interconnect in a skeleton of outcomes that seem to close in a vicious circle. Broadly speaking, the emergence of autocracy at a national level and its sliding into European politics generates mistrust amongst voters, which, added to society's overall illiteracy on the functioning of EU institutions, leads to a very poor turnout.² Simultaneously, the EU struggles to decide whether or not to ban funding to European Political Parties (from now on referred to as Europarties) that jeopardize European values when holding the European Parliament to ransom on rule of law issues.³ Hungary and Poland have been using political and financial leverage to bargain with Brussels in order to not have their post-Covid funds frozen, which, returning to our vicious circle, has increased the electoral, financial, and political repercussions.⁴ A key question arises: How can the Political Parties and Groups in the European Parliament effectively address the rule of law crises and maintain their legitimacy as democratic bodies? This policy brief aims to analyze these repercussions and to find an adequate response to this question, making use of the currently available mechanisms as well as proposing new ones.

Political repercussions

Political repercussions shall be understood as the shortcomings of mechanisms relating to the power and effectiveness of the EP, Europarties, and European political groups; this is the focus of the following section.

In an ideal world, Europarties and European political groups would refrain from being affiliated with any national parties that are in direct violation of the 'European values' of Article 2 TEU. Regardless of the size and political strength of a Europarty, it would avoid collaborating with members that turn autocratic ideas into action. The ideal would look similar to the reaction the European political group Renew Europe (called ALDE at the time) had towards one of its autocratic members. The separation from the European political group was triggered when the member party Alde Romania backed a national law that redefined the Romanian justice system in violation of the rule of law.⁵ Alde

¹ Adam Holesch and Anna Kyriazi, 'Democratic backsliding in the European Union: the role of the Hungarian-Polish coalition' [2022] 38(20) Taylor & Francis Online.

² Florian Gasser, 'David vs Goliath of voter turnout: Why is the participation in EU elections so low?' (Eurac Science Blogs, 29th May).

³ Dalibor Rohac, 'The EU is letting itself be blackmailed by Hungary' [2022] 1(1) The Spectator.

⁴ Alice Tidey, 'Hungary agrees deal and lifts veto on €18bn EU aid package for Ukraine' [2022] 1(1) Euronews.

⁵ Romania Insider, 'Romania's Liberal Democrats pull out of ALDE Europe' (Romania Insider, 3 June 2019) <<https://www.romania-insider.com/romania-liberal-democrats-alde-europe>> accessed 10 April 2023.

Romania formally left the European political group on its own initiative after realizing that an official expulsion was nearing.⁶ In the present case, however, there are limited success stories like this when it comes to the expulsion of members as a direct consequence of their anti-rule of law actions.

The current framework for the establishment of a Europarty can be found in the Regulation on the statute and funding of European political foundations (hereafter Regulation).⁷ Article 3 of the Regulation refers to 'European values' as constituted in Article 2 of the Treaty on the European Union (TEU).⁸ These values must be visible in the manifestos of the Europarties or other publicly available documents, many of which more or less directly copy Article 2 TEU for these purposes.⁹ The mechanism to monitor whether Europarties adhere to Article 3 (1)(c) of the Regulation has so far not proven to be very effective.¹⁰ Thus, up until 2019 the conservative christian-democratic Europarty, the European People's Party (EPP) sheltered and supported the autocratic regime of the Hungarian Fidesz Party led by Prime Minister Victor Orbán.¹¹ Though the EPP together with Fidesz took a mutual decision to suspend Fidesz' membership before the EP elections of May 2019, the Fidesz MEPs still counted towards the EPP during the Spitzenkandidaten procedure.¹² This suggests that with the current regulatory framework, Europarties can benefit from sheltering autocrats due to the absence of a political backlash. The EPP is far from being the only Europarty that is hosting autocrats, but since it is the largest and most influential, it is more noticeable. Another Europarty hosting autocrats is European Conservatives and Reformists (ECR) that, amongst others, is sheltering the Polish Law and Justice Party (PiS) to this day.¹³

Electoral consequences

One of the ways political parties can experience consequences for shielding autocrats is by being held accountable by their voters. Within the European Union, the European Parliament is the only institution where members are directly elected. In theory, this would be an opportunity to hold Europarties accountable for their actions and have them face consequences for shielding autocrats. However, in practice, this does not happen. One of the reasons is the structure of the European Parliamentary elections. Voters elect candidates from their country representing their national parties. Most of

⁶ Ibid.

⁷ Consolidated version of the Regulation on the statute and funding of European political parties and European political foundations [2014] OJ L 317/1.

⁸ Regulation on the statute and funding of European political parties and European political foundations (n5) art 3(2)(c); Consolidated version of the Treaty on the European Union (TEU) [2016] OJ C 202/1, art 2.

⁹ Wouter Wolfs, European Political Parties and Party Finance Reform (Springer Nature Switzerland AG c2022) 207–208.

¹⁰ Regulation on the statute and funding of European political parties and European political foundations (n5) art 10 (3).

¹¹ Decision of the EPP Political Assembly regarding the EPP membership of Fidesz [2019].

¹² ibid; R. Daniel Kelemen, 'The European Union's authoritarian equilibrium' [2020] 27(3) Journal of European Public Policy 481, 488.

¹³ ECR Party, 'EU member parties' (ECR Party website, 2022) <<https://ecrparty.eu/about/>> accessed 5 March 2023.

these national parties are part of European political groups or Europarties.¹⁴ A recent EU wide survey suggests limited knowledge of EU citizens about the European Union as a whole reporting that only a quarter of the respondents knew about all European political groups.¹⁵ This decreases the probability of the voters holding the Europarties accountable for shielding autocrats, because many citizens are not aware of the party structures. The lack of attention to Europarties is also shown in the voter turnout of the 2019 elections of 50.66 percent.¹⁶ This was an increase compared with recent EU parliamentary elections and still showed that nearly half of the eligible citizens are not voting in EU elections.

These factors combined give Europarties the opportunity to possibly shield autocrats without accountability by their voters. Further, Europarties are incentivized to protect members of national parties as these provide votes.¹⁷ Cumulatively, this calls for action to address the visibility of Europarties on a national level.

Financial repercussions

Europarties are bound by regulatory frameworks which lay down rules both for the allocation of EU funds and their proper management. However, there has been a debate over the impact of these rules on the functioning of Europarties.

The main point of critique revolves around the objectives of the funding mechanism. More specifically, it has been suggested that this mechanism aims to keep far-right and/or Eurosceptic parties who are thought to violate fundamental values at bay. The idea behind this is that EU funds should not be distributed to actors who oppose European integration and have been supported by prominent MEPs such as Hannes Swoboda, Manfred Weber, and others.¹⁸ This is directly linked to the fact that compliance with the values of the European Union is a key requirement for the acquisition of EU funds. However, it should be mentioned that European integration and respect for fundamental values are two separate things. Also, the idea that funding should not be distributed to eurosceptics and/or far-right parties is a controversial one and raises the question of equal participation in democratic procedures. Those who oppose this exclusion from funding claim that we should not put restrictions on funding based on political beliefs, as it is unlawful to punish someone for their beliefs and ideas. Nevertheless, reality shows that, even if this is indeed one of the goals of the mechanism,

¹⁴ European parliament, 'European elections: your chance to have your say' (European Parliament website) <<https://www.europarl.europa.eu/at-your-service/en/be-heard/elections>> accessed 5 March 2023.

¹⁵ Fidur et al, 'How much do we know about the EU? A survey about communication and disinformation' [2022] CommEUcation.

¹⁶ European Parliament, 'Final turnout data for 2019 European elections announced' (Website of the European Parliament, 29 October 2019)

<<https://www.europarl.europa.eu/news/nl/press-room/20191029IPR65301/final-turnout-data-for-2019-european-elections-announced>> accessed 19 February 2023.

¹⁷ Kelemen (n10).

¹⁸ Wouter Wolfs, *European Political Parties and Party Finance Reform: Funding Democracy?* (Palgrave Macmillan 2022) 207.

it has not been achieved yet, as some Eurosceptic parties took advantage of the loopholes of the system by creating Europarties in order to gain access to EU funds.¹⁹

Another important element concerns the distribution of funding. According to the respective rules, a small percentage of funds is distributed equally among the Europarties.²⁰ However, the rest is distributed on a proportional basis, based on the number of seats for every Europarty. Therefore, this mechanism favors bigger Europarties which then obtain a larger amount of EU funds. Thus, smaller Europarties can find it hard to organize themselves, having lesser resources at their disposal.

Even though not apparent at first sight, this uneven distribution of funds is connected to the rule of law and democracy issues. This system gives political groups an incentive to keep hosting autocrats in order to increase numbers and maintain their funding. If we also take into account the fact that the mechanism responsible for verification of compliance with EU values is not particularly strong, we see that political parties and groups are not in danger of losing funds. It is necessary to establish rules for sanctions on parties whose members actively violate European values.

2. Legal and policy basis/bases for the EU to act

Regulation 1141/2014 (hereafter Regulation) lays down the foundation of the statutes and funding of Europarties and European political groups.²¹ The Regulation was last amended in 2019 about two months before the EP elections. The Council of Ministers together with the EP is currently revising the Regulation and discussing possible amendments again. Chapter II of the Regulation is dedicated to the statutes while Chapter III concerns the legal status of Europarties and European political groups. Chapter IV describes the funding and Chapter V includes the control and sanctions mechanisms.

Article 2 of the Treaty on the European Union (TEU) states the values on which the Union is founded. The purpose of this article is to establish a consolidated common foundation that every Member State is obliged to respect and provides a criterion on which to judge if a certain entity acts against the EU or not. The values are built around the concerns on freedom, dignity, and rights of the human being, democracy, equality, and the rule of law.

²²

Article 10 (4) of the TEU declares that political parties on the European level allow EU citizens to express their will and advance European political awareness.²³ Article 224 of the Treaty on the Functioning of the European Union states that the European Parliament and the Council can introduce regulations concerning the rules and regulations for European political parties.²⁴ The Rules on the Use of Appropriations from Budget Item

¹⁹ Ludvig Norman and Wouter Wolfs, 'Is the Governance of Europe's Transnational Party System Contributing to EU Democracy?' [2022] 60(2) Journal of Common Market Studies 472.

²⁰ European Parliament, consolidated version of the "Rules on the Use of Appropriations from Budget Item 400".

²¹ Regulation on the statute and funding of European political parties and European political foundations (n5).

²² TEU (n6).

²³ Ibid.

²⁴ Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202.

400 concern the proper use of appropriations allocated to political groups. They were initially adopted on 30 June 2003 and they have been amended several times since then by Bureau decisions.²⁵ The first and the second part consist of the rules and the accounting plan respectively, while the third part contains the guidelines for the interpretation of the rules. Further, there are four annexes that deal with particular issues, such as the inventories and the distribution of Item 400 appropriations.²⁶

3. Action(s) by EU institutions to date and their impact/effect

The Spitzenkandidaten procedure, which was introduced in the 2014 European Parliament elections, is a process by which the Europarties put forward a candidate for the presidency of the European Commission.²⁷ With regards to the rule of law issue, this mechanism has had little impact because of the fact that the procedure does not aim to address this particular concern. Nevertheless, it does serve a useful purpose, as it allows Europarties to nominate potential Commission Presidents that may be bound to uphold the rule of law.

The Spitzenkandidaten process aims to increase the transparency and democratic legitimacy of the EU. The process involves each of the major European Political Parties nominating a lead candidate or “Spitzenkandidat” for the position of the President of the European Commission. However, the decision of nominating the final Commission President still falls upon the European Council, which is composed of the heads of the EU Member States, rather than the European Parliament. This has sparked controversy among Europeans who believe that the process undemocratizes the EU by limiting the final election of the Commission President to a small number of politically elected Spitzenkandidats (which need not have been elected directly), rather than considering a broader range of potentially qualified candidates.

Even though the process aims to make the selection process more transparent and clear towards EU citizens, it had a limited effect on the regulation of the rule of law also taking into account that the President of the European Commission is just one of numerous stakeholders involved in addressing EU plans.^{28,29}

The predecessor of Regulation 1141/2014 did not include a direct reference to the ‘European values’ as constituted in Article 2 TEU. It was not until 2017 that the direct

²⁵ Rules on the Use of Appropriations from Budget Item 400 (n18).

²⁶ European Parliament, unamended version of the “Rules on the Use of Appropriations from Budget Item 400”.

²⁷ Luke Hurst, ‘What is a spitzenkandidat?’ (Euronews, 9 March 2021) <<https://www.euronews.com/2019/04/24/european-elections-2019-what-is-a-spitzenkandidat>> accessed 12 March 2023.

²⁸ Hermann Schmitt and others, ‘Does personalization increase turnout? Spitzenkandidaten in the 2014 European Parliament elections’ [2015] 16(3) SAGE Publications.

²⁹ R. Daniel Kelemen, ‘The Spitzenkandidaten Process: Requiem for a Misguided Eurodream?’ (Dublin City University, 19 June 2019) <[cess-requiem-for-a-misguided-eurodream/](https://www.dcu.ie/~socialsciences/eurodream/requiem-for-a-misguided-eurodream/)> accessed 12 March 2023.

clause entered into force, taking full effect by 2018.³⁰ Thus, before 2018, there was a greater uncertainty about the values themselves and to what extent a Europarty or European political group would have to violate these values in order to be either sanctioned or expelled. As mentioned previously, Regulation 1141/2014 is currently undergoing revision again.

In this same amendment, it was also determined that the European Parliament gains the ability to ask for authority to launch the verification mechanism of compliance with EU values also after a reasoned request made by a group of citizens.³¹ The amendment also made it so that Europarties should, as a condition for receiving funding, provide evidence that their member parties have clearly published on their respective websites the logo and program of the Europarty they are a member of.³²

During the years, several regulations related to the funding of Europarties and political groups have been adopted. On 30 June 2003, the “Rules on the Use of Appropriations from Budget Item 400” were adopted by the Bureau. These rules provide a framework for the management of finances of political groups, as well as procedures to make sure that appropriations are properly used. The rules have undergone several amendments since their initial adoption.³³ More recently, Regulation 1141/2014 was adopted, whose fourth chapter is dedicated to funding provisions that cover all aspects of funding, from necessary conditions to the prohibition of funding. Also, the fifth chapter of the Regulation lays down the conditions under which Europarties might be subject to sanctions.³⁴

Additionally, it should be noted that in the EU system, the requirements for funding are closely related to the prospect of authorization. Once Europarties have passed the hard test of authorization, it is very likely they will also get access to European funds. However, a recent amendment to the regulation for funding has rendered formal recognition even more difficult. Since 2018, only 10% of the funding is equally distributed among political groups (down from 15%), while the rest is distributed on a proportional basis. Some policy advisors have argued that this can even endanger the existence of Europarties, which already struggle to cope with the complex procedures required by the current regulatory frameworks.³⁵

Finally, a concept that is related to the response of the EU to the autocracy crisis is that of militant/defensive democracy. There have been various definitions of the term, but their common denominator is the idea of protecting a democratic entity from

³⁰ Regulation on the statute and funding of European political parties and European political foundations (n5).

³¹ *ibid.*

³² *ibid.*

³³ Rules on the Use of Appropriations from Budget Item 400 (n20).

³⁴ Regulation on the statute and funding of European political parties and European political foundations (n5).

³⁵ Norman and Wolfs (n17).

anti-democratic actors.³⁶ The regulatory framework of the Union includes tools which could be considered means of militant democracy. In fact, the provisions which state that Europarties must respect the EU's fundamental values mentioned in Article 2 TEU, as well as the possibility of deregistration in case of violation of democratic values, constitute means of militant democracy, as they aim to protect a democratic entity (the EU) from anti-democratic actors (autocrats). However, this principle is not generally enforced and, in this case, the effectiveness of militant democracy is limited. Another similar tool is Article 7 TEU for the suspension of the voting rights of members in the Council, as it limits the basic political right of member states. Nevertheless, member states are hesitant to act against other members because they might find themselves in a similar position in the future. Militant democracy is once again weak due to the political nature of the EU.³⁷

4. Gap analysis: scope and necessity for further action

The deregistration of parties and the balancing of fundamental rights

The political shortcomings illustrated in the first section of this policy brief call for solutions that will make Europarties and European political groups monitor their members more effectively. Not only must the solution create an incentive to not add emerging autocratic parties that might get access to the EP after the 2024 elections, it must focus on establishing a working internal mechanism to expel autocrats that are already sheltered now. In order for a solution like this to work, a balance has to be struck to justify when an action breaches Article 2 TEU and the rule of law. Before this can be done however, attention has to be drawn to the fundamental rights that can be altered when preventing autocrats from organizing themselves in Europarties and European political groups. Two main rights come to mind: the freedom of speech and the freedom of assembly.³⁸

Firstly, the freedom of speech can be infringed when members are denied access to Europarties and political groups and thereby do not get speaking time in the EP to the same extent. Generally, as was found by the Grand Chamber of the European Court of Human Rights (hereafter ECtHR) in the case of *Jersild*, the mere public expression of an anti-democratic opinion cannot be a justification to limit an individual's freedom of speech.³⁹ Furthermore, one must keep in mind that there shall be a distinction between criticism of democracy and anti-democratic actions. Based on this, the fact that MEPs verbally indicate anti-democratic ideas shall not in itself constitute expulsion. This shall also extend to the communication done by parties on a national level: speech without direct action or a call for action will not be enough to limit one's freedom.

³⁶ Franca Maria Feisel, 'Thinking EU Militant Democracy beyond the Challenge of Backsliding Member States' [2022] 18(3) European Constitutional Law Review 389–390.

³⁷ *ibid* 400–401.

³⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)(adopted 4 November 1950, entered into force 3 September 1953)(ECHR) art 10; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)(adopted 4 November 1950, entered into force 3 September 1953)(ECHR) art 11.

³⁹ *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) para 37.

Secondly, the freedom of assembly is important to address when it comes to expulsion and possible deregistration of parties. Here it is beneficial to examine the stance of the ECtHR on Article 11 ECHR. One of the cases concerning the dissolution of a political party is the case of the Welfare Party v Turkey.⁴⁰ The case concerned the deregistration of the Welfare Party in Türkiye which was based on domestic legislation requiring political parties to be secular by nature. The Welfare Party had been ordered to cease to exist because of its religious affiliations and the ECtHR argued that the assessment of a party's legality it cannot alone be based on the party program, but must also consider the actions of members of the said party.⁴¹ The Court concluded in Welfare Party v Turkey that there was no breach of the freedom of assembly as there may be a positive obligation under Article 1 ECHR for Council of Europe members to restrict the freedom of assembly where actions of a party violate the fundamental principles of democracy.⁴² This case law can further be applied to the problem of autocrats being sheltered in the EP. Much in line with the case law of the ECtHR, it shall also be possible to ban Europarties if these gravely violate the values of Article 2 TEU. As an extension to this, Europarties, in line with national parties in domestic systems, shall be responsible for the actions of their members and member parties.

The sanctions to address rule of law violations should only be used for grave and/or serious violations of the rule of law. Further, it shall not interfere with the freedom of expression and freedom of assembly but allow for critical remarks on the EU and democracy. The ECtHR has developed guidelines on the balancing of these rights with other interests, which can be used as a guide for the balancing. It is important that it will be decided on a case-to-case basis if the conduct meets this threshold. The Committee of Independent Eminent Persons (CIEP – see below) is fit for this task since it is jointly elected by the European Council, Parliament, and Commission, and therefore through indirect democracy.

The next important question to discuss is if and in what circumstances Europarties should be held accountable for the conduct of their member parties. Ideally, Europarties and political groups should have and utilize their internal framework to take action against member parties violating the rule of law. Therefore the sanctions should only be applied after giving the party the opportunity to use its internal mechanisms in case they do not take action against this member party.

The Committee of Independent Eminent Persons

The Committee of Independent Eminent Persons is an advisory body that has the goal of verifying if Europarties (not including European political groups) comply with EU values, according to Articles 10, 10a and 11 of Regulation 1141/2014.⁴³ It is formed by six members

⁴⁰ Refah Partisi (the Welfare Party) and others v Turkey App nos 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003).

⁴¹ *ibid* para 101.

⁴² *ibid* para 103.

⁴³ Authority for European political parties and European political foundations, 'Committee of Independent Eminent Persons' (APPF / European Parliament, 2017)

in total, jointly elected by the European Parliament, the Council, and the Commission. The main task that this committee is meant to carry out is to act as an external and independent consultant towards the Authority established in Regulation 1141/2014.⁴⁴ Its composition to a great extent its main essence of behaving independently, is favored also by the fact of not having to be accountable to any other institution or government, as expressed in Article 11(1) of the Regulation. Nevertheless, there is a limitation to its purpose in the succeeding Article 11(3), which states that it shall only act when requested by the Authority and only to give a mere opinion on the alleged breach of the EU values. This leads to a subordination that restricts the committee's main purpose and duty. Subsequently, at the end of Article 11, it is stated that the fundamental rights around which this committee shall

operate are freedom of association and pluralism of political parties in Europe, leaving the core value of the rule of law far behind.⁴⁵ Nonetheless, there is an extent up to which the C.I.E.P. can hold power. This limitation is given by the principle of institutional balance, which refers to the equilibrium in the distribution and coordination of powers among different institutions; a Principle by which no single institution should have unchecked power. Every institution should have another one that retains power from them and has the option of initiating investigations and imposing sanctions, otherwise, accountability, transparency, and therefore democracy are all put at risk.

Europarty threshold

As discussed earlier, currently it is difficult for voters to hold Europarties accountable for shielding autocrats because of lack of visibility and attention for European Political parties and issues concerning them. Article 3 of Regulation 1141/2014 lays down the conditions for a political alliance to be registered as a Europarty. These conditions include that it must be represented in at least 25 percent of the member states in the European Parliament, national parliaments or regional parliaments or assemblies.⁴⁶ Or received in the last European Parliamentary elections at least 3 percent of the votes in at least 25 percent of the member states.⁴⁷ This puts a large barrier on the possibility for new Europarties to register. New parties can provide more attention and visibility for Europarties which can increase the political participation of EU citizens. Which can help to achieve a political system where voters can hold the European Political Parties accountable for shielding autocrats. New Europarties also provide more options for people to find a party closer to their political beliefs and also change to a different party when a Europarty shields autocrats. The current threshold for registration makes this difficult to achieve. Lowering this threshold would make it easier for new Europarties to register thus improving the ability of voter accountability for rule of law-related issues.

Funding of Europarties

<<https://www.appf.europa.eu/appf/en/other-information/committees-appf>> accessed 12 March 2023.

⁴⁴ Regulation on the statute and funding of European political parties and European political foundations (n5).

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ *ibid.*

The current regulatory framework concerning the funding of Europarties seems to create an effective system of funding, sanctions, controls, etc. However, given that EU funds are not equally distributed and that Europarties do not seem to be afraid of serious sanctions for shielding autocrats, amendments to the financial regime of the Union could prove fruitful.

In relation to the distribution of funds, it should be more even so that bigger Europarties are not overly favored, especially since worries about parties' survival have been expressed by senior policy advisors.⁴⁸ Even more important is the establishment of a strong mechanism that will impose sanctions on parties whose members do not comply with the fundamental EU values, as this will discourage anti-democratic rhetoric and action. In regard to this, actors should focus on how weaknesses and limitations can be addressed and not on the creation of a new system.

5. Recommendations

To sum up what has previously been stated, the Working Group on European political parties and European political groups consider the following to be the most important and effective measures to counter the rule of law crisis within the scope of the

European Parliament:

- The European Parliament and the Council should, before the European Parliament elections in May 2024, amend Regulation 1141/2014 and establish an internal framework for Europarties and European political groups to expel their national member parties in case of violations of Article 3(1)(c) and the 'European values' as constituted in Article 2 TEU.
- Article 11.3 of Regulation 1141/2014 should be amended in order to grant the Committee of Independent Eminent Persons binding decision-making power towards Europarties and European political groups, so that the following two appeals are fulfilled: (1) The unilateral independence and autonomy of the committee; (2) The faculty of the committee of directly foisting sanctioning measures on Europarties and European Political Foundations. Subsequently, the European Parliament and the Council shall not interfere in the Committee's decisions, but in order to promote the principle of institutional balance, the Authority will not be completely made redundant with regard to Europarties' compliance with EU values, since it will hold the task of checking the C.I.E.P's activity, at least, once a year and with unrestricted access to all documents and files and will also be in charge of allocating funding to the Committee. Finally, the value of the rule of law shall be manifestly expressed in the fundamental values that the committee is required to give full consideration to.
- The mechanism for sanctions in Regulation 1141/2014 should not give emphasis only on the implementation of sanctions in cases of activities that are against the EU's economic interests. It should also focus on how sanctions can be used as a means to enforce compliance with fundamental EU values. In this regard, a separate set of sanctions should be created, which will be applied if members of

⁴⁸ Norman and Wolfs (n17).

Europarties actively engage in rhetoric and/or behavior that undermines democratic values, such as those mentioned in Article 2 TEU. The European Parliament and the Council should further amend Regulation 1141/2014 by replacing Article 3(1)(b) with the following text:

“its member parties must be represented by, in at least 12,5 percent of the Member States, members of the European Parliament, of national parliaments, of regional parliaments or of regional assemblies,

or it or its member parties must have received, in at least 12,5 percent of the Member States, at least three percent of the votes cast in each of those Member States at the most recent elections to the European Parliament”.

(NON)IMPLEMENTATION OF ECHR AND ECJ JUDGEMENTS

Policy proposal by Aleksandra Mizerska, Saira Khan, Carl Asger Kjeldsen Wind and Teodora Iona Anghelache

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Executive summary

The Our Rule of Law Academy Working Group on (Non) Implementation of ECtHR and ECJ Judgements, consisting of Aleksandra Mizerska, Saira Khan, Carl Asger Wind, and Dora Anghelache; mentored by Dr. Barbara Grabowska-Moroz and Dr. Jakub Jaraczewski, makes the following recommendations:

- We recommend that the European Union and the Council of Europe should engage in dialogue to better establish and understand the roles each respective body has within the area of the rule of law.
- We recommend that EU institutions establish focal points of the Charter of Fundamental Rights to encourage effective and willing implementation of Court judgments.
- We recommend reviewing the Founding Regulation of the Fundamental Rights Agency in order to strengthen its role and contribution to ensuring compliance with ECHR and ECJ judgments across all Member States.
- We recommend that the Rule of Law report is reevaluated to be more encompassing and include rule of law infringements under the implementation of Court judgments regime.

1. The Nature of the Problem

As a preliminary remark, countries are obliged to abide by ECtHR's judgment, and ECJ's judgments are binding from the moment they are published, *ex tunc*. Although the ECtHR is not an EU body, it is one of the main bodies responsible for passing judgments on human rights, and all EU Members are also contracting parties to the European Convention on Human Rights (ECHR). Moreover, recently the EU Commission and the 47 Member States of the Council of Europe resumed the negotiations on the EU's accession to the ECHR. It's especially important as: "The EU's accession to the ECHR will make it possible for individuals to take complaints against the EU to an independent international court – the European Court of Human Rights in Strasbourg. Under the terms of the ECHR, the EU will be obliged to put right any human rights violations found by the Strasbourg court. This will help to create a "level playing field" on human rights across the continent. It will also help to make sure that rulings on human rights from the European Court of Human Rights in Strasbourg and the EU Court of Justice (ECJ) in Luxembourg are legally consistent."¹

Despite all that, **there have been few instances of national Courts challenging the ECJ and ECtHR's authority.**

As for ECJ, the non-implementation trend was set by the Public Sector Programme (PSP) judgment of the German Constitutional Court, which said that ECJ acted outside of its competencies' scope.² Furthermore, the Polish Constitutional Court didn't approve the measures imposed by ECJ concerning the Polish judiciary system and later even questioned the principle of EU law's primacy saying it doesn't apply to Polish law on the functioning of the judiciary.³ Meanwhile, the Hungarian Constitutional Court disputed EU law's scope and the Romanian Constitutional Court examined the conformity of national legislation with EU law.⁴ **In 2021 the European Commission launched 847 new infringement procedures.**⁵ At the end of 2021, there was a 21% increase in the number of open infringement cases compared to the end of 2020. The more open cases brought to the Court there are, the more rulings are issued and are to be implemented. **As for the ECtHR, reports are showing that the leading ECtHR judgments are not being implemented.**⁶ Almost 600 judgments are still pending (data as of April 2022).⁷ The average length of awaiting implementation is 4 years and 4 months, but there are many judgments awaiting more than that. **In 2021 there were 1379 new cases opened**, almost

¹ European Union accession to the European Convention on Human Rights – Questions and Answers, <https://www.coe.int/en/web/portal/eu-accession-echr-questions-and-answers>, accessed 10th of April 2023.

² Court of Justice of the European Union, *Judgment in the case C-493/17*, 2018.

³ Court of Justice of the European Union, *Judgment in the case T-495/19*, 2021.

⁴ Court of Justice of the European Union, *Judgment in the case C-564/19*, 2021.; Court of Justice of the European Union, *Judgment in the case C-430/21*, 2022.

⁵ European Commission, *General Overview. Monitoring the Application of European Union Law*, Annual Report 2021.

⁶ Elisabeth Lambert Abdelgawad, *The execution of judgments of the European Court of Human Rights*, Human rights files, No. 19, p. 62–65.; Council of Europe, *Annual Report of the European Court of Human Rights*, 2021, p. 180.

⁷ Democracy Reporting International, *Justice Delayed and Justice Denied: Non-Implementation of European Courts' Judgments and the Rule of Law*, 2022, p. 5–6.

396 more than in 2020.⁸ Moreover, there are 300 more cases pending compared to the number of pending cases a year before.

There are numerous reasons why there is an increase in the number of non-implemented judgments, such as “deeply rooted problems such as continuing political interest, persistent prejudice against certain groups in society, inadequate national organization or lack of necessary resources”, **but one should not be overlooked: a large number of sentences are implemented.**⁹ The “why is that” question is far beyond the scope of this article, but certainly cases are being closed, and only a minority of them are pending. **Overdue cases, the most difficult ones** (both political and systemic) **are the most important for us here. We believe that the execution of judgments must be, above all, effective.**

Accepting non-compliance can have an impact on the system's integrity. Judgments’ binding force and obligation to execute serve not only a way to “settle the matter brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties”.¹⁰ ECtHR has numerously expressed the Court’s role as “constitutional instrument of public order” in the human rights field.¹¹ Selective non-compliance can cause the ECHR system to unravel momentarily.¹² The same applies to the EU. In the judgment *Flaminio Costa v. E.N.E.L.*, ECJ explained that “if national courts could override the Court of Justice, EU law would not be applied equally or effectively across all Member States and the entire legal basis of the EU would be called into question”.¹³ Secondly, States may wish not to implement judgments as they concern extremely sensitive and complex national issues or for technical reasons, but **judgment implementation is key and the only way for the whole legal system to work properly.** Maintaining values and privileges enshrined in international treaties can be done only by ensuring the effectiveness of the law. The latter happens through issuing judgments that show how countries execute provisions of the ratified treaties and whether fundamental values (either human rights or rule of law protection) are being respected. Finally, judgment non-implementation is a rule of law issue, because **it affects the effectiveness of the law.** If there is no judgments implementation, there is no way to ensure rights, privileges and generally, that law is being followed by the Member State. ECtHR and ECJ judgments are legal remedies for law breaches, but they are only effective if implemented.

⁸Council of Europe, *Supervision of the Execution of judgments and decisions of the European Court of Human Rights*, 2021.

⁹Council of Europe, *The implementation of judgments of the European Court of Human Rights*, Report 2020, p. 27.

¹⁰ European Court of Human Rights, *Guide on Article 46 of the European Convention on Human Rights. Biding force and execution of judgements*, 2022, Council of Europe.

¹¹ Ibid.

¹² Commissioner For Human Rights, *Memorandum*, 2013, p. 2–3.

¹³ R. Daniel Kelemen, Piet Eeckhou, Federico Fabbrini, Laurent Pech, Renata Uitz ‘National Courts Cannot Override ECJ Judgments’ <<https://verfassungsblog.de/national-courts-cannot-override-cjeu-judgments/>> accessed 16 February 2023.

2. Legal and policy basis/bases for the EU to act

The competencies of the ECJ are outlined in Article 19 TEU as well as in Article 251–281 TFEU. These include being the final interpreter of EU law, enforcing EU law, annulling EU legal acts, ensuring the EU takes action, as well as applying sanctions on EU institutions.

¹⁴ The Member States are therefore legally obligated to implement the judgments of the ECJ or else they will be in breach of international as well as EU law. All Members of the EU are also contracting parties to the ECHR. And so all the Member States have made the commitment to uphold the common values expressed in the convention. **Article 46 of the ECHR also requires the High contracting parties to abide by the decisions made by the ECtHR.** As stated in Article 1 of the convention and further supported by the court's rulings in **Scordino v. Italy (no. 1) the contracting parties must also ensure that their domestic legislation is compatible with the provisions of the Convention.** This means that the Contracting parties can not invoke provisions of their national legislation to circumvent their international obligations.

The principle of the primacy of EU law was outlined in Declaration (no 17) of the Treaty of Lisbon. Despite this consistent jurisprudence of the Court has established the primacy of EU law. The Court has also confirmed the **direct effect of EU law as in *Van Gend en Loos v Nederlandse Administratie der Belastingen*.**¹⁵ The Court elaborated in *Costa v ENEL*, that **the aims and principles of the Union would be undermined if National law could supersede EU law.** If such a notion were to be accepted, national courts and legislative assemblies could undermine the integrity of the common market, which the union is bound to protect as expressed in Article 169 TFEU. Hence the Court made the argument that **due to the supranational and original nature of the treaties, EU law should supersede national law.** The Court even established that EU law should supersede national constitutions. With the implication that national authorities and **judiciaries can't invoke their national constitutions, to sidestep or disregard EU law.** This means that governments have to implement ECJ judgments in every and all instances.

The Commission has the power to bring Member States before the ECJ, if the Commission judges that a Member State has failed to live up to its obligations under EU treaties as expressed in Article 258 TFEU. The ECJ can then sanction a Member State if it judges that the state has failed to implement the judgments of the Court. **As expressed in Article 260 TFEU, the court can impose a lump sum or a penalty payment, if it judges that a Member State has failed to live up to its obligations.** Despite this many Member States still fail to implement ECJ rulings, and states such as Poland have repeatedly refused to pay the fines imposed by the ECJ.

A more soft tool the EU can employ to encourage compliance is the Rule of Law report. While this yearly commissioned report does not have a direct legal effect on EU Member States, it nevertheless is important as this report is publicly available, impacting a state's

¹⁴ Court of Justice of the European Union, 'Court of Justice of the European Union (CJEU)' (European Union) <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/court-justice-european-union-cjeu_en> accessed 17 February 2023.

¹⁵ Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 (European Court of Justice) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A61962CJ0026>>

reputation. A bad review can therefore not only harm a country's standing internationally, but it can also have direct economic consequences as well as legal consequences. **The Dutch and Czech courts have for example, refused to extradite suspected criminals to Poland,** as these courts have judged that the Polish judiciary is not sufficiently independent from the government to ensure **a fair trial as is guaranteed in article 47 of the EU Charter of Fundamental Rights as well as in article 6 of ECHR.**

The Vienna Convention of which the Members of the EU all are contracting parties, states in Article 26 that international treaties are binding and must be performed in good faith. Article 27 states that **"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"**. Therefore as contracting partners to the ECHR, all EU Members have a legal obligation under international law to abide by the ECtHR's decisions, as well as an obligation to abide by the judgments of the ECJ as Contracting parties to the EU treaties. Since the authority of the ECtHR is clearly outlined in the convention, **Noncompliance constitutes a breach of international law** and a breach of the non-binding but nevertheless important will of the EU as expressed in the Copenhagen criteria.

The ECtHR has the authority to **demand** that the state in breach of the convention **takes the appropriate steps to ensure that future violations of the Convention do not occur again** (Ilgar Mammadov v. Azerbaijan). As established in this case, the **contracting party must also implement the appropriate measures in a timely, adequate, and sufficient manner**. This means that deliberately delaying implementation in bad faith is also a violation of international law, as well as a violation of the Convention.

The EU Charter of Fundamental Rights **offers increased protections to the citizens of the EU compared to the ones set out in the ECHR** but is based on the same principles as the ECHR and encompasses many of the same articles as the convention. **Article 53 of the Charter explicitly states that the adoption of the Charter shall not diminish the protections offered by the ECHR,** and so also implicitly the ECtHR. Since the Charter must not in any way limit the rights guaranteed by the ECHR, and by extension the ECtHR, and since the Charter has the same legal status as treaties, a reasonable argument can be made that the ECJ can help implement ECtHR rulings by citing Article 53 of the Charter. Although it is stated in Article 6 of the TEU that the Charter shall not in any way extend the competences of the Union as defined by the treaties, it also stipulates that the ECHR shall act as a general principle of EU law. **Non-implementation of ECtHR judgements therefore constitutes a breach of Article 6 TEU, and Article 2 TEU.** The ECJ should therefore be able to make the argument that potentially sanctioning Member States (in accordance with article 260 TFEU) for non-implementation is not an extension of the competences as defined by the treaties. This means that the ECJ could refer to the ECtHR when ruling on matters concerning Article 2 TEU and the Charter, and so properly **establish the status of ECtHR case law in regards to EU law.**

The Commission has also recently launched the first infringement procedure based on Article 2 TEU and the Charter. In Case C-769/22 (European Commission v Hungary) the Commission argues that Hungary is in breach of Article 2 TEU, and Articles 1, 7, 11, and 21

of the Charter.¹⁶ If the ECJ rules in the Commission's favor and accede to their argument that Article 2 TEU is legally enforceable, then the Commission will be able to much more efficiently act as a guardian of the treaties and support liberal democracy. **This also means that the Charter may increasingly carry the same legal weight as the treaties, which would in turn strengthen the ECtHR and the Convention** since the ECJ would then indirectly be able to sanction Member States in breach of the Convention.

Another perhaps more political tool the Commission can employ to combat rule of law backsliding and ensure compliance is Article 7 TEU. If a Member State is found by a **unanimous vote** to be in breach of the values outlined in Article 2, then **the Council “may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question”** (Article 7(3) TEU). And since the values expressed in Article 2 TEU includes the rights guaranteed in the ECHR and the Charter, then it should be possible to use the Article 7 procedure to ensure compliance both with the ECJ and the ECtHR. However, the unanimity requirement makes this an impractical tool, since other Member States in breach of Article 2 can veto the attempts of the Council to address these violations unless perhaps this procedure is initiated against multiple Member States at a time.

3. Action(s) by EU institutions to date

It can be argued that EU Institutions have not acted sufficiently to ensure implementation of ECJ judgments, which damages the exercise of fundamental freedoms. States may **wish not to implement judgments as they concern extremely sensitive and complex national issues or for technical reasons**. However, the rights protection mechanism of the Convention fails at its duty when one Member State decides to pick and choose which judgments it would like to implement.¹⁷ Hence, more effort needs to be taken by EU institutions to eliminate non-implementation of Court judgments.

Action by EU institutions to combat this failure to implement Court judgments is limited. The European Commission is responsible for the requests of financial sanctions against such a Member State who fails to respect ECJ decisions. The **ECJ has the ability to issue fines or withhold budget finance to penalize non-implementation**. Despite such power and potential consequence, Member States still fail to comply with Court decisions [See Section 1 for examples]. The impact the judgment can have on domestic law and whether it interferes with complex national concerns can also contribute to non-implementation, which EU institutions should consider when acting. For example, Ireland was issued a €5 million lump sum fine and €15,000 daily fine. The EU Commission required a windfarm to be subjected to an Environmental Impact

¹⁶European Commission v Hungary (Case C-769/22) ECLI:EU:C:2023:XXXX (European Court of Justice, date of judgment) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CN0769>>

¹⁷ Council of Europe, 'Non-implementation of the Court's judgments: our shared responsibility' (Council of Europe – Commissioner for Human Rights, 23 August 2016) <<https://www.coe.int/en/web/commissioner/-/non-implementation-of-the-court-s-judgments-our-shared-responsibility>> accessed 9 February 2023

Assessment.¹⁸ As this fine relates to the climate crisis, a pressing national concern, it was easier for Ireland to agree to enforce this judgment. Also, Poland has exponentially grown as an issue for non-implementation as it refuses to comply with interim orders, which have accumulated a **€1 million per day penalty** and **declared EU law incompatible with the Polish Constitution** using their Constitutional Tribunal.¹⁹ Despite such a crippling fine, **Poland has made no efforts to implement the Court judgment to suspend one chamber of the Supreme Court, which indicates the potentially ineffective nature of punitive actions by EU institutions.**²⁰

However, actions are still being taken by EU Institutions, such as the European Commission and Parliament, to encourage more implementation of judgments. For example, in 2020, the **EU Commission drafted a new strategy to strengthen the application of the Charter.** This strategy focuses on four pillars; effective application by Member States, empowering civil society organizations, the Charter becoming a compass for EU Institutions, and strengthening people's awareness.²¹ Furthermore, the **European Parliament also released a report emphasizing the importance of the rule of law and strongly condemned Member States' effort to question the primacy of EU law** while also calling on the Commission to take punitive measures against these attacks. The **Parliament also called on the Commission to address all Article 2 TEU violations** affecting fundamental rights through their rule of law review cycle and an annual independent, evidence-based review assessing Members' compliance with Article 2.²² **The Parliament instructed the Commission and Council to make full use of all their measures to address risks of breach of the rule of law and Article 7** procedures to ensure the protection of human rights including the implementation of ECtHR and ECJ judgments.

While the ECtHR is not an EU body, it's one of the main European Bodies responsible for issuing human rights judgments. Furthermore, to **become an EU Member State one must accept the ECtHR's jurisdiction**, hence, the Council of Europe's (CoE) interaction with their judgments is incredibly significant to implementation. The CoE, in 2021, agreed to **strengthen the application of the Charter through training, awareness raising, and strict Charter conditions for EU funds.** Such a commitment impacts EU institutions as it encouraged the Commission to draft their strategy to strengthen the Charter's application and the European Parliament also emphasized the importance of monitoring the implementation of Charter rights.

¹⁸Houses of the Oireachtas (2022) *European Court of Justice*, Dáil Debate. Houses of the Oireachtas. Available at: <https://www.oireachtas.ie/en/debates/question/2021-11-09/313/> (Accessed: February 25, 2023).

¹⁹ G Stafford and J Jaraczewski, *Taking European Judgements Seriously*, (Verfassunblog, 24 January 2022), <<https://verfassungsblog.de/taking-european-judgments-seriously/>>, accessed 15 February 2023.

²⁰ Deutsche Welle (2021) *EU fines Poland €1 million per day over judicial reforms* – DW – 10/27/2021, [dw.com](https://www.dw.com/en/eu-fines-poland-1-million-per-day-over-judicial-reforms/a-59635269). Available at: <https://www.dw.com/en/eu-fines-poland-1-million-per-day-over-judicial-reforms/a-59635269> (Accessed: February 25, 2023).

²¹ European Commission, *Strategy to Strengthen the Application of the Charter of Fundamental Rights in the EU*, COM/2020/711

²²European Parliament, *Report on the Situation of Fundamental Rights in the European Union – Annual Report for the years 2018–2019*, A9-02226/2020

Additionally, the Committee of the Regions and the European Economic and Social Committee have **stressed the necessity of involving regional and civic society actors in the implementation process** to mitigate the risk of non-implementation by avoiding a blanket approach.²³ Fundamental rights practice remains within the barriers of domestic law and the ECHR, as seen through case law. This illustrates that the full potential of the Charter and its ability to interact with national law is not fully realized, which could be increasing the risk of non-implementation of court judgments. The decision to **not include ECtHR judgments in the Rule of Law Reports prevents accountability of national Courts from being required to protect fundamental and democratic rights.**²⁴ However, according to the 2022 Rule of Law report, the country chapters include **systematic indicators on the implementation of ECtHR leading judgments by all Member States**, for the first time. The report also highlighted the purpose of the **Common Provision Regulation**, which entered into force in July 2021, that requires States to put in place effective mechanisms to **ensure compliance of programs supported by EU funds and their implementation with rights and principles in the Charter.**²⁵ Such measures by EU institutions have the potential to mitigate the risk of non-implementation of ECtHR and ECJ judgments.

4. Gap analysis: scope and necessity for further action

First and foremost, the Rule of Law Report is aimed at preventing further rule of law backsliding across EU Member States, particularly in response to the recent situations in Hungary and Poland, by including reports and recommendations on all 27 Member States. Yet, in practical terms, **the report has so far failed to ensure compliance with its recommendations, which have often been too vague and lacked the necessary precision to ensure compliance.** For instance, following the extensively reported violations against civil society organizations in Hungary, including an ECHR judgment ruling in favor of freedom of association, the rule of law report only included the recommendation to **“remove obstacles affecting civil society organizations” (nowhere near comprehensive enough).** The report has also failed so far in recognizing the extent of the problem and acknowledging the emerging and in some cases, set autocratic reality, as no clear distinction is being made as to the urgency and degree of rule of law shortcomings in various states when issuing the recommendations. Thus, the Rule of Law Report lacks the firmness and comprehensiveness necessary to have an effect, provide clear guidelines to states or ensure compliance.

When it comes to the Rule of Law mechanism established under Article 7 TEU, the tool whose purpose is to ensure rule of law compliance by monitoring and preventing breaches, which include non-implementation of ECHR and ECJ judgments, has showcased a series of shortcomings when it comes to putting it to practice. Firstly, **the article has only been enforced for instances amounting to severe violations of the**

²³ European Union Agency for Fundamental Rights, *Fundamental Rights Report 2022*, 8 June 2022.

²⁴ G Stafford and J Jaraczewski, *Taking European Judgements Seriously*, (Verfassunblog, 24 January 2022), <<<https://verfassungsblog.de/taking-european-judgments-seriously/>>>, accessed 15 February 2023.

²⁵ European Commission, *2022 Rule of Law Report*, COM(2022) 500, Luxembourg, 13 July 2022.

rule of law and lacks the competence to be enforced for Member States that still present shortcomings, but do not meet the high threshold of necessary violations. For instance, whereas the Czech Republic has a generally very good record when it comes to the implementation of ECHR judgments, it still has 2 cases that have been pending implementation for an average of 7 years and 8 months. This imbalance hinders the achievement of what should be our final goal- which is ensuring the implementation of ECHR and ECJ judgments and rule of law compliance **throughout all of the Member States.** Moreover, even in the case where Article 7 can be applied, it was insufficient in ensuring equality of cases, as it was invoked against Poland, but not Hungary, despite violations and concerns of a similar magnitude.

As a last resort solution, the Mechanism also presupposes the possibility of imposing financial sanctions on states that show a repeated and grave pattern of non-compliance. However, effective and decisive actions in that aspect have not been made. Given that Article 7(2) requires a unanimous vote from the European Council in order to follow through with a sanction, its involvement in the process undeniably leads to a timely and discursive process of thorough analysis and discussions. For example, upon discussing the activation of the first stage of the Framework against Hungary, the Commissioner for Justice argued that she saw “no grounds at this stage to trigger Article 7 or the Rule of Law Framework”, despite a series of concerning proof showing otherwise. Fast and efficient action should be key. A way around it would be Article 7(1), however, it only allows for the adoption of recommendations by the Council should the Council agree there is a serious breach undermining EU values- but requires a two-thirds majority of the European Parliament and four-fifths of the Member States in the Council to agree. As when it comes to the European Parliament, its involvement in the issuing of recommendations under Article 7(1) was often hindered if the largest groups in the Parliament had underlying interests. **Interests and loyalties ought not to surpass the urgency and importance of taking action against rule of law infringement.** Powerful political parties, such as the European People’s Party should cease to protect their cooperating governments when it comes to failure to meet and respect the standards set in Article 2 TEU, which go against the very purpose and aim of the EU. A way around that would be introducing voting by a qualified majority, rather than unanimity in triggering the sanctioning mechanism, to ensure a more decisive approach.

Secondly, the mechanism can be strengthened by establishing a clear assessment criteria for non-implementing states, one that is transparent and public. In that sense, the EU can cooperate with the Council of Europe in ensuring this. Using the expertise of both institutions would create a coherent approach, in which they can undertake complementary and mutually reinforcing actions for maximum efficiency. Moreover, expertise from some of the independent monitoring bodies from the Council of Europe, like GRECO or the Venice Commission can provide valuable insights for the EU, as well as areas in which they can intervene and states for which sanctioning is required.

Looking further, the **Fundamental Rights Agency** can play a pivotal role in facilitating ECHR and ECJ judgments, as a cooperation channel for civil societies across the European Union. With aims and tools that include exchanging and monitoring situations across the Member States, connecting and providing help to civil societies by

recognizing their crucial importance and influence in the country they belong to, the Fundamental Rights Agency has been deficient in fulfilling its designated targets in practice. As the sole non-political EU body tasked with and specializing in the protection of human rights, it has encountered many challenges within the EU. The existing imbalance in practice stems from the fact that it lacks **the appropriate tools to attain precision and analyze the situation in every single Member State, rather than only looking into broad issues concerning the EU as a whole.** very mandate governing its role, following an agreement with the Council of Europe. **Following, the aims of the Agency cannot be properly grasped and achieved when it lacks the appropriate tools to attain precision and analyze the situation in every single Member State and is limited to rather looking only into broad issues concerning the EU as a whole.** Moreover, it also encounters **difficulty it has in reaching the actual stakeholders and decision-makers within the EU.** The European Commission should take extra steps to ensure their view is being taken into account and cooperate with them in the process of initiating rule of law upholding procedures and monitoring. Moreover, they should increase funding and oversee the activities of civil societies with the purpose of informing the general public of the implications of the rule of law and its infringement by other states.

Furthermore, the role of the Fundamental Rights Agency would further be strengthened through cooperation with bodies of the Council of Europe that focus on the involvement of civil society and NGOs. Such an example would be the Commissioner for Human Rights. The Commissioner's mandate ensures a more independent approach, where it can monitor, report and even intervene in both general and specific human rights violations, as opposed to FRA's general analysis and advisory role. Re-shaping the role of the Fundamental Rights Agency can be made in line with such an approach, that offers more power and independence.

Turning to the ECJ's purpose, outside interpreting and applying EU Law, also extends to ensuring the supremacy of EU law within the Member States and, subsequently- the upholding of democratic values. But once the urgency of rule of law backsliding, along with lack of implementation of the Court's judgments has been recognized, **the ECJ failed to prioritize the cases related to infringement for non-conformity** with its judgment or infringement of the treaties following rule of law violations. Dealing with a systemic issue of this nature requires prompt furtherance, in order to hinder further escalation. **The Court has, throughout time, referenced the ECHR as a source of general guidelines, as well as acknowledging some of its individual articles. The ECJ ought to further make reference to the Strasbourg Court, particularly in the cases that allude to common values that the two courts share- democracy, the rule of law, and human rights.** Implementing **coherence between the two institutions at an even higher level can create a new EU standard,** more efficient at grasping the issue of non-implementation. EU's potential accession to the ECHR, if agreed on, can ensure this kind of coherence for the cases in which the two courts' jurisdiction overlaps, as well as resolve any conflicts of reasoning between them. Whereas one cannot deny the significant number of successful implementation cases across Member States, it is important to grasp that rule of law violations can lead to many unwanted repercussions, and immediate action is needed. Lastly, the ECJ is able to impose sanctions on the

non-implementing Member States, if following the infringement case they had continuously refused to comply. By speedily addressing all cases of this urgency, the Court is thus able to identify the States that unceasingly refuse conformity, and eventually impose sanctions that may accelerate adherence to the European Union's values and laws.

5. Recommendations

Recommendation 1: The European Union Institutions and the Council of Europe should engage in dialogue to better establish and understand the roles each respective body has within the area of the rule of law.

We recommend that the EU institutions and the Council of Europe should open a line of communication specifically to provide greater comprehension of what duties each body should take on to ensure effective rule of law protection

We believe that by enabling such dialogue the parties involved will gain clarity of what is expected of them in the fight to improve implementation of court judgments and how best to achieve these goals given their individual resources.

We encourage the EU institutions and the Council of Europe to create guidelines for these duties to ensure that the body with the greatest capability and expertise completes the duty. This greater clarity and collaboration will allow for more efficient efforts in improving the rule of law in this area as well as strengthening the impact of punitive measures to be an effective deterrent for Member States.

Recommendation 2: Establish focal points and guidelines of the Charter to encourage more willing and effective implementation of Court judgments

We recommend that EU institutions establish focal points of the Charter of Fundamental Rights to encourage for effective and willing implementation of court judgments. EU Institutions should draft guidelines or offer advice on practical elements of the Charter for Member states to better understand the most effective way to implement judgments. More guidance by EU institutions should be offered in the step-by-step implementation process itself rather than just simply offering a deadline and an outcome.

We believe that by creating such a plan, EU Member States can raise awareness about fundamental rights, and legal protection and strengthen Charter expertise on a national level. A better comprehension of rights enshrined in the Charter can lead to more willingness to implement the judgments.

We encourage EU Member States' civil societies, NGOs, public rights defenders, and members of legal professions to take part in strategy and plan-making as their expertise is crucial in creating proper policy measures.

Recommendation 3: Review the Founding Regulation of the Fundamental Rights Agency to strengthen its role and involvement

We recommend a renewed and reviewed mandate for the Fundamental Rights Agency. As the current mandate imposes significant limitations that weaken the agency in its quest of having a tangible impact, particularly in regard to the Agency's inability to play an active participatory role when it comes to the decision-making of EU institutions.

We believe that the initial intent expressed in the Founding Regulation, ought to be

re-analyzed with a focus on a cooperative approach that would maximize the efficiency of the two agencies. An approach more similar and based on cooperation with bodies of the Council of Europe aimed at involving civil society, would ensure the strengthening and efficiency of its role.

We encourage a new approach, that no longer limits the Agency to only investigate and publish opinions on thematic topics imposed by the Council, but rather gives it the power to prepare individual reports in the Member States that they deem as most relevant. Moreover, we further recommend that the new mandate enable the agency to intervene as a result of its own initiative to ensure fundamental rights are respected and included in the legislative process, rather than being restricted by proposals of the Commission, as enshrined under Article 4(2) of the Founding Regulation. Lastly, we encourage the Fundamental Rights Agency to play an active role in monitoring the compliance of judgments and with the rule of law throughout the Member States.

Recommendation 4: Reshaping of the Rule of Law report to include precise and all-encompassing recommendations

We recommend a renewed approach to the Rule of Law report, that includes precise recommendations and clear guidelines to Member States. The annual report should showcase a comprehensive monitoring of each distinct situation across the states, and pinpoint the exact problems, as well as means of revising them. We further recommend that the report make distinctions as to the extent and magnitude of the problems seen across the Member States.

We believe that by taking on a more firm approach, States can comply easier with the recommendations, as the issues would be clearly signaled and suggestions would be available to instruct them into taking on the necessary steps. Further, States can take on positive examples from one another to ensure conformity and coherence.

We encourage the European Commission to reshape and rethink the Rule of Law Report's structure, in order to optimize the prevention of rule of law backsliding across the Member States.

AMICUS CURIAE AT THE ECJ BY THE GOOD LOBBY

Policy proposal by Vince Van Hoesel, Sabine Besson,
Andrés Vázquez García, Elpiniki Gavounelli and Jan
Młynarczyk

Mentored by Professor Alberto Alemanno and Professor
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Executive Summary

The Our Rule of Law Academy Working Group on *Amicus Curiae* at the CJEU, consisting of Vince van Hoesel, Sabine Besson, Andrés Vázquez, Elpiniki Gavouneli, and Jan Młynarczyk; mentored by Dr Jasper Krommendijk and Professor Alberto Alemanno, make the following recommendations:

- The European Parliament and the Council, at the request of the Court of Justice or on a proposal of the Commission, should amend the Statute of the Court of Justice of the European Union in order to allow *amici curiae* to submit their briefs in cases pending before it and to delete the second sentence of Article 40, second paragraph, of the Statute.

If so,

- o The Court of Justice and the General Court should issue guidelines regarding the submission of *amicus curiae* briefs.
- o The Court of Justice of the European Union should establish an automated notification system based on the information available in the CURIA database in order to help potential *amici* to be aware of new cases that may be of their interest.
- o The Court of Justice of the European Union should establish an online form to submit *amicus curiae* briefs.
- The Court of Justice of the European Union should ease the interpretation of the requirements in order to become a third-party intervener, so that representative associations defending collective interests find it easier to participate in its cases.

1. The Nature of the Problem

One of the main factors of the rule of law is people's participation in public decision-making: a dialogue between society and the State, and inherently the EU, is essential for the effective functioning of the democratic system. In this regard, according to Article 11(2) of the Treaty on the European Union (TEU), '[t]he institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.'¹

The Court of Justice of the European Union (CJEU or the Court) is not exempt from this provision. In fact, as its President, Koen Lenaerts, puts it:

'the Institution is being called upon more than ever before to adopt judicial decisions on sensitive matters. Whether on preserving the values intrinsic to the rule of law, protection of the environment, combating discrimination, protection of privacy and personal data, enforcing competition rules against digital giants, or protection for consumers, the decisions of the Court of Justice and of the General Court are directly affecting the major issues of today's world.'²

It is evident that society has a lot to say on these grounds, not only because they are public interest issues, but also because every EU citizen is affected by the judgments of the Court given their *erga omnes* effect.³ Notwithstanding, the current requirements of the Court to become a third party intervener are quite difficult to meet for representative associations defending collective interests, *ut infra*. It is clear, though, that the Court must be open to receive the opinion of society in such sensitive grounds pursuant to Article 11(2) TEU, as the rest of EU institutions are.

In fact, the European Commission has recently published two Proposals for Directives that intend to give equality bodies the power to act before national courts, which includes the right to submit observations as *amicus curiae*.⁴ According to that institution,

¹ Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

² 'Judicial statistics 2022: proceedings marked by the major issues facing today's world (the rule of law, the environment, the protection of privacy in the digital era and so forth) and by the restrictive measures adopted by the European Union in the context of the war in Ukraine' (Court of Justice of the European Union, 3 March 2023) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/cp230042en.pdf>> accessed 8 March 2023

³ Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Oxford University Press 2014) 244, 414

⁴ Commission, 'Proposal for a Directive of the European Parliament and of the Council on standards for equality bodies in the field of equal treatment and equal opportunities between women and men in matters of employment and occupation, and deleting Article 20 of Directive 2006/54/EC and Article 11 of Directive 2010/41/EU' COM/2022/688 final, art 9(2)(b); Commission, 'Proposal for a Council Directive on standards for equality bodies in the field of equal treatment between persons irrespective of their racial or ethnic origin, equal treatment in the field of employment and occupation between persons irrespective of their religion or belief, disability, age or sexual orientation, equal treatment between women and men in matters of social security and in the access to and supply of goods and services, and deleting Article 13 of Directive 2000/43/EC and Article 12 of Directive 2004/113/EC' COM/2022/689 final, art 9(2)(b).

'it is less resources-intensive for [them], but still allows them to submit their expert opinion to courts.'⁵

If this solution is advocated for national courts, we consider that it should be extended to the Court as well. Indeed, implementing a mechanism like *amici curiae* briefs would allow people to participate in EU Justice, thus contributing to the openness of the CJEU and promoting the participation of civil society as enshrined in Article 11(2) TEU.

In addition, given the growing number of human rights cases, *amicus curiae* briefs are crucial for promoting accountability and upholding these basic rights and freedoms. They give non-repeat players access to the Court. While demonstrating commitment to impartiality and willingness to consider a wide range of perspectives, admitting such briefs can promote inclusivity and diversity for minorities, underrepresented groups and disadvantaged parties.

By doing so, the CJEU would also align with the European Court of Human Rights (ECtHR). With its increased role in adjudicating fundamental rights, the CJEU should follow the functioning ECtHR example by accepting *amici* submissions and taking them into account. Additionally, accepting and considering *amicus curiae* briefs would allow non-governmental organisations (NGOs) to reach the Court, specifically in terms of environmental matters, thus reinforcing the Aarhus Convention (to which the EU is party) – a task that the ECtHR is currently unable to fulfill.

Furthermore, it is common knowledge that cases before the CJEU raise matters that are not foreseen in current regulation, democratically passed. Since the CJEU covers these legal vacuums, people should also be able to participate.⁶ Greater involvement of the impacted civil society would positively impact issues of legitimacy, a declining sense of community, and rising levels of social inequality.

Second of all, *amici curiae* briefs also profit the Court itself. *Amici* can assist the Court in accessing crucial information, hence contributing to the efficiency of the proceedings, taking the research burden off the Court, and preventing delays in the delivery of justice (e.g., this is the reason for allowing *amici* in Canada).

Moreover, with the intent of upholding the Court's high standard of evidence and impartiality, *amici* may bring factual arguments that can be sensitive on the political ground and that, consequently, parties would not be willing to present.⁷ With the

⁵ Ibid, 19.

⁶ Felipe Bauer, 'El *amicus curiae* en la jurisdicción constitucional española' (2016) 108 *Revista Española de Derecho Constitucional* 181, 183–84 <<https://dx.doi.org/10.18042/cepc/redc.108.06>> accessed 12 February 2023.

⁷ Procedures before CJEU may be influenced by the political context. See R. Daniel Kelemen, 'The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools' [2022] *Journal of European Integration* 9 <<https://doi.org/10.1080/07036337.2022.2152447>> accessed 12 February 2023. Regarding *amici* and politics, see Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88(4) *The American Journal of International Law* 611, 615 <<https://doi.org/10.2307/2204133>> accessed 12 February 2023.

understanding that such information has the intent of giving a global view to the Court; never to politicize it.

Additionally, only some Member States allow third-party interveners that can later participate before the CJEU (on the basis of the procedural autonomy of the Member States), which disadvantages the remaining citizens who would want to get involved. And even so, the criteria for third-party intervention are difficult to fulfill. This creates a difference among EU citizens when accessing EU Justice that *amicus curiae* briefs could reduce.

Current State of the Private Individual's Access to the Court of Justice of the European Union

Direct Access

Currently, access to the Court is quite complicated for private individuals. They may only file an application for annulment if the act concerned is addressed specifically to them or if it is of direct and individual concern to them.⁸ A regulatory act may also be subject to that action, as long as it is of direct concern to them and does not entail implementing measures.⁹ They are also forbidden to claim against Member States because of their failure to comply with EU law.¹⁰

As defined by the Court, to fulfill the direct concern requisite, the contested measure must directly affect the legal situation of the applicant and leave no discretion on its implementation, being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.¹¹

Individual concern requires that the contested measure affect the claimant

'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed by such a decision.'¹²

Notwithstanding, these criteria are difficult to meet when defending collective interests, such as the ones that raise the cases that Judge Lenaerts mentioned, *ut supra*.

⁸ Article 263 TFEU

⁹ Ibid. In this regard, see CJEU (Judgment of 18 May 1994), Case C-309/89 *Codorniu v Council* EU:C:1994:197 [1994] ECR I-1879.

¹⁰ CJEU (Order of 5 February 2010), Case C-361/09 P *Molter v Germany* EU:C:2010:63 [2010] ECR I-00018, para 3-4.

¹¹ CJEU (Judgment of 30 June 2022), Case C-99/21 P *Danske Slagtermestre v Commission* EU:C:2022:510, para 45.

¹² CJEU (Judgment of 31 January 2023), Case C-284/21 P *Commission v Braesch and Others* EU:C:2023:58, para 51; and CJEU (Judgment of 15 July 1963), Case 25/62 *Plaumann v Commission* EU:C:1963:17 [1963] ECR 95.

Third-party intervention

Currently, there is no explicit legal basis for *amicus curiae* submissions at the CJEU.¹³ 'Therefore, such submissions are *in principle* not registered and included in a file of the case to which they refer. Instead, they are *in principle* returned to the sender'.¹⁴

Notwithstanding, Article 40 of the Statute of the CJEU¹⁵ provides that any person who 'can establish an interest in the result of a case submitted to the court' may intervene in it. However, cases between Member States and EU institutions are excluded. That intervention 'shall be limited to supporting the form of order sought by one of the parties'. Given the non-adversarial nature of references for a preliminary ruling, these cases are also excepted.¹⁶

The person wishing to do so must present an application within six weeks of the publication of the notice of the claim in the *Official Journal of the European Union*.¹⁷ It is then transmitted to the parties, who may make observations about it.¹⁸ After that, the President decides whether it is admissible or not.¹⁹ Should it be, the intervener will receive a copy of every procedural document of the case.²⁰ Finally, in cases pending before the Court of Justice, they must submit their statement within one month, but the President may extend that limit.²¹ In cases before the General Court, the President will prescribe the time on a case-by-case basis.²²

The required interest

The Statute and the Rules of Procedure require that the applicant can establish an interest in the case. According to the settled case-law of the CJEU, that refers to 'a direct and existing interest in the ruling on the forms of order sought and not as an interest in relation to the pleas in law or arguments put forward'.²³ The Court adds that 'an interest in the result of the case can be considered to be sufficiently direct only to the extent that that result is likely to alter the legal position of the applicant for leave to

¹³ Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press, 2005) 345.

¹⁴ Email from the Registry of the Court of Justice to the authors (14 March 2023) (emphasis added). See Practice Directions to Parties Concerning Cases Brought Before the Court [2020] OJ L142/1, point 46; and Practice Rules for the Implementation of the Rules of Procedure of the General Court [2015] OJ L152/1, point 92. According to these last ones, "[i]f in doubt, the Registrar shall refer the matter to the President in order for a decision to be taken". This decision can only be challenged by the parties in the proceeding, and the President will decide (point 94).

¹⁵ Protocol (No 3) on the statute of the Court of Justice of the European Union [2008] OJ C115/210.

¹⁶ See Practice Directions to Parties Concerning Cases Brought Before the Court [2020] OJ L142/1, point 38.

¹⁷ Rules of Procedure of the Court of Justice (RPCJ) [2012] OJ L265/1, Article 130; Rules of Procedure of the General Court (RPGC) [2015] OJ L105/1, Article 143(1)

¹⁸ Article 131(1) RPCJ; Articles 144(1) and 144(2) RPGC.

¹⁹ Articles 131(2), 131(3) and 131(4) RPCJ; Articles 144(4) and 144(5) RPGC.

²⁰ Articles 131(2), 131(3) and 131(4) RPCJ; Article 144(7) of the RPGC.

²¹ Article 132(1) RPCJ.

²² Article 145(1) RPGC.

²³ CJEU (Order of 24 June 2021), Case C-220/21 P(I) *Ratiopharm and Others v Orion and Commission* EU:C:2021:521, para 18.

intervene'.²⁴ In this regard, it is not sufficient to be in a similar situation to one of the parties.²⁵

The Court justifies this strict interpretation in the need of avoiding 'multiple individual interventions which would compromise the effectiveness and proper course of the procedure'.²⁶

Notwithstanding, associations are granted leave to intervene if the case raises questions of principle that are likely to affect their members, as long as they represent a considerable number of people that would be affected by the judgment and their objects include the protection of their member's interests.²⁷ In addition to that, 'the questions raised in the case must be sufficiently closely connected to the general aims pursued by the association'.²⁸

For instance, the Court of Justice has granted leave to intervene to an association that represents a large number of companies that are proprietors of well-known trademarks in many different industries in a case in which the Court had to decide the requisites that apply for a trademark to gain a distinctive character and if they had to be fulfilled in each Member State.²⁹

With regard to environmental NGOs, it is required that their activities are focused on the region and sector concerned by the case or, if they work on a larger scale, that they develop protection programs or studies that could not continue if the contested measure were adopted.³⁰

For example, in a case that dealt with the legality of a State aid in favour of indigenous coal, the General Court granted leave to intervene to an environmental NGO that had developed a great campaign against the contested measure. On the contrary, similar NGOs, that relied on their activism against CO₂ emissions, were denied such intervention, since their activities were not focused neither on the coal industry nor in the State involved.³¹

The role of the intervener

As it was said, the intervention is limited to supporting the position of one of the parties. As the Court puts it, an intervener may advance different arguments,³² but he 'may not

²⁴ Ibid 19.

²⁵ CJEU (Order of 22 February 2022), Case C-649/21 P(I) *Fastweb v Iliad Italia* EU:C:2022:171, para 37.

²⁶ CJEU (Order of 1 September 2022), Case C-48/22 P *Google and Alphabet v Commission (Google Shopping)*, para 12.

²⁷ CJEU (Order of 14 July 2022), Case T-782/21 *EAA v Commission* EU:T:2022:470, para 23.

²⁸ CJEU (Order of 21 September 2021), Case T-486/20 *H&H v EUIPO - Giuliani (Swisse)* EU:T:2021:621, para 24.

²⁹ CJEU (Order of 12 January 2018), Joined Cases C-84/17 P, C-85/17 P and C-95/17 P *Société des produits Nestlé/Mondelez UK Holdings & Services* EU:C:2018:16.

³⁰ CJEU (Order of 27 October 2020), Case T-868/19 *Nouryon Industrial Chemicals and Others v Commission* EU:T:2020:523, para 20.

³¹ CJEU (Order of 6 November 2012), Case T-520/10 *Comunidad Autónoma de Galicia v Commission* EU:T:2012:581, para 10.

³² CJEU (Judgment of 6 October 2021), Case T-167/19 *Tempus Energy Germany and T Energy Sweden v Commission* EU:T:2021:645, para 35.

alter the subject matter of the dispute as defined by the forms of order sought and the pleas in law raised by the main parties³³. Consequently, he cannot allege that an action is inadmissible when the defendant has not done so³⁴ or that the contested measure infringes a different regulation.³⁵

2. Legal and policy basis/bases for the EU to act

Legal Basis

The European Parliament and the Council may amend the provisions of the Statute of the Court of Justice of the European Union at the request of the Court of Justice or on a proposal from the Commission, with the exception of Title I and Article 64, according to Article 281, second paragraph, TFEU.

We suggest amending the Statute to include the possibility of *amicus curiae* submissions in cases pending before the Court in the ongoing reform of the Statute that confers jurisdiction to the General Court to determine requests for a preliminary ruling in determined grounds.³⁶ This modification would consist of a deletion of the second phrase of Article 40, the second paragraph of the Statute, and the introduction of a new Article 40a in Title III.

This article could read as follows:

Article 40a

International organisations and representative bodies and associations may submit their opinion to the Court of Justice in cases related to matters that are connected to the general aims they pursue.

With regard to the issuance of guidelines by the CJEU, we consider that no legal basis is required, since they would be non binding. However, Article 19(1) TEU requires the CJEU to ensure that EU law is interpreted and applied consistently across the EU. The CJEU may therefore issue guidelines on unsolicited *amicus curiae* briefs as part of its broader responsibility for promoting the effective and consistent application of EU law.

In this regard, Article 208 of the Rules of Procedure of the Court of Justice (RPCJ) and Article 224 of the Rules of Procedure of the General Court (RPGC) authorise them to adopt practice rules for the implementation of those Rules. Insofar as the guidelines

³³ CJEU (Judgment of 13 March 2019), Case C-128/17 *Poland v Parliament and Council* EU:C:2019:194, para 79

³⁴ CJEU (Judgment of 28 March 2019), Case C-144/18 *P River Kwai International Food Industry v AETMD* EU:C:2019:266, para 23.

³⁵ CJEU (Judgment of 11 July 2014), Case T-533/10 *DTS Distribuidora de Televisión Digital v Commission* EU:T:2014:629, para 211-14.

³⁶ 'Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union' (*Court of Justice of the European Union*, 8 December 2022) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf> accessed 19 March 2023. It is currently being examined at the European Parliament (2022/0906(COD)).

would regulate the acceptance, transmission, and custody of *amicus curiae* briefs, practice rules could be adopted related to Article 20(1) RPCJ and Article 35(1) RPGC. In fact, the CJEU has already published guidelines regarding other matters.³⁷

Comparative Analysis of other Jurisdictions – EU Member States

It is worth noting that the practice of *amicus curiae* is increasingly accepted by a growing number of EU Member States. By following that trend, the Court would contribute to supporting the development of supranational civil society movements within the Union, find more common grounds for communication with national courts, and set a positive example for jurisdictions that have yet to appreciate the value of *amicus curiae*. Consequently, this will further aid the process of harmonizing legal standards across the EU.

Ireland

The practice of *amicus curiae* is developed the most in Ireland. It has a footing both in statute (Irish Human Rights and Equality Commission Act 2014, Section 10) and jurisprudence (*HI v Minister for Justice, Equality and Law Reform*³⁸). As per Finnegan P in *O'Brien v Personal Injuries Assessment Board (No 1)*³⁹, the requirements for the admission of an *amicus* brief are the following:

1. the applicant must have a genuine *bona fide* interest in the matter;
2. the matter must have a public law dimension;
3. the decision must affect a great number of persons.

In recent years, the *amicus curiae* mechanism has experienced a renaissance in Ireland, especially with the case of *Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems*⁴⁰, in which the Commercial Court heard the unprecedented number of nine *amici* applications, admitting four of them on the basis of clear *bona fide* interest and added value (US Government), uniqueness of the perspective (Business Software Alliance and Digital Europe), and expertise otherwise unavailable to the court and a 'counterbalancing perspective' to other *amici* (Electronic Privacy Information Centre). The *Schrems* saga has also expanded the rules of admission by allowing the involvement of *amici* in the first instance hearing when there is no factual dispute or *lis inter partes* (*Schrems* [2016]) as well as recognising that an *amicus* does not necessarily have to be

³⁷ The Court of Justice has published the Practice Directions to Parties Concerning Cases Brought Before the Court [2020] OJ L142/1 and the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2019] OJ C380/1. The General Court has issued Practice Rules for the Implementation of the Rules of Procedure of the General Court [2015] OJ L152/1, which are mandatory, though.

³⁸ [2004] 3 IR 197.

³⁹ [2005] 3 IR 328.

⁴⁰ [2016] No 4809 P.

strictly neutral and non-partisan, as it is precisely because they have an interest in the issue at hand that they seek to join the proceedings – *Schrems v Data Protection Commissioner (No 2)*⁴¹.

The Netherlands

Article 8:26 of the Dutch General Administrative Act 2014 stipulates that an interested party, e.g., the Authority for Consumers and Markets in cases involving competition law, may submit written observations to national courts. It is important to note that this provision was created in order to ensure the uniform application of Articles 101 and 102 of the Treaty on the Functioning of the European Union, pursuant to Article 15, Paragraph 3 of the Council of the European Union Regulation 1/2003.⁴²

Italy

Italy is one of the jurisdictions more recently appreciating the value of *amicus curiae* interventions. On 8 January 2020, the Italian Constitutional Court published an amendment to its Supplementary Rules on Proceedings, which, in its Article 4, allows non-profit social groups and institutional bodies representing collective or diffuse interest relevant to the case to present written opinions to provide the Court with information that may be useful in understanding and evaluating the issue at hand. Moreover, Article 14 gives the Court the power to call renowned experts to assist it in its reasoning.

Slovakia

Art 86.2 of the Act No 314/2018 Coll. on the Constitutional Court of the Slovak Republic formally recognises the admissibility of unsolicited *amicus briefs*. Moreover, the Court may request opinions from non-governmental organisations, professional lawyers' organisations, scientific institutions, renowned experts, or groups affected by the case (Article 86.2) and such a request carries a legal obligation on the addressee to assist the court (Article 86.3). The reasoning behind this provision was that it significantly reduces expenses of contracting external advisors with expertise in niche areas of the law.

Germany

While Germany does not have a formal *amicus curiae* procedure, the courts turn increasingly to professional associations, non-governmental organisations, or institutions, such as the German Institute for Human Rights, for advice in adjudicating in cases requiring expert knowledge of an area. Third-party opinions are used predominantly by the Federal Constitutional Court which, as per § 27a of the

⁴¹ [2014] IEHC 351 (Hogan J).

⁴² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] L1/1.

Bundesverfassungsgerichtsgesetz of 16 July 1998, can call qualified third parties to give their opinion on the issue at hand.

Comparative Analysis of other Jurisdictions – Third Countries

A comparative analysis of non-EU jurisdictions can be a useful source of inspiration for the Court in creating its own guidelines regarding the admission of *amicus curiae* briefs. Below, we provide a short summary of two systems that work well (England & Wales and the United States) and one that we would recommend not to follow (Canada).

England & Wales

England & Wales is a jurisdiction with a highly developed *amicus curiae* tradition. The first recorded traces of this practice can be found in cases furthering the abolitionist cause, such as *Somerset v Stewart*⁴³, in which anti-slavery campaigners intervened as a third party.

It is worth noting that the terminology regarding third-party interventions has evolved over time. Today, the term *amicus curiae* means a non-partisan figure appointed by the Attorney General at the request of the court (which is why it is also sometimes referred to as 'advocate to the court'). However, for the purposes of this proposal, the focus will be put on unsolicited interventions of third parties distinct from parties to the proceedings and not having a direct stake in the outcome of the case.

Third-party interventions have a strong footing in precedent. In *Shields v E Coomes (Holdings) Ltd*⁴⁴, the Equal Opportunities Commission was the first public body to be invited to intervene in a domestic case. In *Sivakumaran*⁴⁵, the UN High Commissioner for Refugees was the first international body to be granted leave to intervene before the courts of England & Wales. Modern public interventions by non-governmental organizations (in this case – Liberty) were first accepted in *R v Khan*⁴⁶.

Parliament has officially recognised the value of third-party interventions, especially following the adoption of the Human Rights Act 1998, as evidenced by the positive assessment of this practice by the Joint Committee on Human Rights:

'Third party interventions are of great value in litigation because they enable the courts to hear arguments which are of wider importance than the concerns of the particular parties to the case.'⁴⁷

⁴³ [1772] 98 ER 499.

⁴⁴ [1978] 1 WLR 1408.

⁴⁵ [1988] AC 958.

⁴⁶ [1996] UKHL 14, [1996] 1 WLR 162.

⁴⁷ Joint Committee on Human Rights, *The Implications for Access to Justice of the Government's Proposals to Reform Judicial Review (Thirteenth Report)* (2013–14), paras 91–92.

Moreover, the recognition of a clear and valuable role for public interest interventions was inscribed in the Supreme Court Rules 2009⁴⁸. It is also appreciated by the judicial community, e.g., Baroness Hale, the former President of the Supreme Court, who said:

'Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer ... [F]rom our – or at least my – point of view, provided they stick to the rules, interventions are enormously helpful.'⁴⁹

As of 2008, 21 out of 75 House of Lords cases involved at least on third party interventions. Today, on average, interventions are being made in about 30–40% Supreme Court cases.⁵⁰

United States of America

The influence of *amicus curiae* briefs on case outcomes of the US Supreme Court can be shown in many ways.⁵¹ It is a fact that *amicus* briefs are linked to litigation success⁵², as they emphasise the significance of the case, increasing the likelihood that the justices will review it⁵³. Based on a study by Collins, Corley and Hamner, the Court has not many times adopted the language from *amicus* briefs in order to criticise the arguments made by the *amici* (out of 1,032 matched phrases, only 7 were negatively incorporated).⁵⁴ It is also likely the Supreme Court might borrow the *amicus*' treatment of an existing precedent and might also use the information from *amicus* briefs that voice the wider economic, legal, and policy implications of the decision.

⁴⁸ Supreme Court Rules 2009, s 15(1)(a).

⁴⁹ The Rt Hon the Baroness Hale of Richmond, 'Who Guards the Guardians?' (Public Law Project Conference: Judicial Review Trends and Forecasts, London, 14 October 2013) <<https://publiclawproject.org.uk/resources/who-guards-the-guardians/>> accessed 11 February 2023.

⁵⁰ JUSTICE UK and Freshfields Bruckhaus Deringer, *To Assist the Court: Third Party Interventions in the Public Interest* (2016) <<https://justice.org.uk/our-work/third-party-interventions/>> accessed 11 February 2023.

⁵¹ Paul M. Collins, Jr., Pamela C. Corley and Jesse Hamner, 'The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content' (2015) 49 *Law & Society Review* 4, 917–920 <<https://www.jstor.org/stable/43670513>> accessed 27 January 2023

⁵² Collins Jr., Paul M. (2004) "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation," 38 *Law & Society Rev.* 807– 32, and Kearney, Joseph D., 8c Thomas W. Merrill (2000) "The Influence of *Amicus Curiae* Briefs on the Supreme Court," 148 *Univ. of Pennsylvania Law Rev.* 74

⁵³ Ryan C. Black, Christina L. Boyd 'Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process' (2013) 94 *Social Science Q.* 4 1124 – 1144 <<http://www.jstor.org/stable/42864450>> accessed 30 January 2023 and Gregory A. Caldeira, John R. Wright 'Organized Interests and Agenda Setting in the U.S. Supreme Court' (1988) 82 *The American Political Science Review* 4, 1109 <<https://doi.org/10.2307/1961752>> accessed 13 March 2023

⁵⁴ Paul M. Collins, Jr., Pamela C. Corley and Jesse Hamner, 'The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content' (2015) 49 *Law & Society Review* 4, 920 <<https://www.jstor.org/stable/43670513>> accessed 27 January 2023

Canada

Following *Ontario v Criminal Lawyers' Association of Ontario*⁵⁵, Canadian courts have jurisdiction to appoint *amici curiae* as part of their authority to control their own process and function as a court of law. Moreover, *Cooper v Canada (Human Rights Commission)*⁵⁶ stipulates that, in addition to making submissions on the questions of law, they may also assist the court with respect to the facts.

However, we would refrain from recommending the Canadian model to the Court of Justice of the European Union. This is because, in recent years, the role of the *amicus* in Canada has become partisan – following *R v LePage*⁵⁷, where an *amicus* represented the Appellant, effectively becoming a party to the proceedings. While this is meant to ensure the right to fair trial and representation (as per *R v Ryan (D)*⁵⁸) and help stabilize the proceedings, the partisan *amicus* has led to unnecessary confusion in terms and tension between the role of an *amicus* to represent a party and their obligation of impartiality to the court. Moreover, as *amicus* is essentially the court's lawyer, it has resulted in an absurd situation in which the court is indirectly giving strategic advice to one of the parties. Therefore, while we support the abovementioned proposition of Irish courts that an *amicus* cannot, by its very definition, be strictly non-partisan, we would advise against the CJEU admitting strictly partisan *amici* in the Canadian sense.

3. Recommendations

Since we can conclude that the Court should accept *amicus curiae* briefs, the question arises of which guideline to handle? Should *amicus curiae* participation be advocated in similar terms for the ECJ and for the General Court? Turning to the jurisdiction of the Court of Justice, it might be helpful to examine first the areas of EU law over which the Court has jurisdiction and then to consider the functional division of jurisdiction between the Court and the General Court.⁵⁹

Although Article 256(3) of the Treaty on the Functioning of the European Union (TFEU),⁶⁰ allows for jurisdiction to hear preliminary references in certain areas to be transferred to the General Court, this has not happened so far. In December 2022 the ECJ, however, issued a request to the Parliament and the Council to reform the Statute of the Court and transfer preliminary references to the General Court within certain areas.

The Union judiciary has a two-fold task in connection with the system of legal remedies set down by the Treaties. In the first place, it is responsible for enforcing all the rules of

⁵⁵ [2013] SSC 43, para 46.

⁵⁶ [1996] 3 SCR 854.

⁵⁷ [2006] CanLII 37775 (ONCA).

⁵⁸ [2012] NLCA 9.

⁵⁹ Albors-Llorens, Albertina PY, 2017, para 10.

⁶⁰ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47

Union law. As a result, it affords protection against any act or failure to act on the part of national authorities. In this respect, Union law acts as a 'sword' for safeguarding the rights deriving from that law and hence this implicates certain types of actions and procedures which ensure that the Member States comply with their obligations under the Treaties. In the second place, the Union judicature secures the enforcement of written and unwritten superior rules of Union law and affords protection against any act or failure to act of institutions and other bodies of the Union in breach of those rules. In this respect, Union law acts as a shield'

The Court of Justice now has full jurisdiction in most matters covered by EU law, including on the provisions in the area of freedom, security, and justice but with the restrictions imposed by Article 276 TFEU.⁶¹ While they share some similarities between the ECJ and the General Court, there are several key differences between these two courts.

Here are the main differences: The ECJ receives many cases of a 'constitutional' nature (which would generally support *amicus* participation since highest and constitutional courts often permit it) and addresses a broader range of areas of law, while the General Court hears cases that are sensitive in terms of protection of business secrets, and which tend to be more fact-based. However, the increasing Europeanisation of the law has led to the CJEU becoming an attractive route for litigation.

1. Jurisdiction: The ECJ has jurisdiction over cases involving EU law, while the General Court has jurisdiction over cases involving the interpretation and application of EU law by EU institutions, including the European Commission, the Council of the EU, and the European Parliament.
2. Composition: The ECJ is composed of one judge from each EU member state, plus a number of advocates general who provide non-binding opinions on cases. The General Court is composed of two judges from each EU member state, and there are currently 47 judges serving on the court.
3. Role: The ECJ is primarily responsible for interpreting EU law and ensuring its uniform application across all EU member states. The General Court, on the other hand, is responsible for reviewing decisions made by EU institutions to ensure that they are in compliance with EU law.

⁶¹ According to Art 276 TFEU, the Court shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State.

Having established the arguments in favor of allowing *amici curiae*, it is also advisable that the Court published guidelines for the following reasons:

First, clear guidelines for *amici curiae* create **certainty and consistency** in the judicial decision-making process. Without clear rules and procedures for the submission and consideration of amicus briefs, there is a risk that their use could be arbitrary and unpredictable, leading to potential bias and confusion. Consistent guidelines would ensure greater transparency and accountability in the decision-making process. By establishing clear criteria for the selection of *amici*, the scope of their submissions, and the factors to be considered in evaluating their contributions, the courts could ensure that the use of *amicus* briefs is fair and impartial. This would help to promote trust and confidence in the EU judicial system, as litigants and stakeholders would have a clearer understanding of the decision-making process and the factors that are considered. Inconsistent guidelines could also create the potential for bias and confusion, leading to differing outcomes in similar cases. This would undermine the credibility and legitimacy of the EU judicial system and could result in challenges to the decisions of the courts.

Second, guidelines for *amici curiae* would ensure **greater transparency** and accountability in the decision-making process. By establishing clear criteria for the selection of *amici*, the scope of their submissions, and the factors to be considered in evaluating their contributions, the courts could ensure that the use of amicus briefs is fair and impartial. It should be borne in mind that, currently, the Court of Justice has not clear criteria, so, even though, “in principle”, it rejects *amicus curiae* briefs,⁶² it seems that, in certain cases, it accepts them. In addition consistent guidelines would facilitate coordination and collaboration among *amici*. When *amici* are working across multiple cases and courts, consistent guidelines would help to streamline the submitting.

Third, guidelines for *amici curiae* would help to promote the legitimacy and credibility of the EU judicial system. By providing a clear and consistent framework for the use of *amicus* briefs, the courts could enhance the **quality and legitimacy of their decisions**, while also promoting public confidence in the EU's legal system.

In conclusion, the General Court should accept *amicus curiae* briefs in the same terms as the Court of Justice to ensure that all relevant information and perspectives are considered when making important legal decisions. By allowing interested parties to submit briefs, the court can benefit from a diversity of viewpoints and expertise, leading to more informed and just outcomes. Furthermore, accepting amicus briefs can promote transparency and accountability in the judicial process, as it demonstrates a commitment to hearing from all stakeholders and considering their arguments. Overall, the acceptance of *amicus curiae* briefs is a valuable tool for promoting fairness and ensuring that legal decisions are based on a comprehensive and well-informed understanding of the issues at hand.

⁶² Email (n 14).

Proposition for guidelines (understood as guidance criteria and not admissibility criteria)

No need for a leave to submit

In the ECtHR, it is necessary to present an application in order to submit an *amicus curiae* brief. The President of the Chamber will then decide whether it should be accepted or refused 'in the interests of the proper administration of justice'.⁶³ On the contrary, the Supreme Court of the United States does not require such an application. Instead, the brief is presented.⁶⁴

It should be noted that judges may be influenced by information available elsewhere and not only in the Court. Consequently, if no requisites are established, everyone could present valuable information to the Court, not only legal professionals or scholars. In sum, access to EU Justice could be democratized.

As it happens in the International Court of Justice, *amicus curiae* briefs could be treated as publications in the public domain.⁶⁵ They would not be part of the case file,⁶⁶ but they would be available to the parties and to the Court.⁶⁷

Moreover, it should be noted that even though the President of the ECtHR Chamber may reject the application to present an *amicus curiae* brief, that rarely happens.⁶⁸ This shows that making the submission of *amicus curiae* briefs contingent on the grant of the Court is not necessary: should it consider that it is useless, it could simply not take it into consideration.

⁶³ European Court of Human Rights, 'Rules of Court', Rule 44(3)(a) (*European Court of Human Rights*, 20 March 2023) <https://www.echr.coe.int/documents/rules_court_eng.pdf> accessed 20 March 2023.

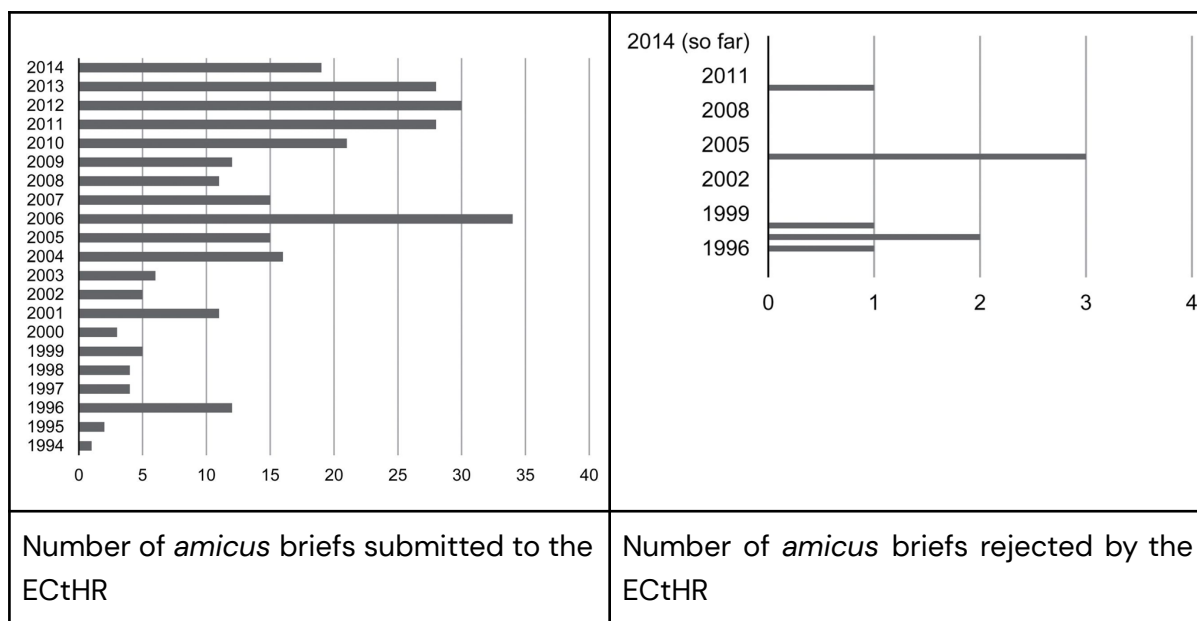
⁶⁴ Supreme Court of the United States, 'Rules of the Supreme Court of the United States, Rule 37' (*Supreme Court of the United States*, 5 December 2022) <<https://www.supremecourt.gov/filingandrules/2023RulesoftheCourt.pdf>> accessed 14 March 2023.

⁶⁵ International Court of Justice, 'Practice Directions', XII(2) (*International Court of Justice*) <<https://www.icj-cij.org/practice-directions>> accessed 14 March 2023.

⁶⁶ Ibid, XII(1).

⁶⁷ Ibid, XII(3).

⁶⁸ Laura Van den Eynde, 'An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights' (2013) 31 *Netherlands Quarterly of Human Rights* 271, 281 <<https://doi.org/10.1177/016934411303100304>> accessed 20 February 2023; and Anna Dolidze, 'Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant' (2015), 26(4) *European Journal of International Law* 851, 866 <<https://doi.org/10.1093/ejil/chv059>> accessed 12 February 2023.



In fact, the Rules of the Supreme Court of the United States have been recently modified and they no longer require the *amicus* to file a motion for leave to file the brief. According to the Court, ‘the consent requirement may have served a useful gatekeeping function in the past, it no longer does so, and compliance with the rule imposes unnecessary burdens upon litigants and the Court’.⁶⁹

Of course, the Court should be able to refuse briefs that do not proceed from international organizations or representative associations, that are not related to the case, or that are contrary to the public order, such as the ones containing violent or pornographic content.

Amici curiae role

Secondly, it seems that the *amici curiae* role should not be restricted to supporting one of the parties, as it happens with interveners. On the contrary, originally, *amici* acted for no one.⁷⁰ In fact, the ECtHR requires them to intervene ‘as impartially and objectively as possible’ and, thus, it prohibits them to ‘express support directly for one or the other party’.⁷¹ Instead, we consider that what matters here is that they can make an innovative approach to the problem.⁷²

⁶⁹ See Clerk of the Supreme Court of the United States, ‘Revisions to Rules of the Supreme Court of the United States. Adopted December 5, 2022. Effective January 1, 2023’ (Supreme Court of the United States, 5 December 2022) <<https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf>> accessed 9 March 2023.

⁷⁰ Samuel Krislov, ‘The Amicus Curiae Brief: From Friendship to Advocacy’ (1963), 72(4) *The Yale Law Journal* 694, 701 <<https://doi.org/10.2307/794698>> accessed 12 February 2023.

⁷¹ President of the European Court of Human Rights, ‘Third-party intervention under Article 36 § 2 of the Convention or under Article 3, second sentence, of Protocol No. 16’ 3 (*European Court of Human Rights*, 20 March 2023) <https://www.echr.coe.int/documents/rules_court_eng.pdf> accessed 20 March 2023.

⁷² Ibid; Supreme Court of the United States (n 64) Rule 37(1).

Amici should also be able to present their briefs in cases that involve EU Institutions and Member States, since they tend to have an important public interest at stake. For instance, representative associations of the Polish judiciary could have given an important insight to the Court of Justice into their situation in the case *Commission v Poland (Independence of the Supreme Court)*.⁷³ However, under the current rules, they would not have been able to intervene.

The document and its presentation

The *amicus curiae* brief should contain a table of contents,⁷⁴ as well as, in separate sections, the case it is related to, an abstract, the interest of the *amicus*, the arguments and a conclusion.⁷⁵ In general, recommendations of the Court regarding the content of procedural documents should be followed.⁷⁶

Following the nature of *amicus curiae* briefs, the document should contain highly pertinent legal or factual points regarding the case at hand, ‘usually on the basis of [the *amicus curiae*’s special expertise or knowledge⁷⁷ (e.g., if the case touches upon a certain environmental matter, the brief should bring information on that case in particular and not the greater and broader issue affected). Novelty would also be a required characteristic.

In general, a maximum length of 10 pages in cases before the Court of Justice should be recommended.⁷⁸ In cases before the General Court, that length should rise to 20 pages.⁷⁹ However, in urgent procedures, the Court may establish another one.⁸⁰

It could be submitted online, as it happens in public consultations of the European Commission.⁸¹ The Registrar could assign it to the proper case and make it available for the Court and for the parties once the deadline is finished.

⁷³ CJEU (Judgment of 24 June 2019), Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531.

⁷⁴ Supreme Court of the United States (n 64) Rule 34(2).

⁷⁵ Supreme Court of the United States (n 64) Rule 37(5).

⁷⁶ For the Court of Justice, see Practice Directions to Parties Concerning Cases Brought Before the Court [2020] OJ L142/1, points 40–44. For the General Court, see Practice rules for the implementation of the Rules of Procedure of the General Court [2015] OJ L152/1, points 80–87, which are mandatory.

⁷⁷ President of the ECtHR (n 71) 2 and 34(b).

⁷⁸ That is the maximum length that the Court of Justice recommends for statements in intervention (Practice Directions to Parties Concerning Cases Brought Before the Court [2020] OJ L142/1, para 34). It tends to apply in the ECtHR as well [President of the ECtHR, n 61, 33(c)].

⁷⁹ The General Court establishes a maximum length of 20 pages in statements in intervention (Practice rules for the implementation of the Rules of Procedure of the General Court [2015] OJ L152/1, para 105).

⁸⁰ Article 109(2) RPCJ and Article 151(3) RPGC.

⁸¹ See European Commission, ‘Have Your Say’ (*European Commission*) <https://ec.europa.eu/info/law/better-regulation/have-your-say_en> accessed 14 March 2023.

The language

As *amicus curiae* briefs would not be considered procedural documents, there would be no need for the Court to translate them.⁸² Even though they could be presented in any official language of the EU, it should be recommended that they use either French, as it is the language for work at the Court, or English, since it is commonly known.

The moment

As we have already mentioned, it is essential that *amici curiae* raise new questions. To do so, they need to take into consideration the position of the parties. Since the defendant usually has two months to lodge his or her defence,⁸³ *amici* should present their briefs after that moment.

It could be set a one month deadline⁸⁴ (or, in expedited or urgent procedures, the time fixed by the President,⁸⁵ if any).⁸⁶ By such a deadline, the parties and the Court would be able to analyse the briefs before the hearings, so they could be taken into account in the debate.

To guarantee novelty in the briefs, access to procedural documents is necessary for them. It should be noted that it is possible for anyone to consult the register and obtain copies as long as they pay a charge.⁸⁷ The parties should be able to identify confidential items or documents as it happens now.⁸⁸

To help potential *amici* to be aware of new cases that may be of their interest, the Court could establish an automated notification system based on the information available in the CURIA database.⁸⁹ They would be able to select the parties and subjects in which they are interested, as cases are classified on those grounds.

⁸² Article 39(1) RPCJ; Article 47(1) RPGC.

⁸³ Article 124(1) RPCJ for direct actions and Article 172 RPCJ for appeals against decisions of the General Court.

⁸⁴ Note that the average duration of the proceedings in 2022 was 16,4 months in the Court of Justice and 16,2 months in the General Court. See: 'Judicial statistics 2022: proceedings marked by the major issues facing today's world (the rule of law, the environment, the protection of privacy in the digital era and so forth) and by the restrictive measures adopted by the European Union in the context of the war in Ukraine' (Court of Justice of the European Union, 3 March 2023) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2023-03/cp230042en.pdf>> accessed 8 March 2023.

⁸⁵ In line with Articles 105(3) and 109(2) RPCJ.

⁸⁶ Articles 111 and 134(1) RPCJ.

⁸⁷ Article 22(1) RPCJ.

⁸⁸ Article 131(2) RPCJ; Article 144(2) RPGC.

⁸⁹ In fact, in the ECtHR, the deadline to submit *amicus curiae* briefs does not start counting until the case is published at its database. See ECtHR (n 63), Rule 44(3)(b).

PUBLICATIONS

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Maria Udrescu | Journaliste en charge des Affaires européennes



Publié le 21-03-2023 à 21h45 - Mis à jour le 22-03-2023 à 08h48



Elene, Anna, Zuzanna et Tekla se prennent en selfie lors du premier jour de l'Académie de notre état de droit, à Bruxelles, le 16 mars. ©M.U.

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THANK YOU!

We would like to thank everyone who has downloaded this report and read the policy proposals prepared by the participants of the Our Rule of Law Academy.

The Our Rule of Law Academy showed us that there are motivated young students, who are willing to take the extra mile for the protection of European Democracy. The only thing they need is a space to do it and support for their actions.

We like to thank all mentors who made the Our Rule of Law Academy possible – Professor Alberto Alemanno, Professor Petra Bárd, Dr Matteo Bonelli, Mr Aleksejs Dimitrovs, Dr Cassandra Emmons, Dr Joelle Grogan, Dr Barbara Grabowska-Moroz, Professor Filipe Marques, Ms Márta Pardavi, Professor Laurent Pech, Professor Sébastien Platon, Dr Evangelia Psychogiopoulou, Dr Yustyna Samahalska, Professor Daniel Sarmiento, Professor Jan Wouters, Dr Anna Wójcik, Dr Wouter Wolfs, Professor Gráinne de Búrca, Professor Jasper Krommendijk, Dr Vasiliki Kosta, Professor Marlene Wind, and Mr Jakub Jaraczewski.

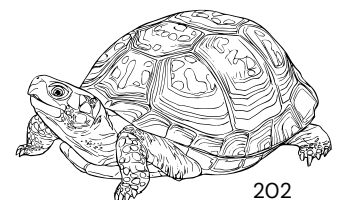
There are also two inspiring role models that deserve special mention – Professor Kim Lane Scheppele and Eleanor Sharpston. Words cannot express our gratitude for your support. We hope to follow in your footsteps.

Our gratitude also goes to Akudo McGee – may we never be turtles on our backs.

Thank you to our partners: Meijers Committee, Dutch Permanent Representation to the EU, Radboud University, Maastricht Campus Brussels, the Good Lobby, and the Good Lobby Profs. Thank you for believing in students and providing them with space and resources to do something meaningful.

And John, thank you for your endless support and encouragement. We wish every student could have a mentor like you.

We have energy for much more, so stay tuned!
Elene Amiranashvili, Tekla Emborg, Zuzanna Uba, and Anna Walczak



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ANNEX 1:

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