Jean Monnet Chair
"The European Union's fundamental values: Democracy, Rule of Law and Protection of Human Rights"

Teaching Materials for "Democracy and Rule of Law in the European Union"

ბათუმის შოთა რუსთაველის სახელმწიფო უნივერსიტეტი

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Democracy and Rule of Law in the European Union

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Under the rule of law, governmental powers are limited by law and may be exercised only on the basis of law. An independent judiciary is indispensable to guaranteeing this state of affairs, and appropriate procedures, including legal remedies, must be in place to guarantee that individuals can protect their rights and trigger judicial review of governmental action. The rule of law has been an enduring basic value of the European Union from its inception, and the principles of the rule of law have been enshrined in the case law of the European Court of Justice (ECJ). The EU's very design is based on a shared responsibility for upholding and enforcing EU law, which is the joint task of the ECJ and national courts. The rule of law within the Member States, at least in areas covered by EU law, is therefore indispensable for the proper functioning of the Union and its legal system. Furthermore, the rule of law is one of the EU's fundamental values, enshrined in Article 2 of the Treaty on European Union, which must be respected by the Member States, including in areas not covered by EU law.

Should an EU Member State be suspected of breaching the rule of law, a number of procedures are available to verify this and, if needed, remedy the situation. First of all, there are three 'soft' mechanisms, which do not give rise to legally binding results, yet nevertheless have a certain political resonance and can be seen as a preparatory step towards legal action. These include the transitional 'special cooperation and verification mechanism' (included in the Act of Accession for Bulgaria and Romania), the Commission's rule of law framework, and the Council's annual dialogues on the rule of law. Apart from these 'soft' mechanisms, three legal procedures are also available which, if concluded, can produce legally binding results. First of all, infringement proceedings can be brought by the Commission if the alleged breach could also amount to the violation of a specific rule of EU law. Secondly, national courts from a Member State in which the rule of law is breached may refer preliminary questions to the ECJ, seeking guidance on the interpretation of EU law with a view to assessing the compatibility of national legislation. Finally, the breach of values procedure can be triggered, possibly leading to the suspension of a Member State's membership rights.

In this Briefing

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Concept of the rule of law in the EU

Understanding the rule of law

The origins of the notion of the rule of law can be traced back to ancient Greek political philosophy, where it was first formulated by Aristotle.[1] Today, in each EU Member State, the concept of the rule of law is understood somewhat differently.[2] However, a number of key elements of the notion can be identified.[3] First of all, it is the idea of government limited by law (principle of legality)[4] whereby officials must operate within the framework of existing law (including the principle of 'lawful administration').[5] Any change of law must follow prescribed procedures. Limited government is considered a crucial element to reducing the arbitrariness of officials' decisions,[6] thereby drawing the line between actual 'rule *of* law' and mere 'rule *by* law'.[7] A second element, known as formal legality (or 'internal morality' of the law) requires that laws must be laid down in advance (no retroactive laws), they must be general (applicable to everyone in a similar situation), and they must be publicly available (promulgated).[8] Some authors also add the principle of proportionality[9] and the requirement for a hierarchical structure within legal systems, whereby inferior rules must conform to superior ones, especially constitutional ones (constitutionalism).[10] A third element is the rule of law requirement for access to an independent and unbiased judiciary enforcing these principles (legal remedies), with appropriate procedures in place allowing citizens and businesses to present their view and argue their position.[11]

EU citizens on the rule of law

A special Eurobarometer on the rule of law (April 2019) showed overwhelming popular support for this value among EU citizens. Some 94 % find judges' independence essential or important, in contrast to only 4 % respondents who consider it unimportant. Likewise, 94 % citizens think that it is important or essential that court rulings be respected, and 91 % recognise the need for judicial review of public authorities' activities. Furthermore, 89 % see a need for independent review by a constitutional court of the constitutionality of laws adopted by the legislature.

Rule of law in the EU legal order

The basic principles of the rule of law were laid down in early ECJ case law.[12] As the ECJ recently recalled, the EU 'is a union based on the rule of law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act' (Case C-64/16 *Associação Sindical dos Juízes Portugueses* ['*ASJP*'], para. 31). This possibility for individuals to seek effective judicial review is 'of the essence of the rule of law' in the Union (Case C-72/15 *Rosneft*, para. 73). The principles of the rule of law, stemming from the common traditions of the Member States and adopted as general principles of EU law in ECJ case law, have been, to a great extent, codified in primary law – in particular the Treaty on European Union (TEU) and the Charter of Fundamental Rights (CFR). In the TEU's preamble, the Member States confirm their 'attachment to the principles … of the rule of law'. This idea is reiterated in Article 2 TEU which indicates that the EU 'is founded on … rule of law', and that these 'values are common to the Member States'. As the ECJ recently highlighted, respect for the rule of law as a value is the basis for common trust between the national judiciaries within the EU (*ASJP*, para. 30). Elements of the rule of law are also codified in the Charter. In particular, Article 41 provides for the right to good administration, and Article 47 provides for the right to an effective remedy and a fair trial.

The European Commission's understanding of the rule of law

In its recent communication of April 2019 on 'Further strengthening the Rule of Law within the Union', the Commission proposed its own definition of the concept of the rule of law:

> *Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.*

While to a great extent this definition corresponds to the elements identified by legal theorists and political scientists (see above), it also includes such substantive elements as democracy, fundamental rights and the separation of powers, which go beyond a formal understanding of the rule of law. The Commission's July 2019 communication on the rule of law (see below) essentially confirmed the broad definition above, blending the rule of law concept with democracy and fundamental rights.

Recent ECJ case law on the rule of law and judicial independence

In a number of recent cases, the ECJ has developed its doctrine on the rule of law and judicial independence, based on Article 19(1), first paragraph, TEU. That provision requires that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' In the *ASJP case*, para. 32, the ECJ held that Article 19 TEU 'gives concrete expression to the value of the rule of law' enshrined in Article 2 TEU. This latter directly produces obligations incumbent upon the Member State, on account of the principle of sincere cooperation, enshrined in Article 4(3) TEU (*ASJP*, para. 34). In the Case C-619/18 *Commission v Poland (Independence of Supreme Court)*, para. 52, the Court held that 'although ... the organisation of justice in the Member States falls within the competence of [the] Member States, ... when exercising that competence, the Member States are required to comply with their obligations deriving from EU law'.

Specifically, according to the ECJ case law, Member States have a duty to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law (Case C-583/11 P *Inuit Tapiriit Kanatami*, para. 100-101; *ASJP*, para. 34; C-619/18, para 48) and to ensure that its national courts or tribunals which operate within areas covered by EU law meet the requirements of effective judicial protection (*ASJP*, para. 37). This includes safeguarding judicial independence, as required by Article 47 of the Charter (*ASJP*, para. 41). According to the ECJ, 'the guarantee of independence, which is inherent in the task of adjudication ... is required not only at EU level ..., but also at the level of the Member States as regards national courts' (*ASJP*, para. 42). In the *ASJP* case (para. 44), the Court defined the notion of independence as a requirement for the court to exercise its judicial functions wholly autonomously, without being subject to any hierarchical constraint or being subordinated to any other body. A court may not take orders or instructions from any source whatsoever, it must be protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.

In Case C-216/18 PPU *Celmer*, para. 65, the ECJ underlined that a national court must be truly impartial, ensuring that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. Moreover, it must maintain objectivity and have no interest in the outcome of the proceedings apart from the 'strict application of the rule of law'. The rules on the composition of courts and on the appointment, length of service, rejection, dismissal and abstention of judges must be framed in a way that dispels 'any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it' (para. 66). Specifically, the dismissal of judges must be determined by express legislative provisions (para. 66). A disciplinary regime for judges must display the necessary guarantees to prevent any risk of being used as a system of political control of the content of judicial decisions (para. 67).

Types of mechanisms for protecting the rule of law in the EU

The mechanisms which can be deployed by various institutional actors in case of a suspected breach of the rule of law by a Member State[13] can be divided into political ones, which do not give rise to legally binding effects, and legal ones, which produce legal effects, including: (1) a legally binding declaration that a Member State has violated a given rule of EU law (Articles 258-260 TFEU); (2) a legally binding interpretation of EU law confirming that a given Member State's laws, regulations or practices violate the rule of law (Article 267 TFEU); (3) a financial penalty imposed upon a Member State (Article 260(2) TFEU) for non-respect of a judgment rendered at the end of an infringement procedure; as well as (4) the suspension of a Member State's voting rights in the EU (Article 7 TEU).[14]

The table below provides an overview of these mechanisms which are discussed in greater detail in the subsequent sections of this briefing.

Table 1 – Typology of mechanisms for protecting the rule of law in the Member States.

Name of mechanism	Legal basis	Initiator	Decision-maker	Effects
Cooperation and verification mechanism	Acts of Accession RO, BG	Commission	Commission	Non-binding recommendations
Commission rule of law framework	n/a	Commission	Commission	Non-binding recommendations
Council's rule of law dialogues	n/a	Council	Council	n/a
Infringement proceedings	Article 258 TFEU	Commission	Court of Justice	Legally binding determination of breach of EU law, possibly interim measures and financial penalties
Preliminary references	Article 267 TFEU	National courts	Court of Justice	Legally binding interpretation of EU law, empowering national courts to set aside non-compliant national legislation
Breach of values procedure – preventive mechanism	Article 7(1) TEU	Commission, Parliament or 1/3 of Member States	Council (majority of 4/5) after obtaining the consent of the EP (2/3 of votes cast, representing the majority of MEPs)	Declaration that there is a clear risk of breach of EU values by the Member State concerned and possible recommendations addressed by the Council to that Member State
Breach of values procedure – sanctions mechanism	Article 7(2)-(3) TEU	Commission or 1/3 of Member States	Step 1: European Council (unanimity), Parliament (consent by 2/3 of votes cast, representing the majority of MEPs); Step 2: Council by qualified majority	Suspension of certain rights deriving from the application of the Treaties, including voting rights of the Member State concerned in the Council

Source: EPRS, author's own elaboration.

Political mechanisms for protecting the rule of law

Cooperation and verification mechanism for Bulgaria and Romania

The Cooperation and verification mechanism for Bulgaria and Romania is a temporary mechanism, set up in 2007, on the assumption that the two then-new Member States 'still had progress to make in the fields of judicial reform, corruption and (for Bulgaria) organised crime'. Some 12 years later, the mechanism is still in place, and the Commission regularly publishes progress reports. The mechanism is 'soft', as no sanctions are provided for in case of lack of progress. In October 2019, the Commission indicated that Bulgaria had now met all its commitments, however, the final decision on ending the mechanism will be for the new Commission.

Commission rule of law framework (pre-Article 7 procedure)

In 2014, the Commission introduced a 'rule of framework' providing a space for structured dialogue with Member States suspected of rule of law breaches. The framework encompasses three stages: assessment, recommendation and follow-up by the Commission.[15] It does not, as such, give rise to binding legal effects.

Activation of the rule of law framework with regard to Poland

The framework was activated for the first time with regard to Poland in 2016. Under the rule of law framework, the Commission engaged in an exchange of views with the Polish government and issued four recommendations: 2016/1374, 2016/146, 2017/1520, and 2018/103. In the Commission's view, some Polish Constitutional Court (PCC) judges had been unlawfully elected and the PCC's independence and legitimacy had allegedly been compromised by the parliament and government. The Commission demanded that the government implement PCC rulings of 3 December 2015 (Case K 34/15) and 9 December 2015 (K 35/15), which 'require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge' at the PCC. It also demanded that it publish and implement three PCC rulings (K 47/15, K 39/16, and K 44/16), which the government initially refused to do, arguing that they had been issued in violation of amending act of 22 December 2015 and the Constitutional Court Act of 22 July 2016, respectively (the former ruled unconstitutional by the PCC in Case K 47/15, in which the Court proceeded directly on the basis of the Constitution itself), before ultimately publishing them on 5 June 2018.[16] The Commission also criticised the reform of the Supreme Court, the National Council of the Judiciary (NCJ), and of the ordinary courts, and demanded that they be reversed. In the meantime, the Polish government was asked to refrain from actions and public statements which could further undermine the legitimacy of the judiciary and to ensure that any future reforms of the Polish justice system uphold the rule of law, comply with EU law and European standards and are prepared in close cooperation with the judiciary and all stakeholders.

The Polish government disagreed with the Commission's position, presenting its views inter alia in an extensive White Paper on the Reform of the Polish Judiciary (March 2018). The government argued that it had to launch a deep reform of the judiciary, due to low public trust in courts, the excessive length of judiciary proceedings, as well as a 'failure to account for the communist past'. The White Paper argued that the Supreme Court is still staffed with judges who had decided political cases before the transformation of 1989 (para. 10ff). Furthermore, the situation prior to the reform amounted to an imbalance between the judicial and other branches of government, in which the judiciary had developed a 'peculiar bureaucratic corporate culture' (para. 25ff). The hitherto existing system of disciplinary proceedings was described as 'ineffective'. Against this backdrop, the Polish government argued that the goal of the reforms is to 'redress the balance, while safeguarding and even enhancing all guarantees of independence ... fully in line with the standards underpinning the European Union' (para. 33, 36). Concerning the introduction of an extraordinary appeal, questioned by the Commission, the government pointed out that it is available to protect fundamental rights or in case of other flagrant violations of the law, with regulations in place designed to ensure that legal certainty is maintained (para 51ff). On the new disciplinary proceedings, the government defended the introduction of lay judges (assessors) by indicating that 'Including lay judges in the process of adjudication (with minority vote) resembles the British solution, where the procedure foresees that the panel adjudicating about disciplinary misconduct must always be composed of – next to two judges – two other persons, none of whom can be a judge or even a lawyer' (para. 63). The government added that the involvement of the Minister of Justice is provided only in the initial phase. The White Paper contains detailed arguments concerning judicial independence, which, in the Government's view, has only been strengthened by the reforms (para. 67ff). As concerns the NCJ, the Government pointed out that the previous system of election of its members, which favoured judges of higher courts, was declared unconstitutional (Case K 5/17), whereas the new system (providing for election by Parliament from among judges) is more democratic. Finally, on the Constitutional Court, the Polish government view is that the previous Parliament (2011-2015 term) was responsible for breaching the law by appointing five judges 'in advance', whereas the 2015-2019 Parliament has rectified what it perceived as a breach of law (para. 139ff), therefore the Court is correctly composed and that there is no issue of new judges elected to already-filled positions. The government's view differs from that of the Constitutional Court itself, expressed in judgments in Case K 34/15 and Case K 35/15.

Following the issuing of recommendations and exchanges of view with the Polish government, the Commission decided to trigger further mechanisms, potentially leading to legally binding effects, including infringement proceedings and the breach of values procedure (see below).

Council annual rule of law dialogues

In December 2014, the Council decided to establish its own annual peer-to-peer dialogues on the rule of law.[17] In their conclusions, the Council and the Member States in Council agreed to set up an annual dialogue in the General Affairs Council, to be prepared by Coreper (the Committee of Permanent Representatives to the EU of the governments of the Member States). The dialogue is to be based on the principles of objectivity, non-discrimination and equal treatment of all Member States, conducted on a non-partisan and evidence-based approach and without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States.

Legal mechanisms for protecting the rule of law

Infringement proceedings (Article 258 TFEU)

Legal framework

As 'guardian of the Treaties', the European Commission is empowered to commence infringement proceedings (Article 258 TFEU) against a Member State suspected of breaching the rule of law principles, if they are directly enshrined in the Treaties. The most important rules of primary EU law concerning the rule of law are Article 19(1) TEU and Article 47 CFR.

Recent and ongoing cases concerning the rule of law in the Member States

Early retirement of judges in Hungary (Case C-286/12, completed)

The first infringement case brought to the ECJ on a rule of law issue was Case C-286/12 *Commission v Hungary (Compulsory retirement of judges)*, regarding the lowering of the retirement age of Hungarian judges and other legal professionals from 70 to 62 years. Technically, the Commission based its case on the Equal Treatment Directive, but from the context, it appeared to observers that the removal of judges, prosecutors and notaries had adverse implications for judicial independence.[18] The Court agreed with the Commission that the Hungarian compulsory retirement scheme violated the principle of proportionality, and therefore illegal under the Directive.

Early retirement of ordinary judges in Poland (Case C-192/18)

On 15 March 2018, the Commission took Poland to the ECJ on the issue of differentiated pension ages for male and female judges, as well as on the discretionary power of the Minister of Justice to extend the length of service for individual judges, issues that had been addressed in the Commission's earlier recommendations (see above). The Commission not only based its case on the Equal Treatment Directive, but also Article 19(1) TEU on judicial remedies and Article 47 CFR on access to justice. In the meantime, Poland modified its laws, providing for the same pension age for female and male judges, and transferring the power to extend service from the Minister of Justice to the NCJ. Before the Court, Poland argued that the case is inadmissible because the national rules had already been amended. Concerning the allegation of a breach of Article 19 TEU, Poland argued that the Commission's application is generalised, hypothetical and abstract, as well as encroaching upon Poland's competence to organise its own system for the administration of justice. Advocate General Tanchev delivered his opinion to the ECJ on 20 June 2019, in which he agreed with the Commission to a large extent. In its judgment, delivered on 5 November 2019, the Court upheld the action brought by the Commission for failure to fulfil obligations and held that Poland had failed to fulfil its obligations under EU law by establishing a different retirement age for men and women who were judges or public prosecutors in Poland and by lowering the retirement age of judges of the ordinary courts while conferring on the Minister for Justice the power to extend the period of active service of those judges.

Early retirement of Supreme Court judges in Poland (Case C-619/18, completed)

A separate case against Poland was filed by the Commission concerning the lowering of the retirement age of Supreme Court judges (Case C-619/18), an issue also addressed earlier in the Commission's recommendations (see above). On the other hand, the Polish legislation gave the President of Poland the power to extend, at his discretion, the period in office of judges affected by the new legislation, thereby enabling the President to allow judges to remain in their posts for the period of their original appointment (i.e. until the previously applicable retirement age). The Commission argued that the Polish legislation breaches the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 CFR. The ECJ introduced interim measures, effectively suspending the application of the Polish legislation and reinstating the Supreme Court judges. However, the measures were implemented by a separate act of the Polish Parliament of 21 November 2018, reinstating the judges in question on the authority of the Polish legislature.

Poland subsequently asked the Court to close the case as devoid of purpose (since the judges had already been reinstated by the act of 21 November 2018), a request to which the Court did not agree. On the substance, Poland, supported by Hungary, argued that that the contested national rules do not fall within the scope of Article 19(1) TEU nor Article 47 CFR. The latter article does not apply, according to the two Member States, because no fundamental rights were violated and the law on organisation of justice does not implement any EU legal act. Concerning the specific issues, Poland argued that early retirement cannot be equated with dismissal, as the judges in question continue to receive their salary (as a 'judge in state of retirement'). Furthermore, Poland argued that the reform aims at aligning the judicial retirement age with the standard retirement age. The President's discretional power to prolong a judge's mandate does not affect the judge's independence, which is guaranteed through the secrecy of deliberations and rules on composition of the Supreme Court's chambers. Finally, Poland pointed to the absence of EU-wide standards on judicial self-government bodies participating in the appointment of judges. The Court delivered its judgment on 24 June 2019, in which it found that by lowering the retirement age of the judges of the Supreme Court for judges in post appointed to that court before 3 April 2018 and, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

New disciplinary regime for judges in Poland (case filed on 29 October 2019)

On 3 April 2019, the Commission launched infringement proceedings against Poland concerning the new disciplinary regime for judges as provided for by the Supreme Court Act 2017 and the amended Ordinary Courts Act 2001. In its letter of formal notice, the Commission argued that the disciplinary regime amounts to a breach of Article 19(1) TEU in connection with Article 47 CFR. On 17 July, the Commission sent a reasoned opinion on the proceedings, giving Poland two months to amend its legislation. On 10 October, the Commission decided to refer Poland to the ECJ, requesting an expedited procedure. The Court received the Commission's application on 29 October.

Preliminary references from national courts (Article 267 TFEU)

Legal framework

The preliminary ruling procedure (Article 267 TFEU) is the very 'keystone' of the EU judicial system (Case C-619/18, para. 45). National courts may use the preliminary ruling procedure to seek an interpretation of EU law, including guidance from the ECJ allowing them to assess, on their own authority, the conformity of specific national measures with EU law. The answer provided in the ECJ's ruling is not only binding on the individual national court which asked it, but as a precedent[19] contains an authoritative interpretation of EU law, binding on all Member States and their authorities. The duty to follow such an interpretation follows from the principle of harmonious interpretation.[20] Failure to comply with an interpretation of EU law provided in a preliminary ruling is a breach of EU law that may give rise to infringement proceedings brought by the Commission.[21]

Recent and ongoing cases concerning rule of law in the Member States

New Disciplinary Chamber of the Polish Supreme Court (case pending)

Joined Cases C-585/18, C-624/18 and C-625/18 *AK* v *KRS (Independence of the Disciplinary Chamber of the Supreme Court)* concern appeals brought by Polish Supreme Administrative Court and Supreme Court judges who launched legal action concerning the lowering of their retirement age. The referring court in all three cases – the Labour Chamber of the Supreme Court – questions the independence of the newly created Disciplinary Chamber of the Supreme Court (DCSC). The Polish government argues that the system of appointment of DCSC judges does not diverge from that for judicial appointments in other Member States and even to the ECJ. The appointment of judges is a prerogative of the President, who is not bound by the opinion of the National Council of the Judiciary (NCJ). The influence of politicians, and judges appointed by parliament, who are members of the NCJ, upon the election of DCSC judges does not compromise the independence of the latter, which is safeguarded by an elaborate system of guarantees, linked in particular to their appointment for an unlimited time, irremovability, immunity, duty to remain apolitical and abstain from extra-judicial activities, and remuneration. The Commission disagreed, pointing inter alia to the fact that the DCSC is a newly created body with newly appointed judges. Attorney General Tanchev delivered his opinion on 27 June 2019, proposing that the ECJ rule that the requirements of judicial independence under Article 47 CFR should be interpreted as meaning that a newly created chamber of a court of last instance of a Member State that has jurisdiction to hear a case by a national court judge and is composed exclusively of judges selected by a national body (such as the NCJ), and that is not guaranteed to be independent from the legislative and executive authorities, does not satisfy those requirements. A judgment is expected on 19 November 2019.

New disciplinary procedure for Polish judges (case pending)

In Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* v *Wojewoda Łódzki,* two Polish judges have sought guidance from the ECJ as to whether the new regime for disciplinary proceedings against judges in Poland meets the requirements of judicial independence under Article 19(1) TEU. The government of Poland argued that rules on disciplinary proceedings against judges fall within the competences of the Member States, and for this reason, EU law does not apply to their assessment. Furthermore, the Polish government adds that the ECJ's reply is not necessary to resolve the disputes in the main proceedings, as they have nothing to do with the disciplinary regime in Poland (the referring judges are not currently subject to any disciplinary proceedings). On 24 September 2019, Attorney General Tanchev delivered his opinion, arguing that whereas the legal questions fall within the scope of EU law (Article 19 TEU), they are nonetheless inadmissible, because the judges have failed to explain in what way the national legislation in question would affect their independence and have not provided any factual or legal elements to substantiate the need for a preliminary ruling for resolving the cases with which they are dealing.

Breach of values procedure (Article 7 TEU)

Legal framework

The Article 7 TEU procedure is concerned, strictly speaking, not only with the rule of law, but also breaches of EU values. In fact, there are two distinct procedures – the preventive mechanism (Article 7(1) TEU), and the sanctions mechanism (Article 7(2)-(3) TEU). Both mechanisms are independent of each other, meaning that the sanctions mechanism can be triggered without going through the preventive mechanism, and the preventive mechanism does not necessarily entail any sanctions.

Preventive mechanism

Under the preventive mechanism (Article 7(1) TEU), the Council may determine that there is a clear risk of a serious breach of EU values by a Member State. The procedure can be initiated by the Parliament, Commission or one third of EU Member States. The Council issues a decision by a

majority of four fifths of its members after having received Parliament's consent which, in turn, requires a two-thirds majority of the votes cast, representing an absolute majority of all Members (Article 354(4) TFEU). The Member State incriminated may not vote in the Council.

Sanctions mechanism

Under Article 7(2)-(3) TEU, sanctions can be triggered with a proposal from the Commission or one third of Member States, but not by the Parliament. In a first step, on such a proposal, the European Council (i.e. Heads of State or Government) determines, by unanimity and after obtaining Parliament's consent (by a two-thirds majority of the votes cast, and an absolute majority of Members under Article 354(4) TFEU), the existence of a serious and persistent breach of EU values by a Member State. The incriminated Member State may not vote in the European Council. In a second step, the Council may suspend certain membership rights of the Member State concerned, including voting rights in the Council. This decision is adopted by qualified majority (354(1) TFEU) and the Council enjoys discretion as to the choice of sanctions to be imposed. Importantly, Parliament's consent is necessary only for the first phase of the sanctions mechanism, but not for the second phase (decision on the suspension of membership rights). The representatives of the Member State concerned do not take part in the votes in the Council and European Council, and are not counted in calculating the majorities necessary to trigger sanctions or a preventive determination, or to adopt other decisions (Article 354(1) TFEU). The need for securing unanimity in the European Council in the first phase of the sanctions mechanism prompted former Justice Commissioner Viviane Reding to describe the mechanism as 'in practice almost impossible to use'.

Ongoing Article 7 procedures

Preventive procedure concerning Poland (launched by the Commission in 2017)

On 20 December 2017, the Commission adopted a reasoned proposal for a Council decision on the determination of a clear risk of a serious breach of the rule of law by Poland. The Council has discussed the issue several times, and the Polish government was heard on 26 June 2018, 18 September 2018, and 11 December 2018. The Commission has regularly updated the Council on the situation, claiming that its concerns remain unaddressed. During Poland's latest hearing on 11 December 2018, seven major topics were discussed (addressed earlier in the Commission's recommendations): early retirement of Supreme Court judges; the reform of the NCJ; impact of the retirement regime upon the independence of ordinary judges; new disciplinary regime and the DCSC; new extraordinary appeal procedure; the situation of court presidents as affected by the dismissal and appointment regime; the question of the composition of the PCC and publication of three of its judgments considered *ultra vires* by the government. Within Parliament, from which consent is required under the procedure, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) has been designated as the lead committee, and the Committee on Constitutional Affairs (AFCO) will deliver an opinion (procedure 2017/0360(NLE)). On 14 October 2019, LIBE appointed its Chair, Juan Fernando López Aguilar (S&D, Spain) as rapporteur. The AFCO committee still needs to appoint its rapporteur for opinion.

Preventive procedure concerning Hungary (launched by the Parliament in 2018)

On 12 September 2018, Parliament adopted a resolution under Article 7(1) TEU, calling on the Council to establish a clear risk of a serious breach of EU values by Hungary (rapporteur: Judith Sargentini, the Netherlands, Greens/EFA), procedure 2017/2131(INL)). Parliament's concerns included a broad array of issues: the functioning of the constitutional and electoral system; the independence of the judiciary and other institutions; corruption and conflicts of interest; privacy and data protection; freedom of expression, academic freedom, freedom of religion, freedom of association; the right to equal treatment; minority rights; fundamental rights of migrants, asylum seekers and refugees; as well as economic and social rights. Following the 2019 European elections, the LIBE committee appointed a new rapporteur, Gwendoline Delbos-Corfield (France, Greens/EFA). On 16 September 2019, the General Affairs Council held a hearing with Hungary, in accordance with

Article 7(1) TEU. The Hungarian delegation argued that Parliament's resolution lacks legal basis, violates Parliament's Rules of Procedure, is biased and contains a number of errors. On the substance, Hungary argued that, in the area of migration, it had to restore balance between individual rights and the public interest. Concerning judicial reforms, it pointed to Hungarian cooperation with the Venice Commission and the country's favourable Justice Scoreboard ranking. On academic freedom, the Hungarian delegation expressed the view that academic life in Hungary is flourishing, while it is normal for countries to regulate academic institutions based abroad, in the interests of ensuring a level playing field. Concerning religious freedoms, Hungary contends that Member States have the right to differentiate between the legal status of historic (traditional) churches and the status of other religious communities. Hungary argued that non-governmental organisations' funding must be transparent, and on minority rights the delegation argued that sound policies are in place against racism, and particular attention has been devoted to the integration of Roma people. The Commission disagreed with the Hungarian delegation. In the debate that ensued, the Hungarian delegation responded to specific issues raised by 10 delegations.

Possible options for enhancing the protection of rule of law

EU mechanism on democracy, rule of law and fundamental rights

In a resolution adopted in October 2016, Parliament called upon the Commission to create an EU mechanism on democracy, rule of law and fundamental rights. Parliament wanted the Commission to submit, by September 2017, a proposal based on Article 295 TFEU that would entail the conclusion of a Union Pact for democracy, the rule of law and fundamental rights, in the form of an interinstitutional agreement laying down arrangements facilitating cooperation between the EU institutions and the Member States in the framework of Article 7 TEU. The new mechanism would integrate and complement existing mechanisms, be evidence-based, objective, address both the Member States and the EU institutions, and include preventive, as well as corrective measures. A panel of independent experts would assess the state of democracy, rule of law and fundamental rights in the Member States annually, as well as develop country-specific draft recommendations. In consultation with the panel, the Commission would draw up an annual report on the state of democracy, rule of law and fundamental rights in the Member States, which would be published and discussed in an annual inter-parliamentary meeting. The Commission replied to Parliament's proposal on 17 February 2017, questioning the need for and feasibility of an annual report and a specific policy cycle prepared by a committee of experts, along with the need for and added value of an interinstitutional agreement in this area. On 14 November 2018, Parliament adopted a new resolution calling on the Commission to propose the adoption of an interinstitutional agreement on an EU Pact and to consider linking the proposal for a regulation on protecting the EU budget in case of rule of law deficiencies in the Member States with that mechanism.

Cutting funding to countries accused of breaching the rule of law

In May 2018, the Commission put forward a proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, based on Article 322(1)(a) TFEU. The proposal defines generalised deficiencies as regards the rule of law as including, in particular, endangering judicial independence, failing to prevent, correct and impose sanctions for arbitrary or unlawful public authority decisions, and limiting the availability and effectiveness of legal remedies. If the Commission finds generalised deficiencies in one of the Member States as regards the rule of law as described above, it may resort to protective measures, including the suspension or reduction of payments from the EU budget and the prohibition to enter into new legal commitments. The Council would be able to veto the Commission's ruling by a qualified majority, but Parliament would have no say in the matter. In April 2019, the Parliament adopted its first-reading legislative resolution on the proposal, putting forward a number of significant modifications. First, Parliament would make the definition of a 'generalised deficiency' far more specific. Second, it would put Parliament and Council on an equal footing in terms of

procedure: once the Commission considers that the generalised deficiency as regards the rule of law is established, it would adopt a decision on the appropriate measures by means of an implementing act; such a decision would enter into force if neither the European Parliament nor the Council reject the transfer proposal within four weeks of its receipt. Thirdly, it would set up a special panel of independent experts on legal and financial matters to assist the Commission in evaluating the situation in a Member State. The Council discussed the proposal during its meetings in May and June 2019, but has not yet adopted a position.

Rule of law review cycle (Commission)

In its July 2019 rule of law communication, the Commission put forward the idea of a 'rule of law review cycle'. It proposed to promote a 'rule of law culture' within the EU through various measures, and to prevent rule of law backsliding in Member States by deepening its monitoring of Member States' compliance with the rule of law through a 'rule of law review cycle'. The cycle would cover all Member States and culminate in the adoption of an annual rule of law report that would summarise the situation in Member States as regards the rule of law. Finally, the Commission intends to 'pursue a strategic approach to infringement proceedings related to the rule of law, requesting expedited proceedings and interim measures whenever necessary', drawing on the recent ECJ case law related to the independence of the judiciary, as well as to improve the procedure used to decide on the existence of a breach of EU values under Article 7 TEU and to modify the 2014 rule of law framework to involve other EU institutions in the process.

Supporting civil society, including at regional level

Raising awareness about the rule of law among EU citizens can also take a regional dimension. In its July 2019 rule of law communication, the Commission highlighted that the EU 'offers a unique platform to develop and promote awareness on rule of law challenges', adding that civil society 'is of particular importance, including at regional and local level'. The Commission has already proposed to boost funding and support for a thriving civil society, the promotion of media pluralism and networking among stakeholders in the rule of law field, as well as supporting EU-wide organisations, bodies and entities pursuing a general European interest in the field of justice and rule of law. In this context, the Commission mentioned a number of programmes within the forthcoming new Multiannual Financial Framework (MFF) for 2021-2027, including 'Creative Europe', 'Rights and Values' and 'Justice'.

Academic proposals

Academics have also advanced a number of proposals. Armin von Bogdandy *et al.* put forward a 'reverse-*Solange* doctrine' for the ECJ, under which the Member States would retain their exclusive competence to protect fundamental rights only 'as long as' (*Solange*) they are not systematically violating their 'essence', enshrined in Article 2 TEU. In this latter case, citizens of the Member State concerned would be able to rely on their EU citizenship to seek protection of their EU fundamental rights before national courts which, in turn, would be able to seek guidance from the ECJ through the preliminary reference procedure. Iris Conor, in turn, proposed a 'horizontal *Solange*' concept, under which it would be for other Member States to sanction their peers that violate the rule of law or other EU values. The ECJ's case law concerning the possibility of refusing to surrender suspects under the European Arrest Warrant procedure to countries where the rule of law is not observed (Case C-216/18 PPU *Celmer*) can be seen as an application of Conor's 'horizontal *Solange*' in practice. Finally, Jan-Werner Müller proposed the creation of a new EU body, which he referred to as the 'Copenhagen Commission'. The aim of this body would be to subject the current EU Member States to a similar monitoring process as applies to candidate countries (hence the reference to the 'Copenhagen criteria'). Petra Bàrd and Anna Śledzińska-Simon propose to give more thrust to rule of law infringement cases, urging the ECJ to automatically prioritise and accelerate such cases, and to use interim measures on a regular basis.

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STUDY

For the AFCO committee

European Parliament

The EU framework for enforcing the respect of the rule of law and the Union's fundamental principles and values

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
PE 608.856 - January 2019

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The EU framework for enforcing the respect of the rule of law and the Union's fundamental principles and values

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the EU founding values and principles set out in Article 2 TEU and the instruments at the EU's disposal to uphold them, in particular Article 7 TEU and Article 258 TFEU, as well as the Rule of Law Framework launched by the European Commission. Focusing on rule of law, the study also examines how these instruments have been used, in particular, in the cases of Poland and Hungary.

The study also looks into the proposals put forward by the European Parliament and the Commission and gives recommendations: It proposes, in particular, the signing of the European Convention on Human Rights by the EU, as well as the introduction of economic conditionality into EU Cohesion Policy and its funds as a sanction mechanism.

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CONTENTS

LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CPR	Common Provisions Regulation
CVM	Cooperation and Verification Mechanism
ECHR	European Convention of Human Rights and Fundamental Freedoms
EMU	Economic and Monetary Union
EU	European Union
EURODAC	European Asylum Dactyloscopy Database
QMV	Qualified Majority Voting
TFEU	Treaty on the functioning of the European Union
TEU	Treaty on the European Union
VAT	Value Added Tax

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EXECUTIVE SUMMARY

The rule of law, democracy and fundamental rights are all key values among those listed in Article 2 of the Treaty on European Union (TEU). They have a "constitutional" nature. The EU pledges to promote these values (Article 3 TEU) and to protect them through various instruments, in particular through the two-phase mechanism laid down in Article 7 TEU: Firstly, Article 7 (1) TEU provides for a prevention mechanism which can be initiated by the Parliament, the Commission or one third of the EU Member States if the Council determines that there is a risk of a serious and persistent breach of EU values. Secondly, Article 7 (2–3) TEU provides for a sanction mechanism which can be triggered by the Commission or one third of the Member States.

In addition to Article 7 TEU mechanism – which could lead to the withdrawal of the voting rights of a Member State in the community institutions – there is another Treaty-based mechanism to safeguard the respect of the founding values and principles: according to the infringement procedure (Article 258–260 TFEU), the Commission, as the "guardian of the Treaties", can report a breach of the EU law by a Member State to the Court of Justice of the European Union. If the Court finds that the Member State concerned has failed to fulfil its obligations under the Treaties, the Member State must "take the necessary measures to comply with the judgment".

To complement the above-mentioned mechanisms, in 2014, the Commission adopted the so-called Rule of Law Framework "to resolve future threats to the rule of law in Member states before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met"[1]. The mechanism is based on a prior dialogue with the Member State concerned with the aim of avoiding any recourse to Article 7 TEU.

This study offers an overview and analytical approach of these mechanisms, also in light of the recent Polish and Hungarian cases where there has been a breach of the Treaty values.

In addition, it examines the proposals made by the European Parliament and the Commission to improve the situation. It concludes that all initiatives have been positive. However, they either represent relatively insignificant advances on the measures already adopted by the EU or imply reforms of the Treaties that are highly unlikely to be undertaken now.

In our view, two truly useful measures could be taken without modifying the Treaties. First, the signing by the EU of the European Convention on Human Rights, submitting to the jurisdiction of the European Court of Human Rights in Strasbourg; and second, establishing an economic economic conditionality in the Cohesion Policy as a coercive means towards those States that seriously, flagrantly and repeatedly violate the rule of law, democracy or fundamental rights, once Article 7(1) TEU has been applied to them or in the event of a final decision from the Court of Justice of the European Union.

[1] European Commission, Communication "A New EU Framework to strengthen the Rule of Law" of 19 March 2014, COM(2014)158 final-2, p. 2.

The rule of law and other values and principles such as democracy and fundamental rights set out in Article 2 TEU are the true "constitutional" principles of the EU. Hence the importance of promoting and safeguarding them. No state can join the EU without respecting these founding values and principles, and a Member State can be sanctioned if it violates them.

However, over the last few years, there have been cases in which, unfortunately, some Member States have violated in a serious and persistent manner the founding values and principles of the EU, particularly the rule of law. Therefore, it is urgent to ensure that there are efficient mechanisms available to guarantee their respect within the EU.

This study aims to examine the legal framework of the founding values and principles of the EU and the instruments to safeguard them, and look into the specific cases that have arisen.

Chapter 1 studies the concept of the rule of law as well as the place of the rule of law and other founding values of the EU (Article 2 TEU) in the legal and constitutional makeup.

Chapter 2 analyses the instruments at the EU's disposal to uphold the founding values and principles of the European project and, in particular, the impact of the mechanisms laid down in Article 7 TEU and Article 258 TFEU, as well as the Rule of Law Framework adopted by the Commission and the Annual Rule of Law Dialogue with the Member States launched by the Council.

Chapter 3 focuses on the most relevant and topical cases to have challenged respect for the rule of law in the Union: Poland and Hungary. At the same time, it looks into the interpretation of Article 2 in relation to Article 4 TEU.

Lastly, Chapters 4 and 5 list out the proposals put forward by the Parliament and the Commission to improve respect for the rule of law, democracy and fundamental rights and introduces policy recommendations addressed to the most relevant actors, including the Parliament.

1. THE FOUNDING VALUES AND PRINCIPLES OF THE EUROPEAN UNION

1.1. The founding values and principles

Article 2 of the Treaty on European Union (TEU) reads as follows:

> *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".*

Article 2 TEU provides that "the Union is founded" on values that become the parameter by which to judge Member States, both at the time of their admission into the Union and at the time of their possible sanction or suspension in view of a violation of those values.

Article 49(1) TEU provides that "(a)ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union".

The founding values and principles are the basic test for the membership of the Union. Article 7 TEU provides for the possible suspension of certain rights deriving from membership of the Union of a State that has seriously violated the values set out in Article 2 TEU.

Therefore, referring in the Treaty to the values as the foundation of the Union is not just a rhetorical expression. This provision can have concrete practical implications and is of extraordinary importance. Respect for the values is a prerequisite for belonging to the Union and the failure to observe them is a ground for the suspension of a Member State's rights in the Union.[2]

The essential values or principles in the Treaties are fundamental rights, democracy and the rule of law. On a different note, the Treaty of the European Union is the first EU primary law act referring to "human dignity" as a value of the Union. Dignity is the foundation of all rights, which is why it also takes first place in the Charter of Fundamental Rights of the European Union (Article 1), along with "freedom, equality and solidarity" (Preamble of the Charter)[3].

The EU's commitment to fundamental rights is enshrined in Article 6 TEU, in its triple reference to the common constitutional tradition, the Charter of Fundamental Rights of the European Union itself and the prevision to accede to the European Convention of Human Rights and Fundamental Freedoms (ECHR).[4] The fundamental rights guaranteed by the ECHR and those resulting from the constitutional traditions common to the Member States form part of the

[2] See López Garrido (Director), *Lecciones de Derecho Constitucional de España y de la Unión Europea (Vol. I)*, Valencia, Tirant lo Blanch, 2018, pp. 199 ff. and López Castillo (director), *Instituciones y Derecho de la Unión Europea* (vol. I), Valencia, Tirant lo Blanch, 2nd ed. 2018, pp. 42-58.

[3] In the European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law ans fundamental rights (2015/2254(INL)), the Parliament reminds that according to the Opinion 2/13 of the European Court of Justice of the European Union and its case-law, the rights recognized by the Charter of Fundamental Rights of the European Union are '' at the heart of the legal structure of the Union and respect for those rights in a condition for the lawfulness of Union acts, so that measures incompatible with those rights are not acceptable in the Union'' (recital C), p.162-177.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

general principles of the Union's law (Article 6 (3) TEU). As for democratic legitimacy, it is consolidated in Title II TEU (Articles 9 to 12).

1.2. Rule of law ''government by laws not by men''[5]

The idea of the rule of law rests on one aim: to avoid arbitrariness in the use of power. The core of the rule of law lies in the principle of lawfulness. Citizens cannot be the object of any other administrative measures than those authorised by law (the principle of legal reservation). There is rule of law from the moment that the law defines the relations between State and citizens and they can turn to the courts in the event of a violation of the law.[6]

As regards the EU, the first judicial reference to the rule of law was made by the Court of Justice in its sentence *Les Verts v European Parliament*[7] in 1983. In its judgement, the Court stated that the Union (then Community) is "a community based on the rule of law":

> *"It must first be emphasised in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles (230) and (241), on the one hand, and in Article (234), on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions".*

In 1993, the European Council adopted the well-known criteria for assessing whether an applicant State was eligible to accede to the EU. Copenhagen criteria include also **the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities** and are referred to in Article 49 TEU:

> *"Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. [-- --] The conditions of eligibility agreed upon by the European Council shall be taken into account".*

The rule of law is one of those criteria. Subsequently, it would come to form part not only of the Union's "values", but also to be considered a "principle" in the Preamble of the Charter of Fundamental Rights of the EU.

[5] Justice Marshall, Marbury v. Madison, The Supreme Court of the United States, 1803.

[6] On the evolution of the concept of the rule of law, please see: Orlandi, M.A., *Stato di Diritto e tutela dei diritti fondamentali nell´evoluzione costituzionale francese e dell´Unione Europea,* in Il Diritto Costituzionale Comune Europeo. Principi e Diritti Fondamentali, a cura di Michele Scudiero, Vol. primo, III Tomo, pp. 1,043 ff. Jovene Editore, 2002.

[7] Case 294-83, Judgement of the Court of 23 April 1986, Les Verts v European Parliament, ECLI:EU:166, paragraph 23.

The European Commission for Democracy through Law of the Council of Europe (the Venice Commission) has identified the following intrinsic components of the notion[8]:

i) Legality, which includes transparent, accountable and democratic processes for enacting laws;
ii) Legal certainty, which is deemed essential to ensure confidence in the judicial system, and includes accessibility and 'foreseeability';
iii) Prohibition of arbitrariness on the part of the State and its authorities;
iv) Access to justice for those subject to administrative action before independent and impartial courts, including judicial review of administrative acts;
v) Respect for human rights by State authorities and the guaranteeing of human rights for everyone within the State authorities' jurisdiction; and finally,
vi) Non-discrimination and equality before the law guaranteed and assured by the State.

In 2013, the then Vice-President of the European Commission and Commissioner for Justice Viviane Redding provided a suitable and complete definition for the concept of "rule of law" in 2013[9]:

> *"By 'rule of law', we mean a system where laws are applied and enforced (so not only 'black letter law') but also the spirit of the law and fundamental rights, which are the ultimate foundation of all laws. The rule of law means a system in which no one – no government, no public official, no dominant company – is above the law; it means equality before the law. The rule of law also means fairness and due process. It means guarantees that laws cannot be abused for alien purposes, or retrospectively changed. The rule of law means that justice is upheld by an independent judiciary, acting impartially. It means ultimately a system where justice is not only done, but it is seen to be done, so that the system can be trusted by all citizens to deliver justice".*

This is what Article 19 TEU means. It enshrines the principle of legal protection as an obligation not only for the Union through the Court of Justice of the European Union (CJEU), but also of the Member States themselves in their domestic legislation, through the appropriate remedies.

> *"For the European Union, the rule of law is of particular importance. The Union is a unique construction, as it is not bound together by force, by a common army or a common police force, but only by the strength of the rule of law. Very rightly, Walter Hallstein, the Commission's first President, called the European Community a 'Community based on the rule of law', 'Rechtsgemeinschaft' in German, 'Communauté de droit' in French".*[10]

According to Walter Hallstein, the European Community is a Community of law in three senses: it is a creation of law (**Rechtsschöpfung**); it is a source of law; and it is a legal order. Despite its

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[8] *The Triangular relationship between Fundamental Rights , Democracy and Rule of Law in the EU-Towards an EU* Copenhagen Mechanism, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2013 , pp. 26-27. Available at: *Copenhagen Mechanism*, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs. Avaialble at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)4930 31 _EN.pdf

[9] Reding, V., "The EU and the Rule of Law – What next?", Centre for European Policy Studies /Brussels, 4 September. 2013 (Speech/13/677).

[10] Pernice, I., Der Beitrag Walter Hallsteins zur Zukunft Europas, WHI-Paper 9/01 (pdf), available at: https://www.rewi.hu-berlin.de

basic economic orientation, the relationship between the Member States and the Community is governed by the law.

European public power, therefore, is under the law. Always within the framework of its powers and in accordance with the procedures laid down for that purpose (cf. Articles 288 and 296 TFEU), it only acts, or preferably acts, through legal instruments, through the law.[11]

With regard to international organisations such as the EU, it is essential to highlight the foundational and decisive nature for the exercise of public power that the rule of law possesses.

In its resolution of 25 October 2016,[12] the Parliament rightly states that "respect for the rule of law within the Union is "a prerequisite" for the protection of fundamental rights, as well as for the upholding of all rights and obligations deriving from the Treaties and from international law, and is a precondition for mutual recognition and trust as well as a key factor for policy areas such as the internal market, growth and employment, combatting discrimination, social inclusion, police and justice cooperation, the Schengen area, and asylum and migration policies, and as a consequence, the erosion of the rule of law, democratic governance and fundamental rights are a serious threat to the stability of the Union, the monetary union and the common area of freedom, security and justice and prosperity of the Union".

The rule of law is a true constitutional principle in the Union. It is inherent in its existence as a Community of Law. The EU Institutions, just like its Member States, are, therefore, subject to judicial control. The Court of Justice has stated this on repeated occasions.

The rule of law and the other founding values and principles are common to the Member States. Thus, these constitutional values and principles contribute to making EU primary legislation a true "material" Constitution, even if it is not formally so, given that law takes the shape of international treaties. That ensures that the Member States trust, and recognise, all the legal systems of the other Community members.

The European Court of Human Rights has stated that the rule of law, insofar as it is inherent in the European Convention on Human Rights, is the basic condition for the exercise of human rights and even for the relations on which coexistence in a civil society is legally based (Caracciolo). [13]

The importance of the rule of law in the Union is clearly reflected, in short, in the famous **Van Gend & Loos judgement** (1962) of the Court of Justice of the then European Community: "The Community constitutes a new legal order... for the benefit of which the (Member) States have limited their Sovereign rights."[14]

Laurent Pech is right to view the content of Article 2 TEU on European values – including the rule of law – as a positive development that enables connecting the **constitutional** system of

[11] Tuori, K, *The Eurozone Crisis. A Constitutional Analysis*, Cambridge, 2014.
[12] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0409 +0+ DOC +XML +V0 //EN
[13] Caracciolo, I., *La rilevazione dei valori democratici nell´ Unione Europea. Una proiezione internazionale per l´identitá giuridica occidentale,* Napoli, Editoriale Scientifica, 2003, p. 76.
[14] See the interpretation of this that Lord Mackenzie Stuart makes in *The European Communities and the Rule of Law,* London, Sterens and Sons, 1977.

the EU to the key principles of Western constitutionalism. In the era of globalisation, says Pech, quoting Tridimas, when there are serious challenges to the democratic legitimacy of the nation-state, the rooting of those values in constitutional treaties seeks to secure legal protection and certainty. At the heart of that European constitutionalism lies the aspiration that a new social and political order will take hold and that the transfer of powers to supranational organisations will be accepted as it will be accompanied by ideals that characterise liberal democracies[15].

In the case C-127/07, Advocate General Poiares Maduro has interpreted that the Article 2 TEU expresses the respect for national constitutional values. Consequently, the Member States are reassured that the EU law will not threaten the fundamental values of their constitutions. At the same time, Member States have transferred the task of protecting those values to the CJEU. Thereby a common European identity is successfully forged in practice[16]. In fact, the Member States' courts have contributed to strengthening the value (or constitutional principle) of the rule of law while interpreting the EU law in the light of that principle.

[15] Pech, L. *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09, 2009, p. 50.
[16] Opinion of the Advocate General in Case C-127/07, Arcelor (2008), para. 16, Ibidem, p. 51.

2. THE EFFECTIVENESS OF THE EU MECHANISMS AIMED AT PROMOTING AND SAFEGUARDING VALUES AND PRINCIPLES

2.1. EU mechanisms on enforcing the rule of law and other founding values and principles

The proclamation of the EU's "values" by Article 2 TEU in the wording of the Treaty of Lisbon (the Treaty of Amsterdam had called them "principles) would be no more than a mere empty assertion if it were not accompanied by effective mechanisms for making those values real and concrete.

There are several mechanisms, but the most prominent in a regulatory and political sense is the one laid down in Article 7 TEU, which is particularly important in relation to the value of the rule of law.

2.1.1. Article 7 TEU

Article 7 TEU gives the Union the power to ensure respect for and adherence to the common values of the Member States. It does so by establishing two mechanisms – a prevention mechanism and a sanction mechanism – that can lead to a suspension of "certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of the Member State in the Council" (Article 7 (3) TEU). The suspension is, in any case, reversible and modifiable (Article 7 (3 to 4 TEU):

Article 7 TEU

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article
2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

Since Article 7 contains measures with theoretically severe consequences, there are certain provisions to soften it. First, the Council (by a majority of four fifths of its members and after obtaining the consent of the Parliament) has to begin by "determining that there is a **clear risk** of a serious breach" of the values – one or several – enshrined in Article 2 TEU by a Member State, always on a reasoned proposal by one third of the Member States, by the Parliament or by the Commission (Article 7(1) TEU).

The next phase, which is the determination – not only the "risk" now – of an actual **serious and persistent breach** of the values referred to in Article 2 TEU, leading to the very severe sanction of the suspension of rights, has to be piloted and decided by the European Council by **unanimity** (with the exception of the Member State concerned) (Article 7 (2) TEU).

The determination of the breach of Article 2 TEU by the European Council must also be on the proposal of one third of the Member States or of the Commission and after obtaining the consent of the Parliament (Article 7(2) TEU).

A similar procedure exists in other international organisations. Article 6 of the United Nations Charter provides for the expulsion by the General Assembly – on the proposal of the Security Council – of a Member State that has **persistently** violated the principles of the Charter. However, there are five states on the Security Council that have the right of veto[17].

As regards the Council of Europe, Article 8 of its Statute[18] allows the Committee of Ministers to suspend the rights of representation of any of its 47 Member States that has **seriously violated** the principles of the rule of law and of fundamental rights and to invite that Member State to withdraw from the organisation. This authority has never been exercised.

According to the Commission Communication on Article 7 of the Treaty on European Union, the Article 7 TEU procedure is not intended to resolve individual cases – as is the case with the ECHR –, but to remedy a breach of the values expressed by the precept by means of a "comprehensive political approach"[19]:

> "The procedure laid down by Article 7 of the Union Treaty aims to remedy the breach through a comprehensive political approach. It is not designed to remedy individual breaches. A combined reading of Articles 6(1) and 7 of the Union Treaty shows that there must be a breach of the common values themselves for the existence of a breach within the meaning of Article 7 to be established. The risk or breach identified must therefore go beyond specific situations and concern a more systematic problem. This is in fact the added value of this last-resort provision compared with the response to an individual breach. This is not, of course, to say that there is a legal void. Individual fundamental rights breaches must be dealt with through domestic, European and international court procedures. The national courts, the Court of Justice, in the field covered by Community law, and the European Court of Human Rights all have clearly defined and important roles to play here."

[17] Charter of the United Nations, 1945, Article 23(1). Available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf

[18] Statute of the Council of Europe, 5 May 1949. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001

[19] Communication from the Commission to the Council and the European Parliament of 15 October 2003 on Article 7 of the Treaty on European Union COM(2003) 606 final. Respect for and promotion of the values on which the Union is based. Available at: http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf

The risk and confirmed breach of the rule of law and the other values of Article 2 TEU are concepts that afford the Council a broad framework of discretion and have to reach the dimension of a systemic problem. In other words, very visible and profound infringements of principles embedded in the rule of law, such as the independence of the judiciary and the irremovability of judges and courts, or repeated contempt for the principle of legality.

The Article 7 TEU procedure may even lead to the suspension of the non-compliant Member State's right to vote to stop its decisions contaminating the other EU bodies mentioned in Article 2 TEU. It is an entirely political decision by the Council, in which, paradoxically, the CJEU cannot intervene, except to monitor the merely formal regularity of the procedure on the basis of Article 269 TFEU:

> *"The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article. Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request".*

In Chapter 3, we shall look in detail into the two cases in which Article 7 TEU has been activated:

- On 20 December 2017, the Commission, for the first time, determined that there was a clear "risk" of a serious breach of the rule of law in Poland and invoked Article 7(1) TEU, submitting a reasoned proposal for a Decision of the Council on the matter[20];
- The same thing has happened in the case of Hungary: After successive European Parliament resolutions on the political situation and fundamental rights in the country[21], in the Resolution of 12 September 2018[22], the Parliament approved a proposal in which it called 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.

[20] See Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, of 20.12.2017, COM (2017) 835 final. It is entitled: "Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland". Available at : https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017PC0835

[21] See, in particular:
-European Parliament resolution of 16 February 2012 on recent developments in Hungary (2012/2511(RSP)),available at:
http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0053&language=EN,
- European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), available at:
http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0315&language=EN&ring=A7-2013-0229, and
- European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)), available at:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P8-TA-2015-0227%_200_%_20DOC%20XML%20V0//EN.

22 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of thevalues on which the Union is founded (2017/2131(INL)). Available at:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340 +0+ DOC +XML +V0//EN&language=EN

2.1.2. The Commission and the Court of Justice: the infringement procedure

Along with Article 7(1) TEU, also Article 258 TFEU procedure can be used to control and, where appropriate, sanction a Member State that breaches the rule of law and other founding values and principles:

Article 258 TFEU

> *If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.*
>
> *If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.*

According to Article 258 TFEU, the Commission may take legal steps against a Member State in case of a breach. The first step is to deliver a reasoned opinion on the matter after giving the Member State concerned the opportunity to submit its observations (by letter of formal notice). If the Member State does not comply with the opinion within the period laid down by the Commission, the Commission can launch a legal action against the Member State before the CJEU.

Similarly, any Member State can appeal to the CJEU should it consider another Member State has failed to comply with any of its obligations under the Treaties.

If the CJEU finds that the defendant Member State indeed failed to fulfil its obligations under the Treaties, the state must, according to Article 260(1) TFEU, "take the necessary measures to comply with the judgment". However, not all Member States comply with a judgment declaring its infringement. Therefore, Article 260(2) TFEU provides that the Commission – if it believes that the judgment has not been complied with – may bring the case back to the CJEU. Before doing so, it must give the Member State the opportunity to submit its observations.

The Commission has used the infringement procedure with regard to the situation in Poland. This will be examined further in Chapter 3.

2.1.3. Rule of law Framework

The Article 7 TEU mechanisms have existed since the Treaty of Amsterdam, but they have proved difficult to apply. The punitive consequences of Article 7, combined with the somewhat abstract nature of the situations that would allow using the Article, has led the Commission to put forward an alternative – yet compatible – way of addressing the problem of a Member State that repeatedly infringes the values set out in Article 2 TEU. In March 2014, in its **Communication on a new EU Framework to strengthen the Rule of Law**[23], the Commission argued that the infringement procedure under Article 258 TFEU could only be launched when a specific provision of community law was breached. However, there were situations where it was not possible to consider an infringement of a specific EU law provision yet they still posed a "systemic threat" to the rule of law. Hence, Article 258 TFEU was

[23] 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.

insufficient and it was necessary to create another complementary way to prevent the breach by a Member State of the values of the Union and to strengthen the rule of law.

The new mechanism established by the Commission sought to prevent the activation of Article 7 TEU and to do so it moved to take early intervention measures. According to the communication[24], the Rule of Law Framework can be activated in situations where the Member State's authorities take measures or tolerate situations which are "**likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law"**. The main purpose is to address those threats to the rule of law which are of a **systemic nature**.

Consequently, there needs to be a threat towards the political, institutional and/or legal order of a Member State as such or its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists. This can happen, for example, as a result of adopting new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework is activated when **national rule of law safeguards** do not seem capable of effectively addressing those threats.

In the case of clear indications of a systemic threat to the rule of law, the Commission will initiate a "structured exchange" with the Member State concerned, with the following principles:

- focusing on finding a solution through a dialogue with the Member State concerned;
- ensuring an objective and thorough assessment of the situation at stake;
- respecting the principle of equal treatment of Member States; and
- indicating swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.

There are three stages in the process:

1) Commission assessment;
2) Commission recommendation; and
3) Follow-up to the recommendation.

Each stage is based on a continuous dialogue between the Commission and the Member State concerned, keeping the Parliament and the Council regularly informed.

The Commission turned to the Rule of Law Framework in the case relating to the situation in Poland, simultaneously applying Article 7(1) TEU. The Commission opened a dialogue with the Government of Poland in January 2016, under that Rule of Law Framework. It was precisely the lack of progress in that dialogue that prompted the Commission to invoke the Article 7(1) procedure on 20 December 2017 and submit the accompanying Reasoned Proposal for a Council Decision on the determination of an unequivocal "risk" of a serious breach of the rule of law by Poland.

[24] See paragraph 4.1. of the Communication.

2.2. Other instruments for promoting and protecting the values of the EU

In addition to the three main mechanisms of an executive or judicial nature, the EU has developed other instruments which are more proactive and promote European values. These are only referred to in this study[25]:

- Cooperation and Verification Mechanism (CVM)[26] ;
- EU Anti-Corruption Report;
- Justice Scoreboard, which is part of the European Semester for economic policy coordination;
- EU inter-institutional annual reporting on fundamental rights and the EU Charter of Fundamental Rights.

Along with those instruments, we must point out that the EU's foreign policy is clearly geared to promoting EU values, as is the security and defence policy.[27]

2.3. The enforcement of the law in the fields of immigration and tax policies

2.3.1. Immigration

The Maastricht Treaty (Treaty on European Union) which entered into force on 1 November 1993, established a "three-pillar structure" for the EU. The third 'pillar' was cooperation in the fields of justice and home affairs which included migration and asylum policies. With the Amsterdam Treaty[28] which entered into force on 1 May 1999, asylum, migration and external border controls were moved into the first pillar. Consequently, decisions by the Council and the Commission now had to be taken by unanimous vote.

Since the abolition of the third pillar by the Lisbon Treaty, provisions on border checks, asylum and immigration (Chapter 2 of Title V TFEU) are adopted by Qualified Majority Voting (QMV) and codecision procedure. In fact, the Lisbon Treaty put a formal end to the issue of whether or not the EU is competent to legislate on both common asylum and immigration policy[29].

The Lisbon Treaty introduced full jurisdiction to the Court of Justice over the whole "Area of Freedom, Security and Justice" (Title V of the TFEU). The Commission and Member States are allowed to bring infringement actions and the Parliament and individuals are allowed to bring actions before the CJEU for annulment (Articles 257 ff. TFEU).

In addition, on 1 May 1999 the Schengen area of free movement of people was incorporated into the Treaties by the Treaty of Amsterdam. The Treaty of Lisbon maintained the situation

[25]European Parliament, Policy Department Citizens' Rights and Constitutional Affairs, 2013. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf

[26] *Assessment of the 10 years' Cooperation and Verification Mechanism for Bulgaria and Romania*, European Parliament, Policy Department for Budgetary Affairs, 2018. Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)603813

[27] Please see, for example, *Value for money: EU programme funding in the field of democracy and rule of law*, European Parliament, Policy Department for Budgetary Affairs, 2017. Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)5727

[28] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed in Amsterdam on 2 October 1997.

[29] Sabina Anne Espinoza and Claude Moraes, *The law and politics of migration and asylum*: The Lisbon Treaty and the EU in The European Union after the Treaty of Lisbon, edited by Ashiagor, D., Countouris, N. and Lianos, I., New York, Cambridge-University Press, 2012, p. 184.

(Article 20, para. 4 TEU and Article 7 of Protocol 19), so that today the Schengen area consists of 22 EU Member States and three non-Members (Iceland, Norway and Switzerland)[30].

The problem of the effectiveness of the rule of law in the field of immigration and asylum lies not in law, but in its non-application by the States. The communitarisation of the right to asylum – the "so-called Dublin System" or the Common European Asylum System (CEAS) –, which is a fundamental right under the Charter of Fundamental Rights of the EU (Article 18), has been a step forward, especially as of 2013, but it has not managed to prevail over national systems of asylum. The situation deteriorated with the humanitarian crisis of 2015. The response of some Member States – particularly the Visegrad Group and Italy – has been to close their borders to refugees, in flagrant violation of the Geneva Convention of 1951 and the Protocol of 1967, as well as the EU's own Treaties. Presently, there are 40 infringement procedures by the European Commission underway against Member States for not applying the CEAS.

The process of reform of the Dublin Regulation and the European Asylum Dactyloscopy Database (EURODAC) and transformation of the European Asylum Support Office into a European Asylum Agency announced by the Commission on 6 April 2015 is currently at a standstill for strictly political, not legal, reasons. Border checks have been extended to May 2019 in countries such as Germany, Austria, Denmark, Norway or the Visegrad Group.

2.3.2. Tax Policies

The EU's powers on taxation are clear, legally speaking. Direct personal and corporate taxes are the jurisdiction of the Member States. Laws on indirect taxes can be harmonised, but always by unanimous decision of the Council, after consulting the Parliament and the Economic and Social Committee (Article 113 TFEU).

As a result, except in the case of VAT, there is no harmonisation of taxes in the EU, despite it being called "Economic and Monetary" (EMU). In view of the conduct of some Member States, engaging in "fiscal dumping" to attract capital to their territories, the Commission has had to turn to community rules on competition (prohibition of state aid) to combat that unfair competition[31]. Tax harmonisation is a pending issue of the Union.

[30] See, on Schengen, Piris, J-C, *The Lisbon Treaty. A Legal and Political Analysis*, New York, Cambridge University Press, 2010, pp. 192 ff.
[31] Vid. Lopez Garrido, D., *The Ice Age. Bailing out the Welfare State.*, London Publishing Partnership, London, 2015. Chapter 5.

3. THE REAL ENFORCEMENT OF THE RULE OF LAW FRAMEWORK

3.1. Overview and analytical approach

The following section will attempt to summarise the complex reaction of the EU legal framework in the face of the two examples of claimed illiberalism at the heart of the EU: Poland and Hungary. These countries caused greatest concern during the course of the current legislature that is now drawing to a close[32], and the manner in which these two difficult cases are handled may have a determining influence on the next legislature. It is therefore essential that the EU pursue a clear constitutional policy, one that takes account of the existing examples (discussed in detailed below) and clarifies the shared commitments that underpin the Union's constitutional basis, without which the legitimacy of the EU itself will be at risk.

It is in this context that we should understand the explicit call in the Parliament resolutions with regard to the situations in Poland and Hungary, emphasising the requirement for cooperation in good faith as an essential element of the articulation of powers within a Member State of the EU.

The rising illiberal currents within Europe show no signs of receding[33]. If we look at the latest trends we cannot rule out the possibility that the Polish and Hungarian examples could be emulated by other proponents of national-populism at the next Parliament elections[34]. Although these movements have progressed at different speeds and their programmes vary in ways that reflect the economic and political scenarios in which they operate, such political movements already hold government positions in some countries (most strikingly, in Austria and Italy) or occupy a significant portion of the political spectrum, with their support measured in double digits.[35]

We will now analyse the details of the European political response in defence of the EU's constitutional foundations, upon which the integration process depends, looking at the actions announced and implemented with respect to the cases of Poland (3.2) and Hungary (3.3).

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[32] See, in particular, European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)). Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0442&_lang_ua_ge_=EN and European Parliament resolution of 17 May 2017 on the situation in Hungary (2017/ 2656 (RSP)),. Available at: ,http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//_TEXT_+TA_+P8-TA-2017-0216_+0+_DOC_+XML+V0//EN

[33] See, for example, European Parliament resolution of 1 March 2018 on the situation of fundamental rights in the EU in 2016 (2017/2125(INI), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0056 +0+ DOC+XML+V0//EN

[34] See, for example, European Parliament resolution of 14 March 2018 on the next MFF: preparing the Parliament's position on the MFF post-2020(2017/2052(INL)) where the Parliament urges the Union to demonstrate that it stands together and is able to address political developments such as the rise of populist and nationalist movements (paragraph 7). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0075 +0+ DOC +XML +V0/ /EN&language=EN

[35] There is, of course, a background to the current illiberal episode. These range from the inclusion of Joerg Haider's Freedom Party in an Austrian coalition government in 2000, an event which was met by a diplomatic boycott although there were no provisions in the Treaty for official action, through the political confusion in Italy under Berlusconi (and Buttiglione), to the more recent revolt against the presidency of Traian Băsescu in Romania (cf., among others, Michael Blauberger and R. Daniel Kelemen, "Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU", in Journal of European Public Policy, 24, 2017, pp. 321–336.)

3.2. The case of Poland

3.2.1. Background

Events in Poland, in particular the political and legal dispute concerning the composition of the Constitutional Tribunal, and a new law relating to the functioning of the Supreme Court, has raised concerns regarding the respect of the rule of law. The table below gives a brief overview of the key developments in 2016 and 2017.

Table 1 : Timeline in 2016 and 2017

2016

- **On 13 January**, the Commission launched a dialogue with the Polish authorities in order to seek solutions to its concerns regarding the Constitutional Tribunal.
- **Between February and July,** the Commission and the Polish Government exchanged a number of letters and met on several occasions.
- **On 13 April,** the Parliament voted for a resolution urging the Polish Government to respect, publish and fully implement the judgments of the Constitutional Tribunal.
- **On the 1st of June**, in the absence of solutions from the Polish authorities, the Commission formalised its concerns by sending a Rule of Law Opinion to the Polish Government.
- **On 27 July**, the Commission adopted a Rule of Law Recommendation, stating that there was a systemic threat to the rule of law in Poland. It invited the Polish authorities to address its concerns within three months, but the Polish Government informed the Commission that it disagreed on all the points raised.
- **By 21 December**, important issues had remained unresolved, and the Commission adopted a second Rule of Law Recommendation, concluding that there continued to be a systemic threat to the rule of law in Poland. The Polish authorities again disagreed with the Commission's assessment.

2017

- **On 20 January**, the Polish Government announced a comprehensive reform of the judiciary in Poland.
- **On 16 May**, the Commission informed the Council on the situation in Poland. There was broad support among Member States for the Commission's role and efforts to address the issue. Member States called upon Poland to resume the dialogue with the Commission.
- **On 13 July,** the Commission wrote to the Polish authorities expressing its concerns about the pending legislative proposals on the reform of the judiciary, underlining the importance of refraining from adopting the proposals as they were drafted at that time, and calling for a meaningful dialogue. The Commission explicitly invited the Polish Foreign Minister and Polish Justice Minister to meet at their earliest convenience. These invitations were ignored.
- **By 26 July,** the Polish Parliament had adopted four judicial reform laws; two of the laws had been signed into force by the President, and two of the laws were vetoed by the President and

subject to further legislative discussions. The Commission adopted a third Rule of Law Recommendation, reiterating its existing concerns about the Constitutional Tribunal and setting out in addition its grave concerns about the judicial reforms. The Recommendation set out a list of proposed remedies, and urged the Polish authorities in particular not to take any measure to dismiss or force the retirement of Supreme Court judges.

- **On 29 July**, the Commission launched an infringement procedure on the Polish Law on Ordinary Courts, also on the grounds of its retirement provisions and their impact on the independence of the judiciary. The Commission referred this case to the Court of Justice on 20 December 2017. The case is pending before the Court.
- **On 25 September**, the Commission again informed the Council of the situation in Poland, and there was again broad agreement on the need for Poland to engage in a dialogue with the Commission.
- **On 26 September**, the President of the Republic transmitted to the Sejm two new draft laws on the Supreme Court and on the National Council for the Judiciary.
- **On 15 November**, the Parliament adopted a Resolution expressing support for the Recommendations issued by the Commission, and considering that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU.
- **On 8 December,** the two new draft laws proposed by the President of the Republic were adopted by the Sejm, the lower house of the Polish Parliament. On the same day, the Venice Commission of the Council of Europe adopted two opinions on the judicial reforms in Poland, concluding that they enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to judicial independence.
- **On 15 December**, the two laws were approved by the Polish Senate, the upper house of the Polish parliament.
- **On 20 December**, the Commission adopted its Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland which included a Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law

Source: extracts from the reasoned proposal[36] and the Commission press release from 24 September 2018[37]

3.2.2. Recent development-Infringement procedure

The new Polish Law on the Supreme Court entered into force on 3 April 2018. It lowers the retirement age for Supreme Court judges from 70 to 65. The law affects 27 of the Court's 72 judges and gives the President of the Republic the power to increase the number of judges.

The new age limit applies as from the date of entry into force of that Law. The Supreme Court judges may continue in active judicial service beyond the age of 65 with the consent of the

[36] Idem.
[37] http://europa.eu/rapid/press-release_IP-18-5830_en.htm

President of the Republic of Poland in case the judge concerned provides a health certificate and a statement confirming his/her will to continue in active service.

Consequently, according to the Law, serving Supreme Court judges who reached the age of 65 before the Law entered into force on 3 July 2018 were required to retire on 4 July 2018, unless they had submitted the necessary documents by 3 May 2018 and the President granted them permission to continue in active service.

The President is not bound by any criteria when deciding whether a judge can continue or not, and the President's decision is not subject to any form of judicial review. The Law on the Supreme Court also gives the President the power to increase freely the number of Supreme Court judges until 3 April 2019.[38]

On 26 June 2018, at the General Affairs Council hearing on the rule of law in Poland on 26 June 2018 in the context of Article 7(1) TEU, the Polish authorities did not provide an adequate response to the need to take measures on the matter. In view of that, and with no progress in the dialogue with Poland, the College of Commissioners decided on 27 June 2018 to empower Vice President Frans Timmermans to launch an infringement procedure as a matter of urgency.

The Commission began with a Letter of Formal Notice on 2 July 2018. The Polish authorities replied to the Letter of Formal Notice on 2 August 2018, rejecting the Commission's concerns.

Next, on 14 August 2018, the Commission sent a Reasoned Opinion to the Polish authorities whose response did not satisfy the Commission. The Commission still considered the law being incompatible with the rule of law, in particular with the principles of legal protection and of judicial independence. The independence of the judicial bodies, and, therefore, the irremovability of judges, are essential if judicial cooperation among Member States of the EU is to function. Therefore, Poland failed to fulfil its obligations under Article 19(1) TEU[39] in connection with Article 47 of the Charter of Fundamental Rights of the EU.

In view of the Polish Government's unsatisfactory response, on 24 September 2018, the Commission agreed to refer the matter to the Court of Justice of the EU and to ask the Court of Justice for interim measures to restore Poland's Supreme Court to its situation prior to 3 April 2018, when the contested law on the Supreme Court took effect.

On 2 October 2018, the Commission brought an action for failure to fulfil obligations before the Court of Justice. The Commission considered that Poland has infringed EU law by, first, lowering the retirement age and applying that new retirement age to judges appointed to the Supreme Court up until 3 April 2018 and, second, granting the President of the Republic of Poland the discretion to extend the active judicial service of Supreme Court judges.[40]

It also requested provisional measures, which the Vice-President of the CJEU, Judge Silva Lapuerta, accepted by an Order of 19 October 2018[41].

For the first time, provisionally and with retroactive effect, the CJEU has blocked a reform of a constitutional body that, according to the Vice-President of the CJEU, entails a "profound and

[38] https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180159en.pdf
[39] According to Article 19(1), "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".
[40] Case: C-619/18, ECLI:EU:C:2018:910.
[41] ECLI: EU: 2018: 852.

immediate" change in the composition of the Supreme Court. They are "urgent interim" measures that will have to be ratified by the CJEU Vice-President herself. The Court has the possibility of executing the interim measures (Article 260 TFEU) through penalty payments or financial penalties.

At the time of writing, the CJEU has not yet given its decision on the case. However, 21 November 2018, the Polish Parliament went back on its initial agreement and complied with the CJEU's interim measure.

We should recall that on 29 July 2017 the Commission had already launched an infringement procedure on the Polish Law on Ordinary Courts for going against judicial independence. The Commission referred the case to the Court of Justice of the EU on 20 December 2017. It remains pending resolution.

It is worth noting that, in the aforementioned Order of its Vice-President (19 October 2018),[42] the CJEU resolved that Poland must immediately suspend the application of national provisions relating to the reduction in the age of retirement of its Supreme Court judges.[43]

This precautionary decision, *inaudita altera parte*, under the provisions of Article 160(7) of the Procedural Regulations of the CJEU, is designed to safeguard the effective impact of a potential decision in favour of the Commission (if the appeal were to be accepted, the immediate application of the provisions in question could irremediably undermine the fundamental right to an independent judge).[44] The decision postpones any decision as to the basis of the claims submitted by the Commission, lodged on 2 October 2018 on the basis that the reduction in the retirement age of judges of the Supreme Court and the faculty conferred on the President of the Republic, granting him the power to extend the active juridical function of Supreme Court judges on a discretionary basis, would infringe Union law in so far as it would weaken the guarantees of effective judicial oversight clearly established in Article 19(1) TEU, and set out as a fundamental aspiration in Article 47 of the Charter of Fundamental Rights of the EU.)

The Order of 19 October 2018 ordered immediate suspension of the regulations in question, and the adoption of the necessary measures to ensure that the Supreme Court judges concerned continue to perform their functions, that no measures are taken with the purpose of appointing new judges to replace them, and that the Commission is provided with monthly reports of all measures taken to conform fully with the provisional measures in this Ruling.

As noted above, the Polish Parliament complied with the CJEU Order by amending its Supreme Court Law on 21 November 2018[45].

[42] ECLI: EU: 2018: 852.

[43] That not any alteration to the conditions under which judges perform their juridical function would constitute a similar threat, in particular if the modifications consisting in reduced payment for national public service reflect objectifiable criteria, in accordance with other relevant constitutional requirements (austerity measures linked to the suppression of excessive budget deficit and a European Union financial aid programme) was clarified in the recent CJEU Ruling of 27 February 2018, as. C-64/16, ASJP and Court of Auditors (ECLI: EU: C: 2018: 117).

[44] *Ordonnance* of the Vice-President of the Court, 19 October 2018, as. C-619/18 R, request for provisional measures. ECLI:EU:C:2018:852.

[45] Finally, by Order of the Court of Justice of the European Union, Grand Chamber, of 17 December 2018, the measures previously agreed, by the aforementioned Order of 19 October, are hereby confirmed. Moreover, by Order of the President of the ECJ of 15 November 2018, it would be decided to deal with the action for failure to

We should also remember that Preliminary Ruling of 25 July 2018[46], issued at the request of the Irish High Court, provided the CJEU with the opportunity to give an opinion with respect to European arrest warrants issued by Polish juridical bodies, based on the proven systemic undermining of the rule of law in Poland. On that occasion, the CJEU, while stating that the rejection of a European warrant should be considered as an exception to the principle of mutual recognition that underpins the simplified extradition instrument in the Area of Freedom, Security and Justice (AFSJ), did not pass up the opportunity to expressly state that the judicial authorities of a Member State should refrain from handing over the individual concerned if that person could be at risk of suffering the violation of their fundamental right to an independent tribunal and, thus, the essential basis of their fundamental right to a fair trial, as a consequence of failings that could affect the independence of the judicial authorities of the Member State issuing the warrant.

The opposition of the subject of the extradition order, based in particular on the aforementioned proposal of the Commission of 20 December 2017, forced the Court to consider whether the threat to the rule of law in Poland raises the need for additional checks, (ruling *Aranyosi and Caldararu*[47]), and, should this be the case, to ask whether the judicial authority issuing the warrant should be asked for additional information and, if so, what guarantees should be offered.

The response was that, with respect to the systemic undermining of the rule of law on which this proposal is based, the judicial authority "must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State (...) there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State."[48]

3.2.3. Article 7 TEU procedure

As already noted in Chapter II, the Commission, by means of the Reasoned Proposal of 20 December 2017[49], initiated a procedure to confirm the clear risk of serious breach of the rule of law by the Republic of Poland, in accordance with the provisions to this effect deriving from Article 7(1) TEU.[50] This initiative was the consequence of a fruitless dialogue between the Commission and the national authorities, starting in November 2015:

> *"During the last two years, the Commission has made extensive use of the possibilities provided by the Rule of Law Framework for a constructive dialogue with the Polish authorities. Throughout this process the Commission has always substantiated its concerns in an objective and thorough manner. The Commission has issued a Rule of Law Opinion and three Rule of Law Recommendations. It has exchanged more than 25 letters*

fulfil obligations in this case under the accelerated procedure, in accordance with Article 23a of the Statute of the ECJ and Article 133 of its Rules of Procedure.

[46] CJEU Ruling, Grand Chamber, 25 July 2018, case C-216/18 PPU. ECLI:EU:C:2918:586.

[47] CJEU Ruling, Grand Chamber, 5 April 2016, joined cases C-404/15 and C-659/15 PPU. ECLI:EU:C:2016:198.

[48] With respect to the preliminary ruling (ECLI: EU: C: 2018: 586), cf. Conclusions of AG *Tanchev*, presented 28 June 2018.

[49] Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, of 20.12.2017, COM (2017) 835 final. It is entitled: "Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland".

[50] Council Decision proposal from the Commission, 20 December 2017, COM 2017, 835 final.

with the Polish authorities on this matter. A number of meetings and contacts between the Commission and the Polish authorities also took place, both in Warsaw and in Brussels, mainly before the issuing of the first Rule of Law Recommendation. The Commission has always made clear that it stood ready to pursue a constructive dialogue and has repeatedly invited the Polish authorities for further meetings to that end."[51]

Also the Parliament has higlighted the fact that the constitutional policies pursued by the Polish authorities are in clear violation of the basic requirements of the system upon which the EU is founded It has given numerous statements on a matter. On 15 November 2017, it adopted a resolution on the situation of the rule of law and democracy in Poland where it "believes that the current situation in Poland represents a clear risk of a serious breach of the values referred to in Article 2 of the TEU and instructs its Committee on Civil Liberties, Justice and Home Affairs to draw up a specific report [-- --] with a view to holding a plenary vote on a reasoned proposal calling on the Council to act pursuant to Article 7(1) of the TEU.[52] On 1 March 2018, the Parliament also adopted a resolution on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland. In its resolution, the Parliament welcomes the Commission's decision of 20 December 2017 to activate Article 7(1) TEU as regards the situation in Poland and supports the Commission's call on the Polish authorities to address the problems. It calls on the Council to take swift action in accordance with the provisions set out in Article 7(1) TEU, and asks the Commission and the Council to keep the Parliament fully and regularly informed of progress made and action taken at every step of the procedure.[53]

The proposal of 20 December 2018 for a Council Decision provides the following:

Article 1

There is a clear risk of a serious breach by the Republic of Poland of the rule of law.

Article 2

The Council recommends that the Republic of Poland take the following actions within three months after notification of this Decision:

(a) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed, by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected;

(b) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016;

(c) ensure that the law on the Supreme Court, the law on Ordinary Courts Organisation, the law on the National Council for the Judiciary and the law on the National

[51] Cit. point 8, of the Proposal (COM 2017, 835 final).
[52] European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931RPS)), paragraph 16. Available at : http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0442&language=EN
[53] (2018/2541(RSP)).

School of Judiciary are amended in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty;

(d) ensure that any justice reform is prepared in close cooperation with the judiciary and all interested parties, including the Venice Commission;

(e) refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.

It is worth noting the language used in this text, which ranges from the implicit instruction in the call to restore the independence and legitimacy of the Constitutional Tribunal as a guarantor of the Polish Constitution to the more explicit requirement to publish and implement fully the judgments of the Constitutional Tribunal, calling on the Polish authorities on the basis of the principle of loyal cooperation between state organs, ("a constitutional precondition in a democratic state governed by the rule of law" (Reason 14)) – to "refrain from actions and public statements which could undermine further the legitimacy of the Constitutional Tribunal, the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole". It also includes the exhortation to ensure that the required reforms of the legal framework are conducted in close cooperation with, among others, "the judiciary and all interested parties, including the Venice Commission" (d), "in order to ensure their compliance with the requirements relating to the independence of the judiciary, the separation of powers and legal certainty".

3.2.4 Rule of Law procedure

On the same date, on 20 December 2017, the Commission also adopted a recommendation (EU) 2018/103 regarding the rule of law in Poland, complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520.[54] In its recommendation of 20 December, it reiterated the importance of the rule of law as a shared value of the EU, and expressly appealed to the obligation of public institutions to cooperate loyally (Reason 4).

In this Recommendation, which supplemented the previous ones adopted as part of the Framework to strengthen the Rule of Law[55] and the numerous occasions on which the Commission has stated its concern at the worrying trends in constitutional politics in Poland (set out in the recitals), it denounces the "threats to judicial independence" and confirms the existence of a systemic threat to the rule of law, before urging the Polish authorities to urgently adopt a whole set of "appropriate actions to address this threat as a matter of urgency".

The Commission declared itself ready to enter into dialogue without delay, and urged the Polish authorities to act to achieve the objectives set out in the following recommendations, on the basis of loyal cooperation:

"46**.** In particular, the Commission recommends that the Polish authorities take the following actions with regard to the newly adopted laws in order to ensure their compliance with the requirements of safeguarding the independence of the judiciary, of separation of powers and of legal certainty as well as with the Polish Constitution and European standards on judicial independence:

(a) ensure that the law on the Supreme Court is amended so as to: not apply a lowered retirement age to the current Supreme Court judges; remove the discretionary power of the

[54] 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. C/2017/9050 (OJ L 17, 23.1.2018, p. 50–64).
[55] COM 2014, 158 final.

President of the Republic to prolong the active judicial mandate of the Supreme Court judges; remove the extraordinary appeal procedure;

(b) ensure that the law on the National Council for the Judiciary is amended so that the mandate of judges-members of the National Council for the Judiciary is not terminated and the new appointment regime is removed in order to ensure election of judges-members by their peers;

(c) refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole.

47. In addition, the Commission recalls that none of the following actions, contained in its Recommendation of 26 July 2017, relating to the Constitutional Tribunal, the law on Ordinary Courts Organisation and the law on the National School of Judiciary, have been taken and therefore reiterates its recommendation to take the following actions:

(d) restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed and by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015, which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function of judge in the Constitutional Tribunal, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected;

(e) publish and implement fully the judgments of the Constitutional Tribunal of 9 March 2016, 11 August 2016 and 7 November 2016;

(f) ensure that the law on Ordinary Courts Organisation and on the National School of Judiciary is withdrawn or amended in order to ensure its compliance with the Constitution and European standards on judicial independence; concretely, the Commission recommends in particular to: remove the new retirement regime for judges of ordinary courts, including the discretionary power of the Minister of Justice to prolong their mandate; remove the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts and remedy decisions already taken;

(g) ensure that any justice reform upholds the rule of law and complies with EU law and the European standards on judicial independence, and is prepared in close cooperation with the judiciary and all interested parties."

3.3. The case of Hungary

3.3.1. Background

Events in Hungary, concerning in particular the functioning of the constitutional and electoral system, the independence of the judiciary and other institutions and the rights of judges or with respect to the corruption and conflicts of interest and a broad spectrum of fundamental freedoms and rights, such as data protection and privacy, freedom of expression, association, religion and others (academic freedom, the right to equal treatment, the rights of persons belonging to minorities, the rights of migrants, asylum-seekers and refugees or economic and social rights). The table below gives a brief overview of some key EP Resolutions adopted in last years.

Table 2 : Timeline up to 2018

- **On 12 September 2018**, the Parliament has passed 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[56]
- **On 17 May 2017,** the Parliament had already adopted a resolution on the situation in Hungary, after a previous hearing held on 27 February 2017 by its Committee on Civil Liberties, Justice and Home Affairs and the plenary debate of 26 April 2017.[57]
- **On 16 December 2015,** the Parliament, follow-up a previous Resolution of 10 June 2015[58] having regard to the Council´s first annual rule of law dialogue (held on 17 November 2015), had adopted a Resolution on the situation in Hungary.[59]
- **On 3 July 2013**, the Parliament, pursuant a previous resolution of 16 February 2012[60] had adopted a resolution on the situation of fundamental rights: standards and practices in Hungary.[61]
- **On 5 July 2011**, the Parliament had adopted a resolution on the revised Hungarian Constitution.[62]
- **On 10 March 2011**, the Parliament had adopted a resolution on media law in Hungary.[63]

In summary, over the last eight years, as well as other European bodies and EU institutions, the European Parliament has also had to deal with the situation of constitutional degradation in Hungary. Through a programme of illiberal changes in a line of weakening of fundamental values and principles. The common pattern of all these changes was that the executive of legislative powers had been systematically enabled to interfere significantly with the composition, powers, administration and functioning of these bodies.

[56] on the situation in Hungary (2017/2131 (INL)).
[57] on the situation in Hungary (2017/2656 (RPS)).
[58] on the situation in Hungary (2015/2700 (RSP)).
[59] on the situation in Hungary (2015/2935 (RSP)).
[60] on the recent political developpments in Hungary. (2012/2511(RSP)).
[61] OJ C 75, 26.2.2016, p. 52 (cf. 2012/2130 (INI)), having regard to such political developments in Hungary (a.e., the Council and Commission statements presented, or the statements of the Hungarian Prime Minister adressed, at the plenary debate held in the EP on 18 January 2012).
[62] OJC 33 E, 5.2.2013, p. 17.
[63] European parliament resolution on media law in Hungary calling on the hungarian authorities to review the media law especially on the basis of the comments and proposals made by European institutions and the case law of the ECHR. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA +20110310 +ITEMS +DOC +XML +V0 //EN&language=EN

3.3.2. Recent development and their analysis

The scope of Article 7 TEU would not be limited to situations of non-compliance with specific European obligations and provisions, unlike remedies for non-compliance with Article 258 TFEU. So that, without prejudice to the safeguarding of the Member States political and constitutional autonomy, the EU values and principles would in any event prevail.

The situation in Hungary was addressed by European Parliament resolution of 12 September 2018, requesting that the Council, in accordance with the provisions of Article 7(1) TEU, confirm the existence of a clear risk of serious violation of the founding values of the Union.

The Parliament, which has been gradually monitoring the deteriorating constitutional situation in Hungary[64], has highlighted developments which undermine the values recognised in Article 2 TEU, generating mistrust in the country's relationship with other Member States and has condemned (by a sizeable majority)[65] the threat that this poses both to the EU and to the rights of that country's own citizens.

The resolution of 12 September 2018 also stresses this point, in emphasising the continuity of the commitments entered into as a result of membership of the Union, regardless of subsequent elections and their outcomes. In other words, the Member State, upon joining, makes a commitment to observe these values, and subsequent governments, whatever discretion they have to develop their own policies, remain bound by this commitment.

If we look in detail at the worrying issues mentioned in the resolution, we can summarise our concerns as focusing on fundamental rights (freedom of expression, in all its diversity, the right to privacy, and the situation of foreigners, among others), the independence of the judiciary, the climate of corruption, and the operation of the electoral system and of the constitutional system in general. These are, in short, a series of democratic anomalies with regard to the values and principles underlying the constitutional rule of law, which, taken as a whole, go beyond the question of the rule of law.

In Hungary, although the overblown national-populist discourse of its leaders is expressed in legal terms, successive constitutional reforms and an unending stream of legislative modifications are the cause of great concern.[66] It is against this background that the Parliament adopted its resolution of 12 September 2018, reflecting the debates which have taken place in various EP committees and, looking outwards, expressing the growing concern among the European public. The concerns set out in this resolution on the situation in Hungary point to nothing less than an emergency threatening those democratic values and principles which are embodied more clearly in the Parliament than in other EU institutions, such as the Commission. The prominence of concerns as to the operation of the constitutional and electoral system is not arbitrary.

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[64] In this respect, cf. successive EP Resolutions (see Table 2). In addition, with references, cf. European Parliament resolution of 14 November 2018 on the need of a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886 (RSP)). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0456+0 +DOC+XML +V0 // EN&language=EN

[65] To date, it has passed 448 in favour, compared to almost 200 against.

[66] Annex to the European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340 +0+ DOC +XML +V0 //EN&language=EN

The Parliament, as the chamber representing the peoples of the Member States (and voted for by resident EU citizens) feels that it has the authority to denounce a repeated violation of the rule of law, which, despite having been implemented through a process of constitutional reform endorsed by the electorate, and legislative changes, is not thereby exempt from the requirements deriving from the conventional/constitutional paradigm clearly established in Article 2 TEU.

Otherwise, these shared values and principles would cease to be available either for the EU or for its Member States (on the assumption that they remain within the Union). Although the Parliament does not go so far as to explicitly say so, an implicit consequence of the logic contained in the Resolution is that, in light of the democratic principles contained in Articles 9 to 12 TEU, if Hungary continues along its current path it will undermine the democratic foundations on which the institutional and legislative system of the EU rest. What is at issue here, then, is not federalist constitutional uniformity but, rather, the need to safeguard constitutional democracy throughout the system, both at the EU level and in each and every one of its Member States.

3.4. Hypothetical assumptions

3.4.1. Direct and indirect breach of Article 6 TEU

We need to start with a systematic interpretation of Article 4(2), with respect to Article 2 TEU. The Treaty clause explicitly guarantees the basic function of the State which, within the framework of its constitutional autonomy – "ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security" – must coexist with the observance of "values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" upon which the Union is founded.

In this respect, the values identified in Article 2 TEU (and referred to and specified as principles and/or rules in other TEU provisions), provide a paradigm for membership of the EU. And this applies not just to those countries wishing to become new Member States of the EU (cf. Article 49 TEU), but also to violation of the obligations deriving from the TEU, not just as a result of the occasional breach or failure to observe these obligations (which can be sanctioned through the EU's infringement procedure, with the attendant remedies and penalties), but as the result of systemic violation of EU values, due to unresolved structural shortcomings, or as a result of open violation of the constitutional order of the Member State. In such cases, contravening the constitutional order would generate grave harm to the general interest of the country, both as a sovereign state and as a Member State of the EU.

Firstly, because this would entail the immediate and direct subversion of the constitutional order. And secondly, in an indirect and less immediate manner, any breach of the fundamental shared values of the EU also seriously undermines the effectiveness of the EU values set out in Article 2 TEU. Insofar as it detracts state support of legitimacy from the constitutional common embodied on this provision.[67]

In other words, violating the fundamental values and principles of the constitution of an EU Member State could be considered to constitute a violation of the constitutional law of the EU. Although the institutions of the EU have, with the passage of time, understood the anti-constitutional aspect of a course of action which flatly contravenes the legal system of a Member State, they appear as yet to be unaware that, as part of our shared foundations, threatening these values within one Member State gives rise, over time, to a violation of Article

[67] Cf. López Castillo, *The European Union in crisis*. Or, how to advance integration without disintegrating as a result of national-populism, in European Papers, 2019, *in print*.

2 TEU. This could result lead not easy to implementation of the procedure established in Article 7 TEU.

3.4.2 Loyalty among Member States

The very existence of a Union of constitutional states implies a requirement of mutual aid and assistance, and this is made explicit in the calls for solidarity among Member States in a number of Articles (for example, in Article 3 TEU, on the objectives of the EU.

In the current version of the TEU, the duty of solidarity among Member States has been raised to the level of a structural and relational principle, designed to enable the development of specific policies such as those articulated in the Area of Freedom, Security and Justice, or with regard to a common foreign, security and defence policy. This could be raised, *de conventione ferenda*, through a proposed addition to Article 4(3) TEU, adding something along the following lines at the end of paragraph 4(3) or as a new Article 4(4): "The Member States of the Union shall mutually respect and assist one another with the purpose of safeguarding the conventional paradigm and objectives of the Union." In any event, until such a clause is included, there needs to be effective mutual respect and assistance between Member States as one of the fundamental assumptions of the EU.

4. WAYS TO IMPROVE THE PROTECTION OF RULE OF LAW IN THE EU

Since the Treaty of Lisbon came into force, there have been various proposals from the Parliament, the Commission and the Council designed to strengthen the protection of EU values. These proposals differ from the ones discussed in Chapter 2 of this study, which are already in force and have been applied in practice (Article 7 procedure; the Rule of Law Framework and the infringement procedure of Article 258).

The Commission and Parliament proposals discussed here have not yet been implemented. We will start by explaining what these proposals are (1.1), and will then go on (1.2) to consider those proposals which, in our opinion, should be implemented and do not require Treaty reform.

4.1 Proposals to safeguard the rule of law and values of the EU put forward by the EU Institutions

In recent years, European Institutions have put forward a large number of proposals designed to safeguard the founding values and principles of the EU, in particular, the rule of law, democracy and fundamental rights. In listing them, we are following and summarising the study entitled "The triangular relationship between Fundamental Rights. Democracy and Rule of Law in the EU. Towards an EU Copenhagen Mechanism"[68]. Normally, the Parliament proposals seek to avoid modifications to the Treaties.[69]

4.1.1 Proposals of the Parliament

Drawing on the Parliament's resolutions on Hungary (Tavares Report, July 2013[70]) , on the situation of fundamental rights in the EU (December 2010 and December 2012),and on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886/RSP)[71], we can summarise the following proposals[i]:

- the need to ensure a more coherent and comprehensive interinstitutional framework cooperation at Union level in the annual monitoring of fundamental rights with bodies like the Council of Europe's Venice Commission and the High Commissioner of Human Rights;[72]

[68]European Parliament, Policy Department Citizens' Rights and Constitutional Affairs, 2013. Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf

[69] See In this respect, the analysis of Wonter van Ballegooij and Tatjana Evas*: An EU mechanism on democracy, the rule of law and fundamental rights*. European added value Assessment, European Parliament, European Parliamentary Research Service, October 2016. Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_IDA(2016)579328

[70] Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), (2012/2130(INI)), 25 June 2013 also known as the Tavares Report. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229 +0+ DOC +XML +V0

[71] Report on the situation of fundamental rights in the European Union (2010 – 2011) , December 2010 (EP Fundamental Rights 2012 Report) ; Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon , December 2010 (EP Fundamental Rights 2012 Report) ; European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy , the rule of law and fundamental rights (2018/ 2886/ RSP).

[72] Paragraph 35 of the EP 2012 Fundamental Rights Report and paragraph 74 of the Tavares Report.

- the European fundamental rights policy cycle, which would deal on a "multiannual and yearly basis [with] the objective to be achieved and the problems to be solved".;[73]
- the Tavares Report suggested the creation of an "Article 2 TEU alarm agenda" or "new Union values monitoring mechanism", which would be dealt with by the Commission; the setting up of a Copenhagen Commission or high-level group of wise men, which would be independent of any political influence and could issue recommendations to the EU on how to respond to and remedy any infractions, complemented by a "scoreboard" of Member States and under the leadership of the Commission[74].
- the Parliament has also recommended that the fundamental rights implications of EU proposals and their implementation by EU Member States are included in the Commission evaluation (transposition) reports, as well as its annual reporting on the application of EU law. The Parliament has recommended that the scope of these Annual Reports should be expanded to include an assessment of Member States' situations as regards the implementation, promotion and protection of fundamental rights, and recommendations addressed to each of them;[75]
- the importance for the Commission to better ensure that infringement proceedings secure effective protection of human rights, "rather than aiming for negotiating settlements with Member States". A key initiative relates to the setting up of a new freezing procedure to ensure "that Member States, at the request of the EU institutions, suspend the adoption of laws suspected of disregarding fundamental rights or breaching the EU legal order, and would complement current infringement and fundamental rights proceedings";[76]
- the Parliament should set up an interdisciplinary platform of academics with proven in-depth expertise on Rule of Law, democracy and fundamental rights aspects and covering the 28 EU Member States to feed into the Parliament's annual report on fundamental rights and other related policy and legislative works of the EP. The network would issue an annual scientific report on the situation of fundamental rights, democracy and rule of law across the Union;[77]
- The CJEU should better facilitate third-party interventions, in particular by human rights NGOs;[78]
- The EU Agency for Fundamental Rights (FRA): The limited scope of the FRA's mandate has been particularly contested, with the EP recommending to expand it to also cover old EU third pillar matters (police and judicial cooperation in criminal matters), a comparative evaluation of Member States' compliance with the EU Charter of Fundamental Rights and the regular monitoring of Member States' compliance with Article 2 TEU. A critical issue that has also been highlighted is the need to strengthen the independence and transparency of the FRA, which is perhaps too vulnerable to Member State governments and their concerns.[79]

[73] Paragraph 20 of the EP 2012 Fundamental Rights Report.
[74] Paragraph 69 of the Tavares Report.
[75] Paragraph 3 of the EP Fundamental Rights 2012 Report.
[76] Paragraphs 28 and 31 of the EP Fundamental Rights 2012 Report, and paragraphs 20 and 40 of the EP Fundamental Rights 2010 Report.
[77] Paragraphs 78 and 80 of the Tavares Report. See also paragraphs 2 and 3 of the European Parliament Resolution of 14 November 2018 on the need for a comprehensive mechanism for the protection of democracy , the rule of law and fundamental rights (2018 / 2886 / RSP).
[78] EP Fundamental Rights Report, paragraph 33.
[79] Paragraphs 44, 45, 46 and 47 of the EP Fundamental Rights 2012 Report.

In our view, these Parliament recommendations, which do not require modification of the Treaties, are sensible and positive, but are not substantially different when compared to the instruments that already exist to protect the values of the EU, which we considered in Chapter 2 of this study. In other words, Treaty reform would unquestionably lead to qualitative progress.

4.1.2 Commission and Parliament proposals amending the Treaties

In September 2013, the Vice President of the European Commission Viviane Reding highlighted in a speech mentioned above the Commission's policy options[80]. These include a reform of the Treaties, in order to entail a more far-reaching rule of law mechanism, which would require:

- "More detailed monitoring and sanctioning powers for the Commission, in an amendment of the Treaty";
- Expanding the CJEU competences and creating a new procedure to enforce the ruleof law principles enshrined in Article 2 TEU " by means of an infringement procedure brought by the Commission or another Member State before the Court of Justice";
- Treaty amendment to lower the existing thresholds for activating the first stage of Article 7 TEU;
- Expanding the mandate of the FRA and a Treaty amendment that puts the legal basis of the FRA into the ordinary legislative procedure, and
- Abolishing Article 51 of the EU Charter, so as to allow "the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law".

The Commission has put forward some perfectly sensible proposals to protect the values of the EU – the Rule of Law, democracy and fundamental rights,[81] and we would also endorse the proposals of the Parliament included in the Resolution of 25 October 2016[82], paragraph 20:

- Article 2 TEU and the Charter of Fundamental Rights of the European Union should become the legal foundation of the legislative measures that should be adopted in the next ordinary legislative procedure;
- by virtue of Article 2 TEU and the Charter, national courts may refer appeals to the Court of Justice with regard to the legality of the actions of Member States;
- Article 7 should be revised in order to establish the penalties applicable, determining which rights of non-compliant Member States (other than the right to vote in the Council) may be suspended: for example, financial penalties or the suppression of EU funds;
- following the adoption of EU legislation and before its application, a vote by one third of the deputies of the Parliament may initiate an appeal to the Court of Justice;

[80] Reding, V. , "The EU and the Rule of Law – What next ?", 4 September 2013, Speech / 13 / 677.
[81] See "Towards a comprehensive EU protection system for minorities", European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, 2017, available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2017)596802
[82] European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0409+ 0+DOC +XML +V0 //P8_TA(2016)0409, paragraph 20.

- the rights of individuals and organisations directly or indirectly affected by the action of institutions or a Member State be protected by modification of Articles 258 and 259 TFEU;
- Article 51 of the Charter of Fundamental Rights should be deleted, and the Charter should become a Declaration of Rights of the Union; and
- the requirement for unanimity in spheres related to the respect for, and protection and promotion of fundamental rights, such as equality and non-discrimination, should be reviewed.

5 RECOMMENDATIONS

The proposals put forward here are specific, precise and effective and do not require a modification of the Treaties, which could be very difficult and highly unlikely at present.

First, the Union should sign the European Convention on Human Rights of 1950, as Article 6(2) TEU prescribes. The monitoring action of the European Court of Human Rights constitutes the highest form of supranational control over violations of essential human rights.

Second, the EU should introduce a conditionality clause into its budget in the implantation of Cohesion Policy, so that the allocation of funds is subject to the benefiting State not infringing the Union's values, including the rule of law[83]. The determination of such an infringement must be as objective as possible. We suggest that the conditionality clause we propose can only be applied if the procedure under Article 7(1) TEU has been formally launched, or in the event of a final judgement from the CJEU.

It is worth pointing out that this recommendation by the authors is not the same as the Proposal coming from the Commission for the European funds of the European Cohesion Policy. The Commission launched it on 29 May 2018, with a view to the next EU budget, covering the period 2021–2027. The proposal for a Common Provisions Regulation (CPR) sets out common provisions for seven shared management funds: the European Regional Development Fund, the Cohesion Fund, the European Social Fund Plus, the European Maritime and Fisheries Fund, the Asylum and Migration Fund, the Internal Security Fund, and the Border Management and Visa Instrument.[84]

The proposal for a regulation refers to social policy, implementing the European Pillar of Social Rights. In its Explanatory Memorandum (para. 5), it links the Cohesion Policy with Fundamental Rights by demanding respect for people with disabilities and for gender equality. Similarly, it calls on the Member States and the Commission to combat all forms of discrimination or segregation. It also proposes protection of the environment as a goal of the Funds.

However, what is most significant for our purposes is that in paragraph 6, and on the basis of Article 322 TFEU (financial regulations), the Commission proposal puts forward as a goal the protection of the Union's budget in case of "generalised deficiencies as regards the rule of law in the Member States, as the respect for the rule of law is an essential precondition for sound financial management and effective funding". In that event, the Commission can take action against the Member State, suspending the application of the regulations on the funds, if it jeopardises the EU's finances through a generalised degradation of the rule of law.

We must take into account that the goal of this Commission proposal is not so much to defend the rule of law as to protect the financial interests of the Union.

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[83] See *Research for REGI Committee-Conditionalities in Cohesion Policy*, European Parliament, Policy Department for Structural and Cohesion Policies, 2018.
Available at: http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2018)617498

[84] 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 - 2018/0196 (COD).
Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A375%3AFIN

That same philosophy underpins the proposal for a regulation that the European Commission had made on 2 May 2018 "on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States"[85]. Article 1 states that the purpose of the Regulation is "the protection of the Union's budget in the case of generalised deficiencies as regards the rule of law in the Member States". Article 3 makes it clear that a series of measures will be taken – such as the suspension of payments – when a generalised deficiency as regards the rule of law in a Member State "affects or risks affecting the principles of sound financial management or the protection of the financial interests of the Union".

Therefore, only if the financial interests of the Union are at risk because of serious deficiencies as regards the rule of law in a Member State of the EU can the EU Institutions – the Commission, primarily – intervene. However, they cannot do so if the violation of the Union's values (Article 2 TEU) does not affect the financial or budgetary interests of the Union.

Our recommendation is not exactly what the Commission proposes. We propose establishing an economic conditionality on the Cohesion Policy of the EU *in any case* of serious violation of the rule of law and the values of the EU in the sense that it appears in Articles 2 , 7 and 19 TEU (legal protection). As Scheppele, Pech and Kelemen say, not only Article 7 TEU defends the rule of law[86]. There are other means. We have pointed to some of them (Article 258 TFEU, for instance), with good results so far in Poland.

We have to increase the mechanisms for defending the rule of law in the EU. Our recommendations move in that direction. In particular, we propose the instrument of economic conditionality in the Cohesion Policy as a coercive means of combating the generalised and serious violation of the values of the EU in any Member State, without any need for the financial interests of the Union to be affected.

[85] Proposal for a Regulation of the European Parliament and the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM/2018/324 final - 2018/0136 (COD)). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0324. See also paragraph 5 of the European Parliament resolution of 14 November 2018 on the need for comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886/ RSP). Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0456+ 0+ DOC +XML +V0 //EN&language=EN

[86] Scheppele, K.L., Pech, L. and Keleman, R.D., *Never missing an opportunity to miss an opportunity: The Council Legal Service opinion on the Commission's EU budget-related rule of law mechanism*, Verfassunblog, 2018/11/12.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, examines the EU founding values and principles set out in Article 2 TEU and the instruments at the EU's disposal to uphold them, in particular Article 7 TEU and Article 258 TFEU, as well as the Rule of Law Framework launched by the European Commission. Focusing on rule of law, the study also examines how these instruments have been used, in particular, in the cases of Poland and Hungary.

The study also looks into the proposals put forward by the European Parliament and the Commission and gives recommendations: It proposes, in particular, the signing of the European Convention on Human Rights by the EU, as well as the introduction of economic conditionality into EU Cohesion Policy and its funds as a sanction mechanism.

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III. ევროპის კავშირის ღირებულებები და ძირითადი პრინციპები

ევროპის კავშირის ღირებულებები

ევროპის კავშირი, გარდა წევრი სახელმწიფოების პოლიტიკური და ეკონომიკური კავშირისა, მათი ღირებულებითი ერთობაა. ევროპის კავშირის ღირებულებებს გააჩნიათ სახელმძღვანელო ეფექტი ევროპული ინტეგრაციისა და მისი წევრი სახელმწიფოების სამართლებრივი, ეკონომიკური და სოციალური სისტემების, პოლიტიკური რეჟიმების განვითარებაზე.

ევროპის კავშირის ღირებულებებს განსაზღვრავს ევროპის კავშირის შესახებ ხელშეკრულების მე-2 მუხლი.

„ევროპის კავშირი ეფუძნება ღირებულებებს, როგორებიცაა: ადამიანის ღირსების პატივისცემა, თავისუფლება, დემოკრატია, თანასწორობა, სამართლის უზენაესობა და ადამიანის უფლებების, მათ შორის, უმცირესობათა უფლებების პატივისცემა. კავშირის ღირებულებები საერთოა წევრ სახელმწიფოთა საზოგადოებაში, სადაც უზრუნველყოფილია პლურალიზმი, დისკრიმინაციის აკრძალვა, ტოლერანტობა, სამართლიანობა, სოლიდარობა და მამაკაცისა და ქალის თანასწორობა.“

ამ ღირებულებების განუხრელად დაცვა ევროპის კავშირში გაწევრიანების ერთ-ერთი ძირითადი პოლიტიკური წინაპირობაა. ევროპული სახელმწიფო, რომელიც მათ არ იზიარებს ან სათანადოდ არ იცავს, კავშირში ვერ გაწევრიანდება.

სახელმწიფოს ევროპის კავშირში გაწევრიანების შემდგომაც ეკისრება ინტეგრაციის ღირებულებების დაცვის ვალდებულება. იმ შემთხვევაში, თუ მათ დაცვას, რეალიზაციას მუდმივი და სერიოზული საფრთხე შეექმნება, ევროპის კავშირის შესახებ ხელშეკრულების მე-7 მუხლი ითვალისწინებს წევრი სახელმწიფოსთვის უფლების შეჩერების პროცედურას, რომელიც სამი ეტაპისგან შედგება:

- *I ეტაპი (ე.წ. „წინასწარი გაფრთხილების მექანიზმი“)* — კავშირის წევრი სახელმწიფოების ერთი მესამედის, ევროპული პარლამენტის ან ევროპული კომისიის დასაბუთებული წინადადების საფუძველზე, საბჭო უფლებამოსილია, ევროპული პარლამენტისგან თანხმობის მოპოვების შემდეგ, სრული შემადგენლობის ოთხი მეხუთედით განსაზღვროს, რომ კავშირის წევრ სახელმწიფოში არსებობს იმ ღირებულებების დარღვევის სერიოზული რისკი, რომლებსაც ეფუძნება ევროპის კავშირი. ამგვარი გადაწყვეტილების მიღებამდე საბჭო ვალდებულია, მოისმინოს ამ სახელმწიფოს პოზიცია. საბჭოს ასეთი სახელმწიფოსთვის რეკომენდაციით მიმართვის უფლება გააჩნია. ამასთანავე, იგი რეგულარულად ამოწმებს, კვლავ არსებობს თუ არა სახელმწიფოში კავშირის ღირებულებების ხელყოფის საფრთხე;
- *II ეტაპი (კავშირის ღირებულებების სერიოზული და მუდმივი დარღვევის დადგენა)* — წევრ სახელმწიფოთა ერთი მესამედის ან ევროპული კომისიის წინადადების საფუძველზე და ევროპული პარლამენტისგან თანხმობის მიღების შემდეგ ევროპული საბჭო ერთხმად იღებს წევრ სახელმწიფოში კავშირის ღირებულებების სერიოზული და მუდმივი დარღვევის დადგენის შესახებ გადაწყვეტილებას. ამგვარი გადაწყვეტილების მიღებამდე იგი ვალდებულია, მოისმინოს ამ სახელმწიფოს პოზიცია;
- *III ეტაპი (სანქციის განსაზღვრა)* — ევროპული საბჭოს მიერ მიღებული გადაწყვეტილების საფუძველზე, კავშირის საბჭო ხმათა კვალიფიციური უმრავლესობით იღებს გადაწყვეტილებას წევრი სახელმწიფოსთვის კავშირის ძირითადი ხელშეკრულებებით გათვალისწინებული ზოგიერთი უფლების (მათ შორის, საბჭოში ხმის მიცემის უფლების) შეჩერების ან არ შეჩერების შესახებ. საბჭომ, გადაწყვეტილების მიღებამდე, მხედველობაში უნდა მიიღოს უფლების შეჩერების სავარაუდო შედეგები ფიზიკური და იურიდიული

პირებისთვის. უფლების შეჩერება წევრ სახელმწიფოს არ ათავისუფლებს კავშირის ძირითადი ხელშეკრულებებით გათვალისწინებული ვალდებულებების შესრულებისგან.

იმ შემთხვევაში, თუ სანქციის დაკისრების განმაპირობებელი გარემოებები შეიცვლება, ევროპის კავშირის საბჭოს უფლება აქვს, ხმათა კვალიფიციური უმრავლესობით მიიღოს სანქციის შეცვლის ან გაუქმების შესახებ გადაწყვეტილება.

ძირითადი უფლებები — ევროპის კავშირის სამართლის ინტეგრირებული ნაწილი

ევროპული ინტეგრაციის დონეზე, მიუხედავად იმისა, რომ ძირითად უფლებათა ქარტიის მიღებამდე (2000წ.) და მის სავალდებულოდ გამოცხადებამდე (2009 წ.) ძირითად უფლებათა დაცვის ნორმატიული კატალოგი არ არსებობდა, ევროპის კავშირის პოლიტიკური ორგანოები და მართლმსაჯულების ევროპული სასამართლო აღიარებდნენ ძირითად უფლებათა მნიშვნელობას და იღებდნენ მათი დაცვის ვალდებულებას. ევროპის კავშირის ორგანოების ინსპირაციის წყაროს ადამიანის უფლებათა დაცვის სფეროში წევრ სახელმწიფოთა საერთაშორისო შეთანხმებები (მაგ.: ადამიანის უფლებათა და ძირითად თავისუფლებათა დაცვის ევროპული კონვენცია), კონსტიტუციური ტრადიციები (მაგ.: ღირსების უფლების აბსოლუტური ხასიათი, ძირითად უფლებებში ჩარევის პროპორციულობის პრინციპი და სხვა) წარმოადგენდნენ. მართლმსაჯულების ევროპული სასამართლოს პრაქტიკით, ხოლო მოგვიანებით — ევროპის კავშირის შესახებ ხელშეკრულების მე-6 მუხლის მე-3 პარაგრაფში დეკლარირებით — ადამიანის უფლებათა და ძირითად თავისუფლებათა დაცვის ევროპული კონვენციით აღიარებული უფლებები არის ევროპის კავშირის სამართლის ინტეგრირებული ნაწილი.

წარმომადგენლობითი დემოკრატია და მოქალაქეთა ინიციატივის უფლება

წარმომადგენლობითი დემოკრატია მმართველობის თანამედროვე, ყველაზე გავრცელებული რეჟიმია. იგი გულისხმობს ხალხის ძალაუფლების ხალხის მიერ არჩეული წარმომადგენლების მეშვეობით განხორციელებას. ევროპულ სახელმწიფოებში წარმომადგენლობითი დემოკრატია უზრუნველყოფილია არა მხოლოდ ეროვნულ, არამედ ევროპულ დონეზეც. წარმომადგენლობითი დემოკრატია ევროპის კავშირის ფუნქციონირების ქვაკუთხედია (TEU 10(1)). კავშირის დემოკრატიულ ცხოვრებაში მონაწილეობა ევროპის კავშირის მოქალაქის უფლებაა (TEU 10(3)). ევროპული პარლამენტი ევროპის კავშირის უმაღლესი წარმომადგენლობითი, ერთ-ერთი ძირითადი საკანონმდებლო ორგანოა, რომელიც აირჩევა პირდაპირი, თანასწორი, საყოველთაო არჩევნების საფუძველზე ფარული კენჭისყრით 5 წლის ვადით. ევროპული პარლამენტი კავშირის ფარგლებში წარმოადგენს და იცავს ევროკავშირის მოქალაქეების ინტერესებს.

ევროპის კავშირის მოქალაქეებს, რომლებიც, გარდა იმისა, რომ ევროპულ პარლამენტში თავიანთი წარმომადგენლებით ახორციელებენ საკანონმდებლო ხელისუფლებას, შესაძლებლობა აქვთ ევროპის კავშირის შესახებ ხელშეკრულების მე-11 მუხლის საფუძველზე, ევროპის კავშირის ორგანოებს მოუწოდონ საკანონმდებლო ინიციატივის განხორციელებისკენ. კავშირის, სულ მცირე, ოთხი წევრი სახელმწიფოს არანაკლებ ერთ მილიონ მოქალაქეს უფლება აქვს, ევროპულ კომისიას საკანონმდებლო ინიციატივის განხორციელებისკენ მოუწოდოს იმ საკითხის თაობაზე, რომელიც, მოქალაქეების აზრით, კავშირის ძირითადი ხელშეკრულებების მიზნების იმპლემენტაციისთვის აუცილებელია.

სამართლის უზენაესობა

სამართლის უზენაესობის პრინციპის ერთ-ერთი ძირითადი მოთხოვნაა ძალაუფლება ხორციელდებოდეს სამართლის საფუძველზე და მის შესაბამისად. იგი, მათ შორის, გულისხმობს კანონის წინაშე თანასწორობას, ძირითადი უფლებებისა და თავისუფლებების უზრუნველყოფას, პირისთვის მასთან დაკავშირებული სახელმწიფო გადაწყვეტილებების გასაჩივრების ეფექტიანი შესაძლებლობის მინიჭებას და სხვა. მართლმსაჯულების ევროპული სასამართლო სამართლის უზენაესობის პრინციპის ერთ-ერთ განზომილებას უკავშირებს, ერთი

მხრივ, ევროპის კავშირის სამართლის ეფექტიანი, შეუფერხებელი მოქმედებისა და, მეორე მხირვ, ევროპის კავშირის სამართალთან დაკავშირებულ საკითხებთან/სფეროებთან მიმართებაში წევრი სახელმწიფოების მიერ ფიზიკური და იურიდიული პირებისთვის ეფექტიანი მართლმსაჯულების სისტემის უზრუნველყოფას. სამართლის უზენაესობის პრინციპს ევროპის კავშირის დონეზე აქვს შიდა და საგარეო განზომილება. შიდა განზომილება გულისხმობს მისი კავშირის წევრ სახელმწიფოებსა და კავშირის დონეზე დაცვას, ხოლო საგარეო განზომილება უკავშირდება ამ პრინციპის ევროპის კავშირის მიერ საგარეო პოლიტიკის განხორციელების პროცესში გავრცელებასა და დაცვის ხელშეწყობას.

თანაბარი შესაძლებლობების უზრუნველყოფის პრინციპი

ევროპის კავშირის სამართლის მიზნებისთვის თანაბარი შესაძლებლობების უზრუნველყოფის პრინციპი მოიცავს ორ ელემენტს: ადამიანებისადმი თანასწორად მოპყრობის პრინციპს; მამაკაცისა და ქალის თანასწორობის პრინციპს.

თანაბარი შესაძლებლობების უზრუნველყოფის პრინციპის შესახებ დებულებებს შეიცავს ევროპული კავშირის ძირითად უფლებათა ქარტიის მე-3 თავი — „თანასწორობა“:

- კანონის წინაშე თანასწორობა — მე-20 მუხლი;
- დისკრიმინაციის აკრძალვა — 21-ე მუხლი;
- კულტურული, რელიგიური და ლინგვისტური მრავალფეროვნება — 22-ე მუხლი;
- ქალისა და მამაკაცის თანასწორობა — 23-ე მუხლი;
- ბავშვის უფლებები — 24-ე მუხლი;
- მოხუცთა უფლებები — 25-ე მუხლი;
- შეზღუდული შესაძლებლობების მქონე პირების ინტეგრაცია — 26-ე მუხლი.

ევროპული პარლამენტი და კავშირის საბჭო კავშირში თანაბარი შესაძლებლობების უზრუნველსაყოფად, უფლებამოსილნი არიან, ორდინარული საკანონმდებლო პროცედურის ფარგლებში ეკონომიკურ და სოციალურ საკითხთა ევროპულ კომიტეტთან კონსულტაციის შემდეგ განახორციელონ შესაბამისი სამართლებრივი ღონისძიებები.

სუბსიდიურობისა და პროპორციულობის პრინციპები

ევროპის კავშირი კომპეტენციებს (გარდა ექსკლუზიური კომპეტენციებისა) ახორციელებს სუბსიდიურობისა და პროპორციულობის პრინციპების ფარგლებში.

სუბსიდიურობის პრინციპის თანახმად, ევროპის კავშირი იმ სფეროებში, რომლებშიც ექსკლუზიური კომპეტენცია არ გააჩნია, უფლებამოსილია იმოქმედოს მხოლოდ მაშინ, თუ დასახული მიზნის მიღწევა კავშირის დონეზე უფრო ეფექტიანად არის შესაძლებელი, ვიდრე ადგილობრივი, რეგიონული ან ცენტრალური ხელისუფლების დონეზე. სუბსიდიურობის პრინციპის მართებულ გამოყენებაზე ზედამხედველობას ეროვნული პარლამენტები ახორციელებენ.

პროპორციულობის პრინციპის მიხედვით, კავშირის მოქმედების ფორმა, შინაარსი, ხარისხი არ უნდა იყოს იმაზე მეტი, ვიდრე ეს აუცილებელია ძირითადი ხელშეკრულებებით გათვალისწინებული მიზნების მისაღწევად.

სოლიდარობის პრინციპი

ლისაბონის ხელშეკრულებამ ევროპულ საზოგადოებაში არსებულ სოლიდარობის პრინციპს სამართლებრივი დატვირთვა შესძინა. ევროპის კავშირის ფუნქციონირების შესახებ ხელშეკრულების 222-ე მუხლის თანახმად, თუ წევრი სახელმწიფოს ტერიტორიაზე განხორციელდება ტერორისტული თავდასხმა ან მოხდება ბუნებრივი ან ანთროპოგენული კატასტროფა, მსხვერპლი ქვეყნის თხოვნის შემთხვევაში სხვა წევრ სახელმ-

წიფოებსა და ევროპის კავშირს ეკისრებათ თავიანთი ძალისხმევის ფარგლებში ამ ქვეყნის დახმარების (მათ შორის სამხედრო) ვალდებულება.

ევროპის კავშირის მიერ სოლიდარობის პუნქტის იმპლემენტაციის შესახებ წესები და პროცედურები დგინდება კავშირის საბჭოს გადაწყვეტილებით ევროპული კომისიისა და საგარეო საქმეთა და უსაფრთხოების პოლიტიკის სფეროში კავშირის უმაღლესი წარმომადგენლის საერთო ინიციატივის საფუძველზე. გარდა ამისა, გადაწყვეტილების მიღებამდე აუცილებელია ევროპული პარლამენტის ინფორმირება. იმ შემთხვევაში, თუ მსხვერპლი ქვეყანა დახმარებას სთხოვს სხვა წევრ სახელმწიფოს, მათ შორის კოორდინაცია უნდა განხორციელდეს კავშირის საბჭოს ფორმატში.

ლოიალური თანამშრომლობის პრინციპი

ლოიალური თანამშრომლობის პრინციპი ევროპის კავშირის შესახებ ხელშეკრულების მე-4 მუხლის მე-3 პარაგრაფით არის აღიარებული. ამ ნორმის თანახმად, „გულწრფელი თანამშრომლობის პრინციპის შესაბამისად, კავშირი და წევრი სახელმწიფოები ორმხრივი პატივისცემის საფუძველზე მხარს უჭერენ ერთმანეთს [დამფუძნებელი] ხელშეკრულებებით განსაზღვრული ამოცანების მისაღწევად. წევრმა სახელმწიფოებმა უნდა განახორციელონ ყველა სათანადო ღონისძიება, ზოგადი თუ კონკრეტული, რომ უზრუნველყონ [დამფუძნებელი] ხელშეკრულებებიდან ან კავშირის ორგანოების აქტებიდან მომდინარე ვალდებულებების შესრულება. წევრმა სახელმწიფოებმა ხელი უნდა შეუწყონ კავშირის ამოცანების რეალიზაციას და თავი შეიკავონ ისეთი ღონისძიებისგან, რომელმაც, შესაძლებელია, საფრთხე შეუქმნას კავშირის მიზნების მიღწევას“. ლოიალური თანამშრომლობის პრინციპი სხვადასხვა შინაარსობრივი კომპონენტებისგან შედგება. იგი უკავშირდება ევროპის კავშირის სამართლის დაცვას, კავშირის ორგანოებთან ლოიალურად თანამშრომლობას, კავშირის სახელმწიფოებს შორის არსებული დავების მხოლოდ ევროპის კავშირის სამართლის შესაბამისად გადაწყვეტას, წევრ სახელმწიფოთა კონსტიტუციური იდენტობის იმგვარად შენარჩუნებას, რომ საფრთხე არ შეექმნას ინტეგრაციის მიზნების რეალიზაციას და სხვა.

დამატებითი ლიტერატურა ევროპის კავშირის ღირებულებებთან დაკავშირებით:

1. Kaczorowska Alina, European Union Law, Second edition, Routledge, 2011, pp. 39-41.
2. Laurent Pech, Rule of law as a guiding principle of the European Union’s external action, https://www.asser.nl/media/1632/cleer2012-3web.pdf (უკანასკნელად ნანახია: 03.10.2019).
3. Marcus Klamert, The Principle of Loyalty in EU Law, https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199683123.001.0001/acprof-9780199683123#targetText=It%20distinguishes%20between%20the%20effects,of%20EU%20law%20(construction). (უკანასკნელად ნანახია: 03.10.2019).

ევროპის კავშირის მართლმსაჯულების სასამართლოს პრეცედენტულ სამართალთან დაკავშირებით:

4. Commission v Poland (Independence of The Supreme Court) (C-619/18).
5. Associação Sindical dos Juízes Portugueses C-64/16.

ეროვნული პარლამენტების როლი ევროკავშირში ლისაბონის ხელშეკრულების შესაბამისად

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1. შესავალი

ეროვნული პარლამენტები თავიდანვე ღებულობდნენ მონაწილეობას ევროპული ინტეგრაციის პროცესში, როგორც კავშირის წევრი ქვეყნების კონსტიტუციური წესრიგის შიდა ელემენტები. ამ ქვეყნების ხელისუფლებები ერთიანდებოდნენ კავშირებში, შემდეგ კი საერთაშორისო საჯარო სამართლის საფუძველზე, ევროკავშირში გაერთიანდნენ. ეროვნული პარლამენტები ასრულებდნენ ხელშეკრულებების და კონვენციის რატიფიცირებას, ზრუნავდნენ შიდა კანონმდებლობის ევროკავშირის კანონმდებლობასთან შესაბამისობაზე, აკონტროლებდნენ საკუთარი მთავრობების ქმედებებს ევროპის არენაზე.

უნდა ავღნიშნოთ, რომ 1979 წლამდე ევროპარლამენტში პირველ საყოველთაო არჩევნებამდე, ეროვნულ პარლამენტებს წარმომადგენლები ჰყავდათ გაერთიანების დონეზე, მაგრამ პარლამენტის, როგორც საკონსულტაციო და ზედამხედველი ორგანოს, კომპეტენციები იმ დროს საკმაოდ შეზღუდული იყო. ეროვნულ პარლამენტებს ევროპული ინტეგრაციის პროცესში „წაგებულის“ როლი ჰქონდა, ვინაიდან მათი საკანონმდებლო ძალაუფლებები გადაეცა ევროპულ ინსტიტუციებს და აღმასრულებელ ორგანოებზე პარლამენტალურ კონტროლს ეროზია შეეტყო. ამ პრობლემის გადაწყვეტას ეროვნული პარლამენტები საკუთარი ხელისუფლების პოზიციების კონტროლის მეშვეობით ცდილობდნენ. ევროკავშირის საკანონმდებლო პროცედურების მიმდენარეობის პროცესში. მთავარ როლს აქ თამაშობენ ევროსაბჭოს საკითხთა კომისიები, ხოლო განხილვის საკითხები, კომისიების მუშაობის მეთოდები, საკუთარი მინისტრების უფლებამოსილებანი, დარგობრივ კომიტეტებთან თანამშრომლობა იყო და ახლაც რჩება ძალიან დიფერენცირებული. ეროვნული

პარლამენტების როლი ამ სფეროში ხელისუფლების პარლამენტარულ ფუნქციას და ყველა სახელმწიფოს შიდა კომპეტენციას წარმოადგენს. 90-იანი წლების დასაწყისში კავშირის წევრი ქვეყნების პარლამენტებმა მიიღეს ევროპულ საკითხებში საკუთარი აზრის აქტიური გამოხატვის საშუალება.

2. მაასტრიხტის ხელშეკრულებიდან ლისაბონის ხელშეკრულებამდე

ევროგაეთიანების დონეზე პირველი ჩანაწერი ეროვნული პარლამენტის შესახებ გაკეთდა ორ დამოუკიდებელ დეკლარაციაში, რომელიც მაასტრიხტის ხელშეკრულებას დაერთო 1992 წელს, *დეკლარაცია ევროკავშირში ეროვნული პარლამენტების როლის შესახებ* (N13) და *დეკლარაცია საპარლამენტო კონფერენციის შესახებ* (N14). დეკლარაციების მიზანი იყო ინფორმაცია ევროკავშირის შესახებ სრულიად ხელმისაწვდომი ყოფილიყო. ოქმში [N 9] ევროკავშირის წევრი ქვეყნების პარლამენტების როლის შესახებ, რომელიც დაერთო მაასტრიხტის ხელშეკრულებას და ამსტერდამის ხელშეკრულების საფუძველზე დადებულ ევროგაერთიანებების ხელშეკრულებას, აღნიშნულია გადაწყვეტილებები პარლამენტების ინფორმირების შესახებ, რომელიც მისცემდა ეროვნულ პარლამენტებს გარკვეულ როლს საკანონმდებლო პროექტების შემოწმების სუბსიდირების წესთან შესაბამისობის თვალსაზრისით. ოქმის მეორე ნაწილი ფორმალურად ჩართულია COSAC-ის, ანუ ევროკავშირის საკითხების სპეციალიზირებული ორგანოების კონფერენციის ხელშეკრულებაში. კონფერენცია წარმოადგენს ეროვნული პარლამენტების ევროკავშირის საკითხთა კომისიებს.

ნიცას ხელშეკრულებას (2001) დაერთო *დეკლარაცია ევროკავშირის მომავლის შესახებ* (N23), რომელშიც ნათლად აღნიშნულია ეროვნული პარლამენტების როლი ევროპულ არქიტექტურაში, ეს თემა დისკუსიის ყველაზე მნიშვნელოვან მიმართულებას წარმოადგენდა დაგეგმილი ევროკავშირის გაფართოვების გამო. დაინიშნა სპეციალური კოლეგიუმი - ევროპის მომავლის კონვენცია (დეკლარაცია Laeken, 2001).

ეროვნული პარლამენტების როლის შესახებ დებატები, რომელიც პარლამენტების მონაწილეობით გადავიდა ევროპული კონვენციის ფორუმზე) (2002-2003), ეფექტი იყო ეროვნული პარლამენტების ევროკავშირში მნიშვნელობის და ევროპის კონსტიტუციის (2004) ცვლილებების შეთავსება. სინამდვილეში კონსტიტუცია არ შევიდა ძალაში, მაგრამ წარმოადგენდა ცვლილებების საფუძველს ლისაბონის ხელშეკრულებისათვის (2007). ამავდროულად კონვენციის კიდევ ერთ შედეგს წარმოადგენს COSAC-ის მიერ მიღებული კოპენჰაგენის დირექტივები, რომელიც ეხებოდა მთავრობების და ეროვნული პარლამენტების თანამშრომლობას ევროკავშირის საკითხებში (2003). ეს იყო გარკვეული მინიმალური სტანდარტები, რომელიც მისცემდა პარლამენტებს საკუთარი მთავრობების ევროკავშირთან დაკავშირებულ პოლიტიკაზე ზეგავლენის საშუალებას.

ლისაბონის ცვლილებებზე მუშაობის პროცესში, რომელსაც ეძახდნენ ხელშეკრულებების რეფორმას, ეროვნული პარლამენტების როლი

ევროკავშირში წარმოადგენდა დებატების მუდმივ თემას. ეს აისახა კომისიის მუშაობაზე, რომელმაც მიმართა ევროპარლამენტს და ევროპის საბჭოს შემდეგი წერილით: „მიღწევების გეგმა მოქალაქეების ინტერესების დაცვით“ (2006)211, აღნიშნულია ევროსაბჭოს დასკვნებში, ივნისი 2006 წ., შესთავაზა ეროვნულ პარლამენტებს მჭიდრო თანამშრომლობა (ე.წ. ბაროსოს ინიციატივა), რომელიც იყო მეგობრულად მიღებული. როგორც ეფექტი, 2006 წლის 1 სექტემბრიდან პარლამენტები ღებულობდნენ, როგორც საკანონმდებლო აქტებს, ასევე კომისიის საკონსულტაციო დოკუმენტებს უშუალოდ კომისიიდან. ამით მიეცათ შენიშვნების და აზრის გამოხატვის საშუალება არა მარტო სუბსიდირების ან პროპორციულობის საკითხებში, არამედ პროექტების შინაარსობრივ მხარესთან დაკავშირებით. კომისიამ წესად მიიღო ინდივიდუალურად პასუხის გაცემის პრინციპი. ასეთ დიალოგს დაერქვა პოლიტიკური დიალოგი.

3. ლისაბონის ხელშეკრულების ზოგადი დებულებანი

ლისაბონის ხელშეკრულებამ გააფართოვა და გააძლიერა ეროვნული პარლამენტების შესაძლებლობები. პირველ რიგში ხელშეკრულებაში აღნიშნული იქნა ეროვნული პარლამენტები:

- ხელშეკრულების ევროკავშირის შესახებ მე-5 მუხლის მე-3 პუნქტში აღნიშნულია, რომ ეროვნული პარლამენტები უზრუნველყოფენ სუბსიდირების წესის შესრულებას, ოქმში [N2} აღნიშნული სუბსიდირების და პროპორციულობის პროცედურის შესაბამისად,
- ხელშეკრულების ევროკავშირის შესახებ მე-12 მუხლში აღნიშნულია, რომ ეროვნული პარლამენტები ღებულობენ აქტიურ მონაწილეობას ევროკავშირის მოქნილ მოღვაწეობაში და აგრეთვე ჩამოთვლილია ყველა აუცილებელი კომპეტენცია, რომელიც მოგვიანებით იქნება აღწერილი, და
- ხელშეკრულების ევროკავშირის შესახებ მე-10 მუხლის მე-2 პუნქტში აღნიშნულია მთავრობების დემოკრატიული პასუხისმგებლობა ეროვნული პარლამენტების წინაშე, რასაც აქვს სიმბოლური მნიშვნელობა ევროკავშირის წევრ ქვეყნების სუვერენობის და ავტონომიის თვალსაზრისით.

ეროვნული პარლამენტების კომპეტენციების დაწვრილებითი რეგულირება აღნიშნულია ხელშეკრულებაში ევროკავშირის შესახებ, ხელშეკრულებაში ევროკავშირის ფუნქციონირების შესახებ და აგრეთვე ოქმებში: ოქმი N 1 - ეროვნული პარლამენტები ევროკავშირში და ოქმი N 2 - სუბსიდირების და პროპორციულობის შესახებ ლისაბონის ხელშეკრულების საფუძველზე.

საკითხები, რომელიც ეროვნული პარლამენტების მთავარ კომპეტენციას წარმოადგენს, განიხილება მოგვიანებით. პირველი საკითხი: კონსტიტუციის შიდა პროცედურების ჩატარების შემთხვევები (ან უშუალო რატიფიცირება), მეორე: ხელშეკრულებაში პირველად აღნიშნული იქნა (მ.1 პ.291 ევროკავშირის ფუნქციონირების ხელშეკრულება) ევროკავშირის კანონმდებლობა ქვეყნის კანონმდებლობაში.

4. **ინფორმაციის და საკანონმდებლო აქტების პროექტების მიღება უშუალოდ ევროკავშირის ინსტიტუციებიდან** - მ. 12 ა ხელშეკრულება ევროკავშირის შესახებ

4.1. უშუალოდ ეროვნულ პარლამენტებში გადაცემული ინფორმაცია

ოქმი [N1], ევროკავშირში ეროვნული პარლამენტების როლის შესახებ. არის უფრო ფართო, ვიდრე წინა დოკუმენტი, როგორც ობიექტური, ასევე სუბიექტური თვალსაზრისით. ადრე მხოლოდ კომისისას ჰქონდა ვალდებულება გადაეცა საკუთარი საკონსულტაციო დოკუმენტები ეროვნული პარლამენტებისათვის. ამჟამად ეროვნულ პარლამენტებში/პალატებში გასაგზავნ დოკუმენტებს აგზავნიან ორ ოქმთან შესაბამისად:

- საკანონმდებლო აქტების პროექტები და საკანონმდებლო აქტების პროექტების ცვლილებები მიუხედავად იმისა, ვინ არის მათი ავტორი,
- ევროპარლამენტის საკანონმდებლო დადგენილებები და საბჭოს პოზიცია,
- კომისიის საკონსულტაციო დოკუმენტები (მწვანე, თეთრი წიგნები, განცხადებები)
- წლიური საკანომდებლო პროგრამა და სხვა დოკუმენტები საკანონმდებლო პროგრამის ან პოლიტიკური სტრატეგიის შესახებ,
- სხდომების განრიგი და საბჭოს სხდომების რეზოლუციები, მათ შორის საბჭოს სხდომათა ოქმები საკანონმდებლო აქტების პროექტების შესახებ,
- აუდიტორთა სასამართლოს წლიური ანგარიში
- ევროსაბჭოს კომისიის ანგარიში ევროსაბჭოს ხელშეკრულების მ.5 შესრულების შესახებ (სუბსიდირების პრინციპი).

გარდა ამისა ხელშეკრულებებში აღნიშნულია:

- ინფორმაციის მიღება ევროკავშირში გაერთიანების განცხადების შესახებ, მ. 49 შესაბამისად (მ.12 ე ხელშეკრულება ევროკავშირის შესახებ),
- ინფორმაციის მიღება თავისუფლების, უსაფრთხოების და სამართლიანობის სფეროში, რაც აღნიშნული იქნება პ. 6.1

4.2 საკანონმდებლო აქტის პროექტის განმარტება

საკანონმდებლო აქტების პროექტის განმარტებას პარლამენტები ღებულობენ უშუალოდ ევროკავშირის ინსტიტუციებიდან და არა საკუთარი მთავრობიდან. ამ პროექტების განმარტება მოცემულია N1 ოქმში და N2 ოქმში იდენტურად. ეს არის „საკანონმდებლო აქტის მიღების მიზნით გაცემული კომისიის განცხადებები, ევროკავშირის წევრი ქვეყანების ჯგუფების წინადადებები, ევროპარლამენტების წინადადებები, ევროპულ თანამეგობრობათა სასამართლოს გადაწყვეტილებები, ცენტრალური ევრობანკის რჩევები, ევროპის საინვესტიციო ბანკის განცხადებები“.

აღსანიშნავია აგრეთვე ფაქტი, რომ - N 2 ოქმის შესაბამისად - საკანონმდებლო პროცესის ინიციატორი სუბიექტები (ზოგიერთის სახელით საბჭო) ვალდებულნი არიან გაუგზავნონ პარლამენტებს არა მარტო პროექტები, არამედ საკანონმდებლო აქტების პროექტების ცვლილებები. ევროპარლამენტი აგრეთვე გადასცემს საკუთარ რეზოლუციებს, ევროსაბჭო კი - მიღებულ პოზიციებს.
ორპალატიან პარლამენტებში ინფორმაციის და საკანონმდებლო პროექტების მიღების უფლება აქვს ორივე პალატას.

5. **საკანონმდებლო პროექტების სუბსიდირების პრინციპთან შესაბამისობის კონტროლი** - ხელშეკრულება ევროკავშირის შესახებ, მუხლი 12 ბ

მაასტრიხტის ხელშეკრულების საფუძველზე მიღებული სუბსიდირების პრინციპი ამჟამად წარმოადგენს ერთ-ერთ ძირითად პრინციპს, რომელზეც დაყრდნობილია ევროკავშირი. ამ პრინციპის შესაბამისად, იმ შემთხვევებში, თუ ეს არ არის მხოლოდ და მხოლოდ ევროკავშირის კომპეტენცია, ევროკავშირი იღებს თავის თავზე იმ ღონისძიებებს, რომელიც კავშირის მასშტაბში მეტად შედეგიანი იქნება, ვიდრე ევროკავშირის ცალკეული ქვეყნის ქმედება.

ამსტერდამის ხელშეკრულებას დაერთო ევროკავშირის ხელშეკრულების ოქმი [N30] სუბსიდირების და პროპორციულობის პრინციპების გამოყენების შესახებ და ამ პრინციპების გამოყენების ზუსტი კრიტერიუმების აღნიშვნით. გარდა ამისა შეიქმნა სუბსიდირების და პროპორციულობის წესების ეროვნული პარლამენტების მიერ განხილვის ფორმალური საფუძველი. ეროვნულ პარლამენტებს მიეცა 6 კვირა საკანონმდებლო აქტის პროექტის განხილვისათვის ევროკავშირის ხელშეკრულების VI თავის მიხედვით, რომელიც ეხება პოლიტიკურ და სასამართლოებს შორის თანამშრომლობას სისხლის სამართლის საკითხებში (ევროპარლამენტში და ევროსაბჭოში ყველა ენაზე შედგენილი პროექტების გადაცემის შემდეგ უნდა გასულიყო 6 კვირა, იმისათვის რომ ის ჩაწერილიყო ევროსაბჭოს სხდომების ოქმში, N 9 ოქმი მ. 3 ხელშეკრულება ევროკავშირის შესახებ, ხელშეკრულება ევროპული კავშირის შექმნის შესახებ, ხელშეკრულება ევროპული კავშირის ატომური ენერგიის შესახებ ამსტერდამის ხელშეკრულების საფუძველზე).

5.1. სუბსიდირების პრინციპის შესწავლა ხდება ლისაბონის ხელშეკრულების საფუძველზე და შემდეგი მუხლების შესაბამისად:

- მ. 5 ხელშეკრულება ევროკავშირის შესახებ, ეროვნული პარლამენტები ზრუნავენ სუბსიდირების პრინციპის შესრულებაზე, ოქმით [2] გათვალისწინებული პროცედურის მიხედვით სუბსიდირების და პროპორციულობის გამოყენების წესების შესახებ
- მ. 69 ხელშეკრულება ევროკავშირის ფუნქციონირების შესახებ - ეროვნული პარლამენტები უზრუნველყოფენ პოლიტიკური და სასამართლოებს შორის სისხლის სამართლის საკითხებში თანამშრომლობის ფარგლებში გაკეთებული განაცხადების და საკანონმდებლო ინიციატივების შესაბამისობას სუბსიდირების პრინციპთან, N 2 ოქმის შესაბამისად,

- ოქმი [N2] სუბსიდირების და პროპორციულობის პრინციპის გამოყენების შესახებ. უნდა აღინიშნოს, რომ მიუხედავად იმისა, რომ ოქმი N2 არეგულირებს ორივე პრინციპის გამოყენებას, ეროვნული პარლამენტების ახალი უფლებამოსილებანი გამომდინარეა მხოლოდ სუბსიდირების წესის ზედამხედველობის მექანიზმიდან.

ახალი დარეგულირება, რომლის საფუძველზე ამჟამად ხდება **სუბსიდირების წესის შესწავლა,** შედგება:

- სუბსიდირების წესის გაფართოებული განმარტება - სავალდებულოა ევროკავშირის წევრ ქვეყნებში არა მარტო ცენტრალურ დონეზე, არამედ რეგიონალურ და ადგილობრივ დონეზე: ევროკავშირი შეიძლება ჩაერთოს მხოლოდ მაშინ, როდესაც ევროკავშირის წევრი ქვეყანა ვერ ახერხებს მიზნის მიღწევას, როგორც ცენტრალურ, ასევე რეგიონალურ და ადგილობრივ დონეზე; ეროვნული პარლამენტები ვალდებულები არიან ჩაუტარონ კონსულტაციები რეგიონალურ პარლამენტებს, რომლებსაც აქვთ საკანონმდებლო კომპეტენციები (მ. 3 პ.5 ხელშეკრულება ევროკავშირის შესახებ, მ. 6 ოქმი N2)
- **საკანონმდებლო აქტების და შესწორებების პროექტების უშუალოდ გადაცემა** ეროვნულ პარლამენტებს (თავი 1, ოქმი N1)
- შესწავლის **ვადის გაგრძელება** 6-დან 8 კვირამდე. ეს არის ვადა ოფიციალურ ენაზე შედგენილი პროექტის პარლამენტების მიერ მიღების მომენტიდან ევროსაბჭოს სხდომის ოქმში ჩაწერამდე. 8 კვირის განმავლობაში, საჩქარო შემთხვევების გამონაკლისით, არ ხდება არანაირი შეთანხმება ამ პროექტის სფეროში. გარდა ამისა აგრეთვე განსაკუთრებული შემთხვევების გამონაკლისით, საკანონმდებლო აქტების პროექტის ევროსაბჭოს სხდომების დღის წესრიგში ჩაწერის დღიდან პოზიციის მიღებამდე ვადა შეიძლება 10 დღეს მოიცავდეს (მ.4 ოქმი N1),
- **წინასწარი გაფრთხილების მექანიზმის დადგენა,** რომელიც აძლევს ეროვნულ პარლამენტებს უფლებას ევროკავშირის საკანონმდებლო პროცესში ჩარევას. წინასწარი გაფრთხილების მექანიზმი აღწერს აგრეთვე ე.წ. ყვითელ და ნარინჯისფერ ბარათების გაცემას (მ.6 და 7 ოქმი 2),
- ეროვნული პარლამენტების მიერ **მართლმსაჯულების ევროპული სასამართლოში საჩივრის შეტანის შესაძლებლობა,** საკუთარი ხელისუფლების შუამდგომლობით , სუბსიდირების პრინციპის დამრღვევი საკანონმდებლო აქტის შესახებ, რასაც ზოგჯერ წითელ ბარათს უწოდებენ (ოქმი N2, მ.8),
- **კომისიის ვალდებულებებში შედის ეროვნული პარლამენტების ყურადღების მიქცევა** იმ პროექტებზე, რომლებისათვისაც **ევროკავშირის ფუნქციონირების ხელშეკრულების მუხლი 352** საფუძველს წარმოადგენს, სუბსიდირების წესის კონტროლის პროცედურის ფარგლებში. იგი მოიცავს შენიშვნას მოქნილობის შესახებ, რომელიც მოღვაწეობის საშუალებას აძლევს იმ პირობებში, რომელიც არ არის აღნიშნული ხელშეკრულებაში, მაგრამ აღნიშნული წესების მიღწევა აუცილებლობას წარმოადგენს, გარდა მიზნების, რომელიც დაკავშირებულია საერთო საგარეო და თავდაცვის პოლიტიკასთან.

ღირს აღინიშნოს, რომ ევროკავშირის სტრუქტურის შეცვლის შედეგად, **გაფართოვდა სუბსიდირების წესის ობიექტური** გამოყენება, ვინაიდან ყველა

სფეროში გაცემული საკანონმდებლო აქტები ექვემდებარება სუბსიდირების წესს, გამოკლისს წარმოადგენს საერთო საგარეო და თავდაცვის პოლიტიკა.

5.2 წინასწარი გაფრთხილების მექანიზმი ნიშნავს იმას, რომ ყველა ეროვნულ პარლამენტს ან პალატას შეუძლია გაუგზავნოს ევროპარლამენტის, საბჭოს და კომისიის თავჯომარეებს დასაბუთებული აზრი საკანონმდებლო აქტის პროექტის სუბსიდირების წესთან შეუსაბამობის შესახებ - საკანონმდებლო აქტის პროექტის ეროვნულ პარლამენტებში გადაცემის მომენტიდან არა უგვიანეს 8 კვირისა.

თითოეულ პარლამენტს აქვს 2 ხმა (ორპალატიანი პარლამენტის შემთხვევაში, თითოეულ პალატას აქვს 1 ხმა). 2 ოქმის მ.7 შესაბამისად, საკანონმდებლო აქტის პროექტის ავტორმა უნდა გაითვალისწინოს გამართლებული აზრები. იმ შემთხვევაში, თუ გამართლებული აზრები ერთ მესამედს წარმოადგენს, და ევროკავშირის ფუნქვიონირების ხელშეკრილების მ. 76 საფუძველზე გამოხატული აზრების შემთხვევაში - ეროვნული პარლამენტების ხმების ერთ მეოთხედს, პროექტი ხელმეორედ უნდა იყოს განხილული (ყვითელი ბარათი). განხილვის შედეგად, პროექტის ავტორს (კომისია, ევროკავშირის ქვეყნების ჯგუფი, ევროპარლამენტი, მართლმსაჯულების ტრიბუნალი, ევროპის ცენტრალური ბანკი, ევროპის საინვესტიციო ბანკი) შეუძლია მიიღოს გადაწყვეტილება პროექტის მხარდაჭერის, შეცვლის ან შეჩერების შესახებ. გადაწყვეტილება უნდა იყოს დასაბუთებული.

ნარინჯისფერის ბარათი შეიძლება გაიცეს ჩვეულებრივი პროცედურის ფარგლებში და მხოლოდ კომისიის ავტორობის პროექტების შემთხვევაში. იმ შემთხვევაში, თუ დასაბუთებული აზრი სუბსიდირების პრინციპთან შეუსაბამობის შესახებ შეადგენს ეროვნული პარლამენტების ხმების უმრავლესობას (რაც პრაქტიკაში ნიშნავს 50% + ერთი, ანუ აბსოლუტური უმრავლესობა), კომისიას, ხელმეორე ანალიზის შემდეგ, შეუძლია დაუჭიროს მხარი, შეცვალოს ან შეაჩეროს პროექტი.

პროექტის მხარდაჭერის შემთხვევაში, კომისია წარმოადგენს დასაბუთებულ შეფასებას სუბსიდირების წესთან შესაბამისობის თვალსაზრისით, ხოლო ეროვნული პარლამენტების და კომისიის დამადასტურებელი შეფასებების გაცნობის შემდეგ, ევროპარლამენტს ან საბჭოს შეუძლია შეაჩეროს პროექტი პირველი წაკითხის დასრულებამდე. ამისათვის საჭიროა ევროსაბჭოს წარმომადგენელთა 55% (დემოგრაფიული ტესტი არ არის აუცილებელი) ან ჩვეულებრივი ხმების უმრავლესობა ევროპარლამენტში (დაწეულია ჩვეულებრივი პროცედურის დონემდე, რომელშიც ევროკავშირი შეჩერებს პროექტს კვალიფიციური უმრავლესობით).
ეროვნულ პარლამენტებს არ შეუძლიათ დამოუკიდებლად დაბლოკონ საკანონმდებლო აქტის პროექტი.

6. **კომპეტენციები თავისუფლების, თავდაცვის და სამართლიანობის სფეროში**
   - ხელშეკრულება ევროკავშირის შესახებ მ.12, ხელშეკრულება ევროკავშირის ფუნქციონირების შესახებ მ. 70, 71, 88, 81 პ.3

6.1. **თავისუფლების, თავდაცვის და სამართლიანობის სფეროში ჩატარებული პოლიტიკის შეფასების მექანიზმებში მონაწილეობა:**

- ინფორმაციის მიღება ევროკავშირის წევრ ქვეყნების მიერ თავისუფლების, თავდაცვის და სამართლიანობის სფეროში გაკეთებული შეფასების შესახებ, ხელშეკრულება ევროკავშირის ფუნქციონირების შესახებ მ.70,
- ინფორმაციის მიღების უფლება ოპერატიული თანამშრომლობის შესახებ შიდა თავდაცვის საკითხებში, რომლის დანიშნულებაა შიდა თავდაცვის სფეროში ევროკავშირის წევრ ქვეყნების ორგანოების მიერ გაწეული ოპერატიული მოღვაწეობის კოორდინირების მხარდაჭერა (ხელშეკრულება ევროკავშირის ფუნქციონირების შესახებ მ.71, 2010 წლის 25 თებერვალს მიღებული ევროსაბჭოს დადგენილება (ევროკავშირი 2010/131).

6.2 ევროპოლის პოლიტიკურ კონტროლში და ევროპული სასამართლოების თანამშრომლობის ერთეულის (ევროიუსტის) შეფასებაში მონაწილეობის მიღება - ხელშეკრულება ევროკავშირის ფუნქციონირების შესახებ მ. 88, 85

ხელშეკრულებაში ევროკავშირის ფუნქციონირების შესახებ აღნიშნულია, რომ ევროპარლამენტი და ევროსაბჭო გაცემენ დადგენილებებს, რომელიც განსაზღვრავენ ევროპოლის და ევროიუსტის სტრუქტურას, ფუნქციონირებას და დავალებებს, აგრეთვე:

- „ევროპარლამენტის და ეროვნული პარლამენტების მონაწილეობის პირობები ევროიუსტის მოღვაწეობის შეფასებაში“, ხელშეკრულება ევროკავშირის ფუნქციონირების შესახებ მ. 85
- „ევროპარლამენტის მიერ ევროპოლის კონტროლის პროცედურები, რომელშიც ევროპარლამენტები ღებულობენ მონაწილეობას“. ხელშეკრულება ევროკავშირის ფუნქციონირების შესახებ მ. 88

საპარლამენტთაშორისო ფორუმებზე გამართულ დისკუსიებზე პარლამენტები გამოხატავდნენ თავიანთ ეჭვს კონტროლის და შეფასების ახალი პროცედურების შესახებ, რაც გამოწვეული იყო სიტყვების „კონტროლი“ და „შეფასება“ გაურკვეველი მნიშვნელობით. გარდა ამისა იყო გამოწვეული ფაქტით, რომ ზედამხედველობა დამოკიდებულია ევროპოლის და ევროიუსტის მისიებზე, დავალებებზე და სტრუქტურებზე, რომელიც მხოლოდ შემდგომში იქნება განსაზღვრული დადგენილებებში. ამიტომაც პარლამენტები მოითხოვდნენ დადგენილებების პროექტების განხილვას პარლამენტარული კონტროლის ფარგლებში (შეხვედრა COSAC, პრაღა 2009 წლის 10-12 მაისი, პ. 3.5, ევროკავშირის ოფიციალური ჟურნალი 2009 ც 230, გვ.5).

6.3 აქტის მიღების პროცედურაში მონაწილეობის მიღება საოჯახო სამართლის ტრანსსაზღვრო შედეგების საკითხებში - ხელშეკრულება ევროკავშირის ფუნქციონირების შესახებ მ.81, პ. 3 აბზაცი 3

ყველა პარლამენტს აქვს უფლება განაცხადოს უარი კომისიის განცხადებაზე საოჯახო სამართლის ტრანსსაზღვრო შედეგების საკითხებში. ამ საკითხებში გადაწყვეტილებას ღებულობს საბჭო. კომისიის განცხადების მიღების შემდეგ 6

თვის განმავლობაში, ერთი პარლამენტის წინააღმდეგობის შემთხვევაშიც კი, საბჭოს არ შეუძლია მიიღოს ეს გადაწყვეტილება.

7. **ხელშეკრულებების შეცვლის პროცედურებში მონაწილეობის მიღება - მ. 12 დ** ხელშეკრულება ევროკავშირის შესახებ, მ.48 ხელშეკრულება ევროკავშირის შესახებ

პარლამენტები ღებულობენ მონაწილეობას ხელშეკრულებების ცვლილებების პროცედურის ორივე რეჟიმში, რომელიც გათვალისწინებულია ლისაბონის ხელშეკრულებით:

- **ჩვეულებრივი პროცედურა,** რომელშიც:
- აცნობებს ეროვნულ პარლამენტებს ხელშეკრულებების ცვლილებების შემოთავაზებას
- ეროვნული პარლამენტების წევრები შედიან კომიტეტის შემადგენლობაში, რომელიც განიხილავს ცვლილებების შემოთავაზებებს და ღებულობს რეკომენდაციებს საერთაშორისო კონფერენციისათვის - **გამარტივებული პროცედურა:**
- ეროვნული პარლამენტები ღებულობენ ინფორმაციას ევროსაბჭოს ინიციატივების შესახებ, რომელიც ეხება სპეციალური პროცედურიდან ჩვეულებრივზე გადასვლას და ერთსულოვნებიდან კვალიფიციურ უმრავლესობაზე, ე.წ. გენერალური პროცედურის ფარგლებში/ ხიდის პროცედურა აღნიშნული ხელშეკრულებაში ევროკავშირის შესახებ მ.48 პ.7. ერთი პარლამენტის წინააღმდეგობა 6 თვის განმავლობაში ევროსაბჭოს ინიციატივის მიღებიდან გამარტივებული პროცედურის მიხედვით ბლოკავს პროცედურას, ანუ ევროსაბჭოს გადაწყვეტილება არ იქნება მიღებული.

8. **ეროვნულ პარლამენტებთან და ევროპარლამენტთან საპარლამენტთაშორისო თანამშრომლობაში მონაწილეობის მიღება -** ხელშეკრულება ევროკავშირის შესახებ მ. 12 ფ, ოქმი N 1, II „საპარლამენტთაშორისო თანამშრომლობა'.

ლისაბონის ხელშეკრულებაში საპარლამენტთასორისო თანამშრომლობა პირველად მიიღო ხელშეკრულების საფუძველი. ხელშეკრულების ევროკავშირის შესახებ მ. 12 F აღნიშნუშნულია, რომ ეროვნული პარლამენტები ხელს შეუწყობენ ევროკავშირის ფუნქციონირებას ეროვნული პარლამენტების ევროპარლამენტთან თანამშრომლობის საფუძველზე. N 1 ოქმის მ. 9 გამომდინარეა, რომ ევროპარლამენტი და ეროვნული პარლამენტები ერთობლივად განმარტავენ შედეგიანი და სისტემატიური თანამშრომლობის გზებს. ეს არის მნიშვნელოვანი ეროვნული პარლამენტების ახალი უფლებების თვალსაზრისით, ასეთი როგორც მაგ. წინასწარი გაფრთხილების მექანიზმი, რომელიც შეიძლება განხორციელებული იყოს მხოლოდ მჭიდრო თანამშრომლობის შემთხვევაში.

შედეგიანი თანამშრომლობის ორგანოზება ითვალისწინებს საპარლამენტთაშორისო დაგეგმვის და კოორდინირებას გეგმას, ეს საკითხი დაყენებულია როგორც ევროპარლამენტის, ასევე ევროკავშირის პარლამენტების

თავჯდომარეთა კონფერენციაზე და COSAC- ზე. ზოგიერთი ზოგადი წესი აღნიშნულია ჰააგაში 2004 წელს და შეცვლილი ლისაბონში 2008 წელს ევროკავშირის პარლამენტების თავჯდომარეთა კონფერენციაზე მიღებულ „დირექტივებში ევროკავშირში საპარლამენტთაშორისო თანამშრომლობის შესახებ“. საპარლამენტთაშორისო თანამშრომლობის ერთადერთ ორგანოს, რომელიც აღნიშნულია ხელშეკრულებაში არის COSAC (Conference of Community and European Affairs Committees of Parliaments of the European Union). მის კომპეტენციებში, რომელიც ამჟამად ძალზედ ელასტიურია, შედის:

- ყველა შენიშვნა ეროვნული პარლამენტების როლის შესახებ გადაეცემა ევროპარლამენტს, კომისიას და საბჭოს, შეზღუდვების გარეშე, რომელიც იყო აღნიშნული ოქმში [N9] , დაერთო ხელშეკრულებას ევროკავშირის შესახებ ამსტერდამის ხელშეკრულების საფუძველზე. იმ ოქმის საფუძველზე COSAC-ს შეეძლო განეხილებინა საკანონმდებლო აქტის ყველა პროექტი, თავისუფლების, თავდაცვის და სამართლიანობის სივრცის დადგენასთან დაკავშირებით, ჰქონდა უშუალო ზეგავლენის საშუალება ერთეულების ძალაუფლებებზე და თავისუფლებაზე, შეეძლო შენიშვნები შეეტანა ევროპარლამენტში, ევროსაბჭოში და კომისიაში ევროკავშირის ლეგისლაციური მოღვაწეობის საკითხების შესახებ, განსაკუთრებით სუბსიდირების წესის, თავისუფლების, თავდაცვის და სამართლიანობის სივრცის და ძირითადი უფლებების თაობაზე. ახალი ოქმში არ არის აღნიშნული, რომ COSAC-ი გადასცემს ევროკავშირის ინსტიტუციებს თავის შენიშვნებს „აქტების პროექტების საფუძველზე ევროკავშირის წევრ ქვეყნების მთავრობების წარმომადგენლების გადაწყვეტილების შესაბამისად“;
- ეროვნული პარლამენტის და ევროპარლამენტის (ასევე კომისიების) შორის ინფორმაციის და საუკეთესო გამოცდილების გაცვლის მხარდაჭერა;
- საპარლამენტთაშორისო კონფერენციების ორგანიზება, განსაკუთრებით საერთო საგარეო და თავდაცვის პოლიტიკის, მათ შორის საერთო უსაფრთხოების და თავდაცვის საკითხებში.

ბოლო ორი პუნქტი იყო COSAC-ის ახალი კომპეტენცია, მაგრამ უნდა აღინიშნოს რომ ინფორმაციის და გამოცდილების გაცვლა თავიდანვე წარმოადგენდა COSAC-ის შეხვედრების ძირითად ელემენტს.

და ისევე, როგორც ეს მანამდე იყო COSAC-ის მიერ გაცემული შენიშვნები არ არის სავალდებულო ეროვნული პარლამენტებისათვის და „არ ამტყუნებს მათ პოზიციებს“.

9. შეჯამება

ზემოაღნიშნულ ინფორმაციაში აღნიშნული იყო ახალი კომპეტენციები, რომელიც მიენიჭა ეროვნულ პარლამენტებს ლისაბონის ხელშეკრულების საფუძველზე. შეიძლება შემოკლებით და გამარტივებით დავაჯგუფოდ შემდეგნაირად:

- **გაძლიერებულია ინფორმაციის მიღების უფლება** - ინფორმირების მექანიზმი ბევრად მოქნილია, გაფართოვდა დოკუმენტების და ინფორმაციის კატალოგი, რომელიც უშუალოდ პარლამენტებში იგზავნება (მაგ. საკანონმდებლო აქტების პროექტები, ლეგისლაციური დაგეგმვის დოკუმენტები, ევროკავშირში გაერთიანების განცხადებები, ხელშეკრულებების ცვლილებების შემოთავაზებები, ინფორმაცია ევროკავშირის ქვეყნების მიერ თავისუფლების, თავდაცვის და სამართლიანობის სივრცის პოლიტიკის განხორციელების შეფასება), აგრეთვე ცნობილია ევროკავშირის ინსტიტუციების სია, რომელიც ვალდებულია უშუალოდ გადასცეს ინფორმაცია და საბუთები (ადრე ამას მხოლოდ ევროკომისია ასრულებდა),
- **სუბსიდირების წესის შესრულებაზე ზრუნვის უფლება,** რომლის ელემენტს წარმოადგენს წინასწარი გაფრთხილების მექანიზმი, რომელშიც უშუალოდ ჩართულია ყველა პარლამენტი: ყვითელი ბარათი შეიძლება გამოიწვიოს საკანონმდებლო აქტის პროექტის ცვლილებები ან შეჩერება, თუ პარლამენტის აზრით დარღვეულია სუბსიდირების წესი, ნარინჯისფერი - ჩვეულებრივი საკანონმდებლო პროცედურის შეწყვეტა გამარტივებულ რეჟიმში. მანამდე პარლამენტებს შეეძლოთ სუბსიდირების წესის შესრულების შესწავლა ზოგად წესებზე დაყრდნობით და გადაეცათ შენიშვნები საკუთარ მთავრობებისათვის ან გამოექვეყნებინათ COSAC-ის ფორუმზე (მაგ. სუბსიდირების წესის კოორდინირებული კონტროლის ფარგლებში); ხოლო COSAC-ის პოზიციას არ ჰქონდა სავალდებულო მნიშვნელობა არც ევროკავშირის ინსტიტუციებისათვის, არც პარლამენტებისათვის,
- **ვეტოს უფლება** - ერთი პარლამენტის წინააღმდეგობა იწვევს შემდეგი პროცედურის, ხიდის გენერალური პროცედურის შეჩერებას (ხელშეკრულება ევროკავსირის შესახებ მ.48, პ7-ხელშეკრულებების ცვლილებების გამარტივება) და ხიდის დარგობრივი პროცედურის შეჩერებას (ხელშეკრულება ევროკავსირის ფუნქციონირების შესახებ, მ. 81, პ.3 - აქტის მიღების პროცედურის შეცვლა ოჯახის სამართლის ტრანსსაზღვრული შედეგების ფარგლებში); ადრე ეროვნულ პარლამენტებს მსგავსი იარაღი არ ჰქონიათ,

- **თავისუფლების, თავდაცვის და სამართლიანობის სივრცის ზედამხედველობა** - რაც ნიშნავს პარლამენტების მონაწილეობას ევროკავშირის პოლიტიკის შეფასებაში, აგრეთვე ევროპოლის პოლიტიკურ კონტროლს და ევროიუსტის საქმიანობის შეფასებას; მანამდე ევროკავშირის ლეგისლაციური მოქმედებების თავისუფლების, თავდაცვის და სამართლიანობის სივრცის დარგში შენიშვნების გაცემის უფლება ჰქონდა მხოლოდ COSAC-ს,
- **ფართო საპარლამენტთაშორისო თანამშრომლობაში მონაწილეობის მიღება** - თანამშრომლობის ახალი მექანიზმები შეიძლება ითვალისწინებდეს დებატების ორგანიზებას საერთო საგარეო, თავდაცვის და უსაფრთხოების პოლიტიკის დარგში; COSAC-ი შეიძლება არა მარტო ევროკომისიების თანამშრომლობის, არამედ სპეციალური კომისიების ფორუმს წარმოადგენდეს; ეროვნული პარლამენტები და ევროპარლამენტი მიიღეს ევროკავშირში საპარლამენტთაშორისო სისტემატიური და შედეგიანი თანამაშრომლობის ორგანიზების ფარგლების განმარტების მანდატი.

ეროვნული პრალამენტების პოზიცია ევროკავშირში ლისაბონის ხელშეკრულების საფუძველზე - ზოგიერთი დოკუმენტი და პუბლიკაცია http://libr.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=28&Itemid=54

დებატები ეროვნული პარლამენტების ევროკავშირში როლის შესახებ ლისაბონის ხელშეკრულების საფუძველზე - ინფორმაცია *OIDE* http://libr.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=510&Itemid=296

CONSTRUCTING THE EUROPEAN COMMUNITY LEGAL SYSTEM FROM THE GROUND UP:

THE ROLE OF INDIVIDUAL LITIGANTS AND NATIONAL COURTS

WALTER MATTLI [*] & ANNE-MARIE SLAUGHTER [**]

Table of Contents

ABSTRACT

The process of European legal integration has been characterized by considerable variation in the timing and the extent of acceptance of key doctrines of EC law among different national courts. What explains this variation? We answer this question by refining our earlier model that explained legal integration as the result of cooperation between the European Court of Justice and both individual litigants and national courts. To explain variation, we pay close attention to the specific preferences of the various actors we identify and the constraints shaping their pursuit of those preferences. Regarding individual litigants, we examine the constraints imposed not only by the legal process, but also by a differential ability to bring a series of suits rather than just one. With respect to national courts, we analyze those constraints in the context of specific conceptions of judicial identity and the constraints imposed by legal legitimacy and democratic accountability. We conclude with a review of some developments in legal scholarship that are likely to prove conducive to more interdisciplinary collaboration between political scientists and legal scholars.

I. Introduction

Political scientists have discovered the European Court of Justice (ECJ). Three years ago we published Europe before the Court, a political analysis of legal integration in the European Community (EC) within a neofunctionalist framework.[1] We added our voices to a number of others calling for an interdisciplinary approach to EC law, or at least a plea to examining EC law in political, economic and social context. Legal scholars such as Eric Stein, Francis Snyder, Martin Shapiro, Hjalte Rasmussen, and, most notably, Joseph Weiler, had been pushing European and American lawyers away from strictly doctrinal analyses of EC law for over a decade. On the political science side, Mary Volcansek had revived the pioneering tradition of Stuart Scheingold in developing an impact analysis of European judicial politics, focusing particularly on the relationship between the ECJ and national courts.[2] Nevertheless, as we noted at the time, the overwhelming majority of political scientists studying and writing about the European Community gave the Court very short shrift.

This deficit has been remedied. Geoffrey Garrett, for example, has advanced a general model to account for the impact of the Court on the general process of European integration.[3] Martin Shapiro and Alec Stone have begun analyzing the Court from the perspective of comparative judicial politics.[4] In addition, a crop of younger scholars are focusing specifically on the dynamics of European legal integration. Promising dissertations are forthcoming from Karen Alter, Bernadette Kilroy, and Amy Richmond, to name only a few, examining the relationship between the ECJ and national courts, the congruence between national court decisions and economic and political definitions of the national interest in specific countries, and the rate of member state participation in cases before the ECJ.[5] Other contributions include Jonathan Golub's analyses of patterns of references from the national courts, Karen Alter and Sophie Meunier-Aitsahalia's analysis of the Cassis de Dijon decision, and several thought-provoking analyses by Daniel Wincott.[6] At the same time, a new generation of EC legal scholars are adopting a much more lively and critical stance toward ECJ jurisprudence, coupled with reflections on the dynamics of the EC legal community.[7]

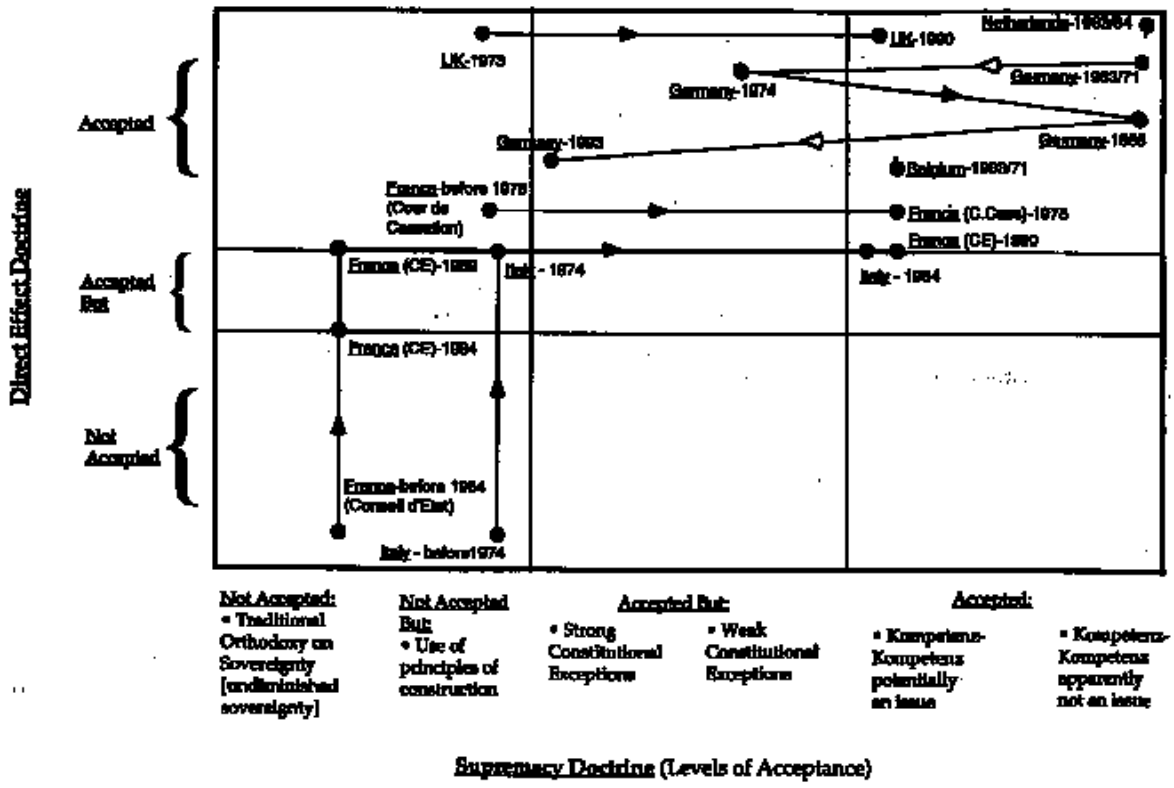
Amid this ferment, we seek to revisit our original framework for explaining EC legal integration. We contend that much of the empirical evidence that has emerged in the interim confirms our basic claims concerning the key actors in the legal integration process, their motives, the dynamics of their interaction, and the context in which they operate. EC lawyers themselves are increasingly willing to acknowledge the closely constructed network of sub- and supra-national actors acting within an insulated and self-consciously constructed "community of law."[8] At the same time, the limits of the initial framework are also now becoming clear. This paper seeks to address some of those limits in ways that we hope will contribute to further research.

Scholars have challenged the neofunctionalist explanation of legal integration from two principal directions.[9] First is the neorealist claim that the ECJ has actually had little independent or unforeseen impact on European

integration; that although straying occasionally, it has acted largely as the faithful agent of member state interests.[10] In response, we challenged the empirical evidence of congruence between ECJ decisions and member state interests. More fundamentally, we questioned the identification of state "interests" as unitary economic interests. From this perspective, the value of a neofunctionalist analysis is its emphasis on microfoundations, on specifying the interests of particular actors in the process of European integration.

A second challenge to the neofunctionalist explanation of European legal integration concerned its teleological quality. Just as Haas's original neofunctionalist analysis waxed and waned with the fortunes of the Community itself, so too do neofunctional dynamics seem less compelling in 1996 than in 1992. Neofunctionalism seems to be a tale tailored for success, an account of how different actors can overcome obstacles to achieve a common goal. It is less a theory of when integration will and will not happen than a description of the process of how it does. To understand when the conditions favorable to this process are most likely to occur, we need a theory of interest formation. In the context of European legal integration, we originally argued that both individual litigants and national courts cooperated with the ECJ in the construction of the EC legal system. We paid relatively little attention, however, to the specific motives animating these actors, beyond the broad assertion that they were generally pursuing their self-interest. Such generalizations cannot explain the considerable variation in the timing and the extent of acceptance of key doctrines of EC law among different national courts (see Figure 1).

Figure 1. - Summary of Timing Reception of Community Doctrines by the Member States



Moreover, national courts are fundamentally dependent on the cases presented for their decision, cases brought to them by individual litigants with a wide range of specific motivations. Of particular importance in this regard is increased awareness in Europe of the way in which courts can be used to achieve a particular political result, as well the growth of a phenomenon that U.S. lawyers refer to as "public interest litigation." The result, particularly in Great Britain, is a stream of cases brought by public interest groups seeking to use EC law to advance the interests of groups such as women and environmentalists.

In addition to refining the specification of interests of national courts and individual litigants, a theoretical account capable of explaining variation in the pace and scope of European legal integration among different

member states must disaggregate the state itself. The standard neofunctionalist model assumes that the "state" is a monolith, to be circumvented and influenced by coalitions of sub- and supra-national actors. Yet closer examination of the actual process of integration, with starts and stops within and across states, reveals courts, legislatures, executives, and administrative bureaucracies interacting as quasi-autonomous actors.[11] Each of these institutions has specific interests shaped by the structure of a particular political system, the need to perform specific socio-political functions such as judging or legislating, and the demands of specific political constituencies.

In lieu of standard models of the unitary state, the picture that emerges is one of "disaggregated sovereignty," an image of different governmental institutions interacting with one another, with individuals and groups in domestic and transnational society and with supranational institutions.[12] This picture is closer to general liberal theories of international relations than it is to any particular account of European integration,[13] although it is easily combined with a neofunctionalist framework. Although liberal theories all emphasize state-society relations, they do not challenge the standard assumption of the unitary state. The disaggregated state model refines the analysis of state-society relations by examining the interests and constraints facing specific state institutions as they interact with social actors. This paper explores both the interests and the constraints facing both individual litigants and national courts in the EC. Our discussion of individual litigants is stimulated by a new stream of scholarship examining patterns of EC litigation in Great Britain. Our discussion of national courts flows out of a larger project examining the reception by national courts of the core ECJ doctrines mandating the direct effect of EC law in the national legal systems of EC member states and the supremacy of that law over conflicting rules of national law. This project includes six case studies examining the process of reception of these doctrines in Belgium, France, Germany, Great Britain, Italy, and the Netherlands. The case studies have been written by European legal scholars who were instructed not only to provide a doctrinal account of this process, but also to gather evidence concerning causes "beyond doctrine."[14] On a more theoretical plane, we also seek to pay more attention not only to the preferences of the various actors we identify, but also the constraints shaping their pursuit of those preferences. Regarding individual litigants, we examine the constraints imposed not only by the legal process, but also by a differential ability to bring a series of suits rather than just one. With respect to national courts, we analyze those constraints in the context of specific conceptions of judicial identity and the constraints imposed by legal legitimacy and democratic accountability. The next generation of scholarship on EC legal integration, as with European integration more generally, will require far more nuanced attention to the identification of both interests and constraints in very specific contexts. It will move away from contending paradigms such as realism and neofunctionalism and toward the development of mid-range hypotheses that are both theoretically sophisticated and empirically informed.

II. THE ROLE OF INDIVIDUAL LITIGANTS IN EC LEGAL INTEGRATION

A. The Actors and the Dynamics of Integration: Neofunctionalism and Legal Integration

In our original account we set out to explain the gradual penetration of EC law into domestic law of its member states. We defined two principal dimensions of this process. First is the dimension of formal penetration, the expansion of the types of supranational legal acts that take precedence over domestic law and the range of cases in which individuals may invoke Community law directly in domestic courts. Second is the spilling over of community legal regulation from the narrowly economic domain into areas dealing with social and political issues. We argued that the independent variables posited by neofunctionalist theory provide a convincing and parsimonious explanation of legal integration. Drawing on the work of legal scholars such as Joseph Weiler, we identified the Article 177 procedure in the Treaty of Rome as providing a framework for links between the European Court of Justice (ECJ) and subnational actors - private litigants, their lawyers, and lower national courts.[15]

The novelty of our study was not the emphasis on sub- and supranational actors per se, for there already existed a rich body of literature on the Commission's relations with various interest groups.[16] We simply argued that the neofunctionalist dynamic was at work in a domain that the integration literature had overlooked: the legal domain. The absence of prior theoretical work on legal integration may be explained by the dearth of empirical accounts of "pressure through law". Revealingly, little mention - if mention at all - is made of the European

Court of Justice in the many handbooks for lobbyists.[17] This has, in part, been attributed to the European perception of courts as impartial and judicially independent bodies. An alternative explanation refers to the text of the Treaty of Rome. Only member states and Community institutions are mentioned as entitled to "privileged access" to the Court; not so individuals, firms or European-wide interest groups.[18] Article 173 permits "any natural or legal person [to] institute proceedings [only] against a decision addressed to that person or against a decision which, although...addressed to another person, is of direct and individual concern to the former." Similar restrictions on individuals hold under Article 175 (failure to act). Finally, the right to intervene in a case to present evidence to the Court is reserved to the Commission and member states only.[19]

Nevertheless, the absence of empirical literature on "pressure through law" conveyed no accurate reflection of the true importance of the phenomenon, for lobbying in the legal domain was alive and well. In our original article, we explained the phenomenon of pressure through law by arguing that the ECJ made subnational actors aware of the opportunities offered to them by the Community legal system. The Court in fact created these opportunities by giving pro-Community constituencies a direct stake in the promulgation and implementation of Community law. As a result, individuals (and their lawyers) who could point to a provision in the Community treaties or secondary legislation that supported a particular activity they wished to undertake - from equal pay for equal work to a lifting of customs levies - were able to invoke community law and urge a national court to certify the question of whether and how community law should be applied to the ECJ.[20] Lower national courts partook in this process of legal integration because it bestowed upon them greater powers. This neofunctionalist utilitarian account of integration included the ECJ itself. Any measure that succeeded in raising the visibility, effectiveness, and scope of European Union law also enhanced the prestige and power of the Court.[21]

B. Litigants and Litigation Strategies

A refinement of our analysis at the subnational level must start with private litigants. Without individual litigants, there would be no cases presented to national courts and thus no basis for legal integration. The various identities, motivations and strategies of litigants inevitably influenced the nature and pace of integration. This section summarizes new data collected by British scholars on the importance of private litigants in the deepening and broadening process of EC law and highlights its implications regarding the interests and constraints facing national actors. This analysis sets the stage for a closer look at the role played by national courts. Marc Galanter, a prominent observer of efforts to achieve social and economic change through the U.S. legal system, has distinguished between "one shotters" (OSs) can be distinguished from "repeat players" (RPs).[22] This distinction, as well as other socio-economic categorizations of private litigants, offers not only a typology of actors appearing before the courts but also provides insight into different tactical approaches to Euro-litigation.[23] Galanter further observes: "If we analyze the outcomes of a case into a tangible component and a rule component, we may expect that in [a single] case, [an] OS will attempt to maximize [the] tangible gain. But if [a] RP is interested in maximizing his tangible gain in a series of cases..., he may be willing to trade off gain in any one case for rule gain...[I]t pays an RP to expend resources in influencing the making of the relevant rules."[24]

Several different categories of litigants have been RPs before the ECJ. First are public interest "pressure groups," seeking to use a variety of political and legal strategies to advance particular causes. These have been active largely in Great Britain. Paul Craig confirms in his report on the United Kingdom that particular litigants have made strategic use of the greater rights afforded under Community law than under national legal rules to play a significant part in the development of substantive Community law, particularly in employment law and gender equality.[25]

The same theme is evoked in the writings of Carol Harlow. She describes how pressure groups have made calculated use of the litigation strategy offered under Article 177 to establish freedom of movement, to query income tax assessments, to claim social security benefits, equal pay and damages for invalid administrative action, to protest against discrimination, to challenge nationalization and immigration policies, and to dispute elections.[26] Interestingly, a number of these cases were fought by groups that conceal their identity behind "frontman." Harlow notes, for example, that the three celebrated cases involving Madame Defrenne, which established the direct effect of Article 119 EEC Treaty and the ensuing equality directives were on the face all

brought by a single individual who took no active part.[27] In actual fact, they were test cases fought in her name by a feminist lawyer who presumably had the backing of groups affluent enough to pay the costs of protracted legal battles.[28]

A second category of RPs in Euro-litigation is large corporate actors. Consider the role played by powerful French firms in forcing the Conseil D'Etat to accept EC law doctrine. Until the beginning of the eighties, the Conseil D'Etat felt little pressure to endorse direct effect and supremacy. Two of its major partners, Germany and Italy, had supreme courts that refused to fully comply with the ECJ's jurisprudence. In 1984, however, the Italian Constitutional Court authorized lower national judges to declare national law incompatible with treaty obligations without having to refer the case to the Constitutional Court.[29] The German Federal Constitutional Court announced in 1986 in the Solange II case that it would no longer control the constitutionality of Community legal acts. The legal context in which corporate interests in France now found themselves put them increasingly at a competitive disadvantage relative to firms operating in member states where supremacy and direct effect doctrines were fully accepted.[30]

To remedy this situation major import- and export-oriented companies in France launched systematic attacks on government decisions that they felt were contrary to Community law. Their aim was to provoke a chain of verdicts by the ECJ condemning France for breach of Community law. This increased the pressure on the French government and the Conseil d'Etat to comply with Community rule. It is no coincidence that the decision by the Conseil d'Etat confirming direct effect of Community directives in France was initiated by a Philip Morris and Rothmans - classical repeat players.[31]

Richard Rawlings provides another account of the litigation strategy of corporate RPs in the European context in his study on the Sunday Trading saga, appropriately entitled The Eurolaw Game.[32] At issue was the British Shops Act of 1950 that places statutory restrictions on Sunday trading. Large retailers used an Article 177 reference to the ECJ with the practical effect of freezing the enforcement of the national law. The economic incentive for such action is clear. For large retailers Sunday trading represents up to 23% of their turnover.[33] The "European Defense" put forth by the retailers stated that the Shops Act contravenes Article 30 EEC Treaty which prohibits "quantitative restrictions on imports and all measures having equivalent effect." If a shop is prohibited from trading on a Sunday, they argued, its overall sales will be reduced; if sales are reduced, imports from the European Community will be reduced (by about 15 per cent). Ergo the Shops Act amounts to a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article 30.[34] The Sunday trading saga - too long and convoluted to be narrated here in full - illustrates a number of critical points to which future studies on Euro-lobbying must be sensitive. First, the saga demonstrates the potential for the use of Eurolitigation strategies to achieve gains by powerful corporate interests. However, the issue here is not primarily one of coercing compliance with Community legislation. To "win" a case in that sense may not be the principal aim. Interim remedies providing time for retaliation or delays caused by legal proceedings may be the true objective of litigation especially if it involves repeat players.[35] In the Sunday Trading saga, the retailers ultimately lost the case in court, but they managed to reap large profits while the case remained pending. Furthermore, the action of the large retailers inevitably had a "domino" effect on smaller merchants who felt the commercial pressure to start trading on Sundays while the national law was in abeyance. During that protracted period, the big players also helped bring about changes in the shopping habits and in people's expectations about the opening hours of stores. "In short, a social context more favorable to reform was fostered."[36]

Second, the saga contains a subplot that Rawlings calls the Multi-national Game. In this game, large British retailers were part of a coordinated eurowide litigation strategy by corporate interests in other member states that used Article 177 references almost simultaneously to intensify the pressure for abolition of restrictions on Sunday trading in their respective countries. Rawlings characterizes the Eurolaw game played in the Sunday trading saga in terms of outflanking or "trumping" the domestic system.[37] He concludes: "It is not only the doctrines of primacy and of direct effect which give increased scope for litigation strategies...Particular features of the system have a strong tendency towards uncertainty and delay, attributes of a legal order which the...litigation strategy [of repeat players] not only works to generate but also thrives upon."[38]

Ideological commitment and material interest provide the incentives for RPs; lack of resources and short time horizons provide the principal constraints. Pressure groups and large corporate actors may have very different,

indeed opposing, motivations with regard to the legal outcomes they seek, but both are well-placed to see the ECJ as a potential ally. Of particular interest is the way in which a repeat-play strategy on the part of a particular litigant dovetails with the Court's preferred method of expanding the reach of Community law: an incremental approach implemented over a series of cases, in which national governments win typically win the battle and lose the war. The Court's standard move is to enunciate a principle of great long-term significance but to find some procedural or factual reason not to apply it to the case at hand.[39] The repeat play analysis suggests that in many of these cases the individual litigant who has sought aid from the Court may be a willing partner in this strategy.

III. THE ROLE OF NATIONAL COURTS IN EC LEGAL INTEGRATION

In our original article we also focused on the role of the ECJ itself in forging ties with national courts to create an independent legal community of sub- and supra-national actors. We noted the Court's efforts to make European law attractive to individual litigants and their lawyers through its caselaw and its efforts to educate and appeal to national judges through tactics ranging from weekends in Luxembourg to tacit offers of a judicial partnership. A number of the country studies offer additional evidence for this picture. The judges of lower Italian courts, for instance, were assertedly motivated by a desire to have their cases referring issues to the ECJ "feature at the center of the attention of the world of lawyers."[40] This notoriety resulted from approval of their analysis by the ECJ, in the face of the apparent ignorance of EC law on the part of many law professors and higher court judges.[41]

The French study also highlights the potential importance of the socialization of individual national judges through a tour on the ECJ. Plötner tells the tale of Yves Galmot, the first member of the French Conseil d'Etat nominated as a judge on the ECJ, who was sent off to Luxembourg with the expectation that he would hold the line against judicial activism at the European level. A year after he returned to the Conseil d'Etat - thoroughly converted to Community doctrines - the Conseil took its famous Nicolo decision that implicitly authorized judges to make treaties prevail over national law.[42] Much of the remaining time is spent in each other's company.[43] More generally, many of the country studies emphasize time and again the small size and relatively close knit character of the legal community in each country, forged by ties of education, socialization, and professional mobility between the professoriate, private practice, and the judiciary.

To the extent that we focused on national courts as independent participants in this community of sub- and supranational legal actors, we argued that they were motivated largely by self-interest, borrowing Joseph Weiler's concept of "judicial empowerment."[44] A number of scholars have argued convincingly that this analysis is too crude.[45] It does not specify what power judges seek, nor how they were able to obtain it through acceptance of the authority of the ECJ. We also conflated the professional and personal interests of individual interests with the institutional interests of judges.[46] Finally, such a general concept cannot explain differences in the rate of acceptance of critical ECJ doctrines such as direct effect and supremacy among different courts within the same national legal system. Nor can it account for limits to integration. A much more precise specification of judicial interests is needed, as well as of the constraints on the pursuit of those interests.

Borrowing from our critics, and drawing on the data presented in the country studies, we offer a more refined and differentiated definition of the kinds of power that courts actually seek. First is the power of judicial review to establish the validity of national legislation, which is an increase in power with respect to national legislatures. Some national courts, notably constitutional courts, already exercise this power within their domestic legal system; others gained this power with respect to at least some subset of national statutes in partnership with the ECJ. Second is the pursuit of institutional power and prestige relative to other courts within the same national judicial system. Here we draw primarily on the work of Karen Alter, who has developed an "inter-court competition" approach to explain European legal integration. Third is the power to promote certain substantive policies through the law. In other words, where European law and national law promote different policies or have different distributional effects with respect to a particular class of litigants, a national judge may have the opportunity to achieve the result that she favors through the application of European law.[47]

A noteworthy aspect of this refinement of judicial interests, or preferences, is that each factor may explain resistance to as well as acceptance of EC law. Courts that already exercise the power of judicial review, for instance, are likely to perceive the "parallel" exercise of that power by the ECJ regarding matters of European law as a threat. Alec Stone emphasizes this tension in light of the particular incentives facing national constitutional courts, typically the only European courts entitled to engage in any form of judicial review.[48] Similarly, the inter-court competition model posits that courts that already enjoy substantial prestige and power relative to other courts within the same national legal system are likely to object to the extension or even transfer of that power elsewhere in the system; they may thus reject EC law for the same reasons that their counterparts accept it. Finally, the congruence of EC law with a particular set of substantive legal outcomes in different issue areas can produce opposition from national courts who favor the outcomes produced by the application of national law as easily as it can marshal support from judges who would like to see a change in national law.

The following subsections discuss each of these strands of judicial interests in turn, drawing on evidence from the country studies. The result is a more nuanced and sophisticated understanding of "judicial empowerment." Note, however, that this typology is inevitably stylized. A quest for power has both personal and professional aspects. It reflects a universal desire for individual recognition and acknowledgment by others as well as an instrumental effort to acquire the means to achieve specific goals. Judicial empowerment is likely also to partake of the ideals of the judiciary, closely allied with both the idea and the ideal of the rule of law. Self-images forged in this crucible include courts as protectors of the weak, as impartial dispensers of justice, as checks on the abuse of power by their fellow branches of government, and as guardians of social order through faithful application of the law as written and - occasionally - as felt.

The categories we advance here cannot capture this complexity. Our specification of both judicial interests, and, in the following section, the constraints attendant on the pursuit of those interests, are efforts to isolate specific elements of this mix as part of a more generalizable model.

A. Judicial Review

A number of the country studies offer evidence of a link between acceptance of EC law through adoption of the doctrines of direct effect and supremacy and a desire to exercise some judicial review powers. In the Netherlands, for example, Parliament amended in 1956 the Dutch constitution (introducing Articles 65 and 66) giving national courts the power to review legislation on its compatibility with international treaties. This new power was at odds with a long tradition that banned judicial review of the constitutionality of legislation. Judges could now set aside statutes that violated international obligations, but at the same time, the inviolability of these statutes against any judicial review of their constitutionality was maintained. The judges remained in the beginning reluctant to use their new powers. Only when encouraged by the European Court of Justice did they assume their new task. Claes and de Witte note that in the landmark Van Gend en Loos case, the ECJ's willingness to accept the role of "accomplice" in Van Gend encouraged Dutch courts to exercise their constitutionally recognized powers against the national legislature.[49]

The British situation is similar to the Dutch in that the doctrine of parliamentary sovereignty preempted any courts from attacking primary legislation. With the formal acceptance of EU supremacy in the Factortame case of (1990), however, national courts were granted the right to set aside primary legislation that violated Community obligations. Craig notes that "the UK jurisprudence provides a good example of how readily the national courts can embrace their new found authority."[50] Perhaps the best example, however, of the way in which a desire to exercise judicial review shaped acceptance of direct effect and supremacy comes from the Italian experience. As told by Cartabia and Ruggieri Laderchi, the Italian story is a drama with three principal characters: the ECJ, the Italian Constitutional Court, and the lower courts. Again aided and abetted by the ECJ, lower court judges understood that supremacy afforded them the opportunity to control Italian national legislation for consistency with Community law. The Italian Constitutional Court understood equally well that its prerogative of exclusive constitutional review was in jeopardy and sought to supervise the application of EC law in the face of contrary national legislation by the lower courts. Only in the 1980s, after it perceived that it was lagging behind the supreme courts of virtually all other member states, did it finally accept supremacy more or less on the ECJ's terms.[51]

In France, the monopoly of interpretation of public and constitutional law belonged to the Conseil d'Etat until 1958. In that year, the power to review the constitutionality of legislation passed to the newly-established Conseil Constitutionnel. This body decided in 1975 to abstain from examining the conformity of international treaties with national laws. The Conseil d'Etat - a particularly elitist group of French civil servants - considered any interference by the ECJ in French domestic affairs as a direct menace to its administrative and political power and chose therefore to ignore the ECJ.[52] Not so the Cour de Cassation. It decided only four months after the Conseil Constitutionnel's refusal to review legislation on its compatibility with international treaties to accept the supremacy doctrine in the landmark Jacques Vabre case.[53] Up to that point, the Cour de Cassation had followed the famous Matter doctrine, requiring judges to avoid conflicts between domestic law and international obligations using rules of construction; but if such avoidance was impossible, judges had to enact national law for they "cannot know other will than that of the law."[54]

What motivated the Cour de Cassation to abandon the Matter doctrine? Plötner argues in favor of the judicial review thesis. He writes: "From now on, any simple court could not only control all acts of parliament but also became . . . the common judge of Community law."[55]

B. Judicial Competition

Karen Alter has developed an "inter-court competition" model to explain variations in the scope and pace of national court acceptance of the doctrines of direct effect and supremacy.[56] She argues: "different courts have different interests vis-à-vis EC law . . . national courts use EC law in bureaucratic struggles between levels of the judiciary and between the judiciary and political bodies, thereby inadvertently facilitating the process of legal integration."[57] The exercise of judicial review involves a "horizontal" competition between courts and legislatures, allowing a judge to invoke the higher law of the constitution or a treaty as a bar to enforcement of a particular legislative product. Pure inter-court competition, on the other hand, can occur both horizontally, between high courts each charged with superintending a different body of law, and "vertically," between higher and lower courts within different branches of a national court system. The country studies contain substantial evidence for the inter-court competition model, as Alter documents.[58] The model is particularly appropriate to Germany, as benefits to lower national courts from integration are less apparent in Germany than in most other member states. The power to conduct judicial review was already present in the German legal system and cannot be seen as a new introduction of the EC legal system.[59] Vertical competition between lower and higher courts offers a better account of the incentives propelling German courts to accept direct effect and supremacy. But the model also offers a convincing framework within which to analyze variation in other member states. Indeed, it dovetails with Alec Stone's emphasis on the competition between constitutional courts and other national courts, another important chunk of the story.

Judicial interests flowing from inter-court competition reflect interests in relative judicial power -- power and prestige relative to other courts within the same national legal system. These interests may intersect interests in gaining the power of judicial review; in national legal systems in which some courts exercise judicial review while others do not, for instance, those courts lacking the power under the national system may seek to equalize their status with other national courts by arrogating the power to review national law for compatibility with EC law in partnership with the ECJ. For instance, Plötner argues that the Cour de Cassation's institutional position vis-a-vis the Conseil d'Etat improved greatly with its swift endorsement of EC supremacy.[60] Such competitive interests may also intersect with interests in promoting particular substantive policies, to the extent that a lower national court disagrees with a higher national court on a particular set of doctrinal outcomes and seeks to leapfrog that higher court by reference to the ECJ. It is to the interests in promoting substantive policies that we now turn.

C. Promotion of Substantive Policies

Jonathan Golub has recently demonstrated the ways in which a desire to shape specific policy outcomes may motivate national courts to limit the number of references to the ECJ. He shows that British courts have been reluctant to make references in cases in which the environmental protection requirements in EC law are less

stringent than in British environmental law.[61] Golub seeks to explain patterns of references, not acceptance of the doctrines of direct effect and supremacy. But other analysts of the reception of Community law by national courts have similarly pointed to judicial policy preferences as an explanatory factor. For Stone, a court has an "interest in using its decisions to make good policy."[62] Alter notes that "lower courts can use EC law to get to policy outcomes which they prefer, either for policy or legal reasons."[63]

How are we to identify and assess judicial policy preferences? The question has long bedeviled students of judicial politics, who have been singularly unsuccessful at generating an algorithm that can help predict the political attitudes of individual judges.[64] It is much easier to demonstrate a correlation between the political posture of a particular judge and a particular set of judicial outcomes than to identify which judge will favor which policies.

This uncertainty is multiplied in the present context by the difficulty of predicting how acceptance of direct effect and supremacy will affect outcomes in individual cases. Suppose, for instance, that a British judge favors high levels of environmental protection. At a given moment, EC directives and ECJ interpretations of those directives might mandate higher levels of environmental protection than British law. Yet those directives could change, as could the composition or disposition of the ECJ. Further, the acceptance of direct effect and supremacy cannot be limited to a particular class of cases. EC law and the ECJ's interpretation of that law could contradict the same national judge's policy preferences with regard to state subsidies for particular industries, gender discrimination, immigration law, or any other substantive area.

But why cannot an individual national judge accept direct effect and supremacy and then control the actual application of EC law simply by manipulating references? Golub's findings suggest that British courts may be pursuing this strategy. However, courts' ability to pick and choose cases to refer will be progressively limited both by the pressure of individual litigants and lower courts, as well as by the overriding need for minimum consistency and coherence in the law itself. Once a court has declared that EC law is supreme over national law, litigants will cite favorable doctrines of EC law and appeal national court decisions that do not follow those doctrines where they clearly apply to the facts in a particular case. Lower courts will similarly seek clarification in cases of apparent conflict between EC and national law. And to the extent that higher national courts refuse to provide such clarification, or selectively apply EC law in individual cases, the resulting patchwork will endanger the legitimacy of the national legal system.

Such pressures from litigants and requirements of the legal process are more properly classified as constraints, as discussed below. For purposes of analytical clarity, a judge's preferences regarding any individual case or class of cases will be a compound of views on a range of substantive issues: highly individualized preferences over specific policy outcomes combined with more general preferences concerning modes of statutory interpretation, the optimal relationship between courts and the legislature, and the need to protect specific classes of litigants. These preferences will then be tempered by a need for consistent, coherent, generalizable rules. It is important to note, however, that legal education, training, and socialization often results in the internalization of the constraints of clarity and predictability as independent preferences. Judges will thus often refer to these attributes as goals that they seek to pursue in upholding the "rule of law."

Returning to the question of preferences concerning direct effect and supremacy, it is still possible to identify situations where accepting direct effect and supremacy may on balance advance a judge's substantive policy preferences. First, some number of national judges may simply favor European integration and would see participation in the construction of the European legal system as an important step in that direction. Second, a national court might have a particular "constituency," such as workers or traders, that will by systematically advantaged by EC law. Plötner appears to provide such an example, noting that the judges of the Cour de Cassation "had closer and more direct ties to French economic agents and the average citizen" than the members of the Conseil d'Etat. These judges "realized that the impossibility of referring to certain Community regulations risked both to put competitive French firms at a disadvantage and to limit French citizens' protection of civil rights."[65] Kokott's study also suggests a similar dynamic with respect to the willingness of German labor courts to make references to the ECJ on the assumption that EC law would be more "employee-friendly" than national law, although she points out that the ECJ has recently gone too far in this regard.[66]

Overall, however, such examples are few, hard to prove, and easy to challenge. Courts typically do not have readily identifiable constituencies[67]; further, it is very difficult to predict the ultimate effect of acceptance of any legal doctrine. It is far more likely that a judge's preferences for coherence, consistency, and generalizability will produce a preference for direct effect and supremacy in situations in which other national courts have already accepted these doctrines, creating a patchwork that can now only be remedied by universal acceptance. Plötner's discussion of the Cour de Cassation, for instance, assumes that national judges across Europe were already applying EC law. The Italian Constitutional Court explicitly noted in accepting supremacy in the 1980s that other high courts across Europe, including Germany, had already taken this step.[68] Indeed, the phenomenon of "judicial cross-fertilization" identified in many of the country studies - meaning instances in which courts of one nation refer to the decisions of another - may be understood not only as a pure intellectual exchange and as a risk minimization strategy with respect to incurring obligations already accepted by other member states,[69] but also as recognition of the need to harmonize European law as law.

In sum, judicial preferences over specific policy outcomes are unlikely to be sufficiently generalizable to explain initial acceptances of direct effect and supremacy, although they may nevertheless be relevant to explaining or understanding the outcome of any particular case. Preferences for consistency and coherence across a body of rules are generalizable and may provide motives for acceptance of direct effect and supremacy. But they are more likely to operate at the end rather than the beginning of the first stage of constructing an EC legal system. Interestingly, Kokott points to the German Labor Court's "right and obligation to ensure a coherent legal system" as the driving factor behind a new phase of references to the ECJ, which she reads as inviting the ECJ to change its caselaw to conform better to the realities of national labor conditions and the specific contours of national law.[70]

IV. CONSTRAINTS ON THE PROCESS OF LEGAL INTEGRATION

In the end, even the most precise specification of the preferences of individual litigants and national courts provides an incomplete account of the legal integration process. It is simultaneously necessary to identify the constraints operating on these actors in their pursuit of their preferences. As outlined above, different courts within different national legal systems have different preferences. However, to the extent that we observe variation in the timing and scope of acceptance of EC legal doctrines by national courts that should have roughly the same preferences (two national constitutional courts, for instance) those differences are likely to flow from the relative constraints that those courts face in pursuing their preferences. We discuss these constraints as they operate on national courts (and hence indirectly on individual litigants) in terms of a more refined conception of judicial identity.

In our initial analysis we focused principally on one very general, albeit fundamental, aspect of judicial identity: the self-conception of courts in countries upholding the rule of law as non-political actors.[71] These courts universally conceive of themselves as courts, as agents and servants of the law, as participants in a specialized normative discourse with other courts. Their receptivity to participation in a dialogue with the ECJ depends in part on their perception of it as a court like themselves, as a fellow member of a community of law. This conception of judicial identity as fundamentally non-political was crucial to our "mask of law argument." Political considerations attach to judicial decisions and may motivate these decisions at the margin. Nevertheless, overt political arguments are illegitimate; actions must be justified with reference to generalizable principles and in a technical discourse that imposes its own constraints.[72] Law thus operated as a mask to conceal the full political import of the ECJ's decisions.[73]

In this account, judicial identity helped to insulate the pursuit of judicial preferences from political interference; it thus functioned primarily to facilitate the pursuit of those preferences as protected participants in a "community of law."[74] We paid less attention to the ways in which a particular conception of judicial identity in liberal democracies committed to the rule of law can function as a constraint on the pursuit of judicial preferences.[75] A closer examination of the constraints flowing from this conception of judicial identity reveals parameters that can vary across countries. Identification and exploration of these constraints thus provides a critical piece in an account of variation in the acceptance of the foundational doctrines of the EC legal system across national courts.

A court in a liberal democracy is charged with interpreting and applying the law without regard to the judge's own political preferences, the power and political preferences of the parties appearing before her, or the power and political preferences of any other branch of government with an interest in the case. Two principal constraints shape this process of rule interpretation and application. First is the constraint of minimum fidelity to the demands of legal discourse: "the language of reasoned interpretation, logical deduction, systemic and temporal coherence . . . ."[76] Reasoning and results that do not meet these requirements may be challenged as "unfounded in law," or as indicative that a court is acting ultra vires -- in excess of its mandate.

Second is a constraint of minimum democratic accountability: the requirement that a court not stray too far from majority political preferences.[77] At first glance, this constraint may seem completely at variance with the conception of courts as non-political actors. By definition, surely, courts are not accountable to voter preferences. A closer look, however, reveals that although judges are not and cannot be directly accountable to the voters, and indeed are specifically safeguarded by guarantees of life tenure and prohibitions on judicial salary reduction from feeling the full effects of electoral disagreement with their decisions, judicial decisions that consistently and sharply contradict majority policy preferences are likely to undermine perceptions of judicial legitimacy and can result in legislative efforts to restrict or even curtail judicial jurisdiction -- the scope of judicial power over particular classes of cases.[78] An astute judge will anticipate these reactions and seek to avoid them.

Yet if a court is constrained by the demands of legal reasoning and discourse, how can it "choose" to decide more or less in line with majority preferences? In many cases the choice will be clear: the weight of text and precedent, the elemental requirements of precision, clarity, and determinacy in rule interpretation and application, or the potentially disastrous social, political, or economic consequences attendant on one of the proffered readings of a textual provision as compared to another, leave little room for doubt as to the correct "legal" outcome. In such cases, should the judicial outcome diverge from majority preferences, then it is up to the legislature to change the law. In other cases, however, the sides are much more evenly matched. The text may be genuinely ambiguous, legislative intent murky, the option of a clear and determinate rule equally available on both sides, equal prospects for creating a cascade of evils or a cornucopia of benefits however the court comes out. In these cases -- hard cases, close cases, frequently very important cases -- judicial outcomes that consistently or persistently stray too far from perceived majority opinion in a particular country, whether expressed through the legislature or not, are likely to trigger suspicions that judges are substituting their own policy preferences for those of "the people."

Both these constraints -- the demands of legal discourse and democratic accountability -- are likely to vary from country to country. The sources of this variation are three: 1) variation in national policy preferences concerning the desirability of European integration; 2) variation in "national legal culture"; and 3) variation in specific national legal doctrines. In the first category, a national court that readily accepts direct effect and supremacy will face less of a challenge to its legitimacy in a polity where public support for European integration is generally strong than in one with a split in public attitudes. In the second category, the demands of legal discourse will vary depending on the nature and strength of the links between the legislature and the judiciary and different styles of legal reasoning. Some national legal cultures prove more hospitable to national judicial participation in the EC legal system than others. In the third category, doctrines governing the relationship between national and international law, the specific function of particular national courts, and the definition and operationalization of national sovereignty pose particular obstacles within national legal discourse and may themselves reflect majority preferences. The remainder of this section explores the ways in which factors in each of these categories produced variations in the constraints facing different national courts.

A. National Policy Preference

As discussed above, the case studies show that the rate of acceptance of supremacy doctrine in particular, and to a lesser extent direct effect, generally track national attitudes toward European integration. Figure 1 shows that the first countries to accept the doctrines of direct effect and supremacy were the Netherlands, Germany, and Belgium, followed by Italy, France, and Great Britain, in that order.[79] No surprises here; an observer ignorant of EC law and national legal doctrine but knowledgeable about relative political support for the EC in these

various countries is likely to have predicted a similar sequence. It is possible, of course, that national judges simply shared the prevailing attitudes toward European integration held by their fellow citizens and interpreted the law accordingly. We cannot know without interviewing individual judges, who would in any event be reluctant to confirm such speculation. However, such evidence is unnecessary insofar as the democratic accountability thesis would lead to the same result. Based on our assumption that national judges across countries shared uniform preferences concerning the advantages and disadvantages of entering into a partnership with the ECJ, the pursuit of these preferences would be constrained by the need not to allow their decisions to diverge too far from majority political preferences.

Behind the aggregate statistics presented in Figure 1 are a number of stories linking judicial outcomes with national policy preferences concerning European integration, policy preferences that are themselves derived from a composite of historical, geographical, and political factors. Hervé Bribosia, author of the Belgian case-study, notes that Belgium's size and export-dependent economy produce favorable national attitudes toward European integration, a factor that he adduces as a partial explanation for the willingness of the Belgian Cour de Cassation (the highest private law court) to take a high profile stance accepting supremacy in 1971.[80] Monica Claes and Bruno De Witte, writing on The Netherlands, are even more explicit. They trace Dutch support for the direct enforcement and application of international treaties back to Hugo Grotius's magisterial 17th century treatise on the freedom of the seas, locating these attitudes in small size and dependence on open borders for economic prosperity: "[T]he willingness to cooperate with foreign nations is clearly in the interest of a small trading nation that is too small to preserve its dependence on its own and needs open borders for its prosperity."[81] It is no coincidence that ten out of the first thirteen references to the European Court of Justice came from Dutch Courts.

On the other side of the ledger, Paul Craig observes that the reluctance of British courts to accept supremacy was but "one part of [Britain's] more general approach toward the EC."[82] However, he argues further that the view of Britain as consistently seeking to slow the pace of integration is distorted, that the majority of the British population accept EC membership as the political norm, and thus that the House of Lords simply sought "to bring constitutional doctrine up to date with political reality" when it finally accepted supremacy in 1990.[83]

If judges are constrained by majority preferences, however, how then is the construction of the European legal system even a puzzle? What of our story that the system was built by the ECJ and national judges, lawyers, and litigants against the wishes, or at least behind the backs of, member state governments? Are we not now advancing a version of Garrett and Weingast's claim that the ECJ was able to do its job because both its substantive decisions and the legal apparatus it created to enforce them advanced the interests of the states that created it? The answer, of course, is no. But to advance our argument at this level we must move beyond a unitary conception of the state. Our argument, in essence, pits courts and national executives against each other not in deciding whether to support further European integration (a decision ultimately up to the electorate) but in determining the balance of power among governmental institutions in an integrated Europe.

If we assume that the member states of the European Union are arrayed along a spectrum in terms of favorable attitudes toward integration, attitudes broadly determined by the electorate as a reflection of economic interest, historical experience, and geopolitical position, we can nevertheless imagine alternative architectures for an integrated Europe that would be relatively more or less favorable to the interests of national executives, legislatures, and courts. For instance, a Union that required provisions of the Treaty of Rome to be implemented by decisions of the Council of Ministers, which in turn imposed obligations on national executives and legislatures to pass directives implementing these decisions at the national level, affords much more power to national executives than a structure in which Treaty provisions can be directly implemented through national courts. It follows that there is no contradiction between our original (and continuing) assertion that national courts did not follow the preferences of national executives in accepting direct effect and supremacy and our recognition that both national courts and national executives are more or less constrained by majority preferences concerning European integration.

The country studies provide strong evidence for both these propositions. Relative to one another, national courts in all countries accepted direct effect and supremacy in keeping with the general attitudes of the electorate toward European integration: the Dutch first, the British last. At the same time, the Dutch Supreme Court

accepted both these doctrines within a year after the Dutch executive argued fervently against the interpretation of the Treaty of Rome that gave rise to them in the landmark case of Van Gend & Loos.[84] In France the highest private court accepted direct effect and supremacy fifteen years before the highest administrative court, the Conseil d'Etat, which plays the dual role of adviser to the executive and most closely identifies with what it perceives to be the executive's interests. In Germany the executive unsuccessfully sought to intervene in the judicial process on the side of the highest financial court against a decision of a lower financial court mandating compliance with an ECJ judgment on the basis of supremacy.[85] The stakes in these cases concerned less the desirability of European integration per se than a struggle over which domestic branch of government would control decisions over the pace, scope, and manner of integration within the broad outlines of the Treaty.

This inter-branch struggle, however, does not always cut in favor of increased integration. A case in point is the relationship between the German constitutional court, the German government, and the ECJ. Like the German government, which has long perceived itself as a "motor of integration," the German constitutional court has sought to develop a special relationship with the ECJ, generally supporting the creation of the EC legal system but periodically applying the brakes by insisting that the ECJ develop Community-wide protections for human rights or, more recently, insisting on delimiting a core area of national sovereignty. The German court's contributions to this dialogue reflect its assessment of a number of different factors: the requirements of domestic constitutional law, the proper interpretation of the Treaty of Rome, and the mood of the people, among others. This assessment may overlap with the German government's position, but may also diverge in ways that can bring the legal and the political into conflict. Thus, regarding its recent Maastricht decision, in which a German legislator challenged the Maastricht Treaty as a violation of the German constitution, the Federal Constitutional Court essentially found for the government by upholding the constitutionality of the Treaty. However, as Juliane Kokott explains: "[T]he Court tried . . . to assure itself of wide support for its judgment" by taking account of rising opposition to monetary integration among the German people in emphasizing the many strict preconditions for monetary union embedded in the Treaty, preserving the right of withdrawal from the monetary union should it prove to be unstable, and upholding the right of the German people to be represented by the German parliament rather than the European parliament.[86]

These constraints may prove tighter than Kohl and his successors would like in pushing for monetary union as the bargaining chip with which to achieve widening of the Community. More generally, however, the Federal Constitutional Court has created a legal situation that will allow and may even spur Germany's negotiating partners to customize their acceptance of Community law. The Court emphasized that the member states remained "masters of the treaties," thereby denying Community institutions complete supranational authority. In the legal sphere, the Court translated this principle into a claim that it retained the power to determine the scope of Community competence. The ECJ would remain supreme with regard to the interpretation and application of Community law, but the Federal Constitutional Court would determine the scope of that law. Should the supreme courts of other EC members follow suit, the uniform administration of EC law, and the bargaining that now depends on the assumption that the deals struck will be uniformly enforced could be imperiled.

B. National Legal Culture

Judges are products of specific national legal systems. Their training within particular systems gives rise to a set of professional values and attitudes that overlay, mediate, and temper their political instincts. They not only learn a body of national legal rules, but also absorb specific features of their national legal culture. At the core of this culture are particular modes of legal reasoning -- formal versus pragmatic, deductive versus inductive, abstract versus contextual -- that give rise to a distinctive style of framing and resolving legal questions. Other features of national legal culture include a particular understanding of the role of courts in relation to legislative bodies, differing specifically on the extent to which judges "make" law in the process of interpretation and application of legislative provisions and the extent to which they can fill the gaps in those provisions.

Even wider is the gap between common law judges, who elaborate rules without legislative guidance based on the doctrine of precedent, and civil law judges, whose only source of authority flows from national legal codes. Yet both systems contain room for yet a third feature of national legal culture: relative judicial activism or restraint. How far should a judge depart from a previous decision, or from the strict letter of a particular statute?

Individual judges within a particular national legal system can differ on this question, of course, but an entire national legal culture -- due largely to the influence of national history and tradition -- can lean in one direction on the other. Finally, national legal culture may reflect national legal structure: different types of federalism, as in Belgium or Germany, or systems divided into substantively specialized courts (labor courts, tax courts, constitutional courts) in which each court develops its own tradition of protecting a specific set of interests.

These features of national legal culture ultimately condition the relationship between national courts and a supranational tribunal. We posited that such a relationship developed in the EU within "a community of law," a community that required that the participants recognize one another as equivalent legal actors speaking a common language and sharing a common legitimacy. Nevertheless, the forging of such a relationship between specific national courts and the ECJ depended on a number of preconditions. Judicial preferences, constrained by national political attitudes toward integration, created a predisposition; ECJ decisions provided the opportunity by creating the doctrinal "hook." But an additional factor constraining or facilitating the establishment of this relationship -- particularly the acceptance of the legal hierarchy between the ECJ and national courts created by the doctrine of supremacy -- was the relative "fit" between the two legal systems, a fit optimized by traits of national legal culture.

A core element of national legal culture is the delimitation of the scope of judicial relative to legislative power. All the members of the EU uphold the general liberal principle of a division between the legislative and the judicial power; however, its implementation in each country is historically and culturally conditioned. A principal indicator of this distribution of power is recognition of the principle of judicial review, even if it is exercised only by constitutional courts. The existence of judicial review anywhere in the national legal system embodies recognition of a higher law constraining the will of the people as expressed through the legislature. On this dimension, it is not surprising that German and Italian courts, from national legal systems that have judicial review, were quicker to recognize supremacy than French and British courts, which have traditionally been wholly deferential to the national legislature.[87] On the other hand, countries that do not have judicial review, such as the Netherlands, can nevertheless recognize supremacy as the result of the will of the legislature expressed either in the Constitution or the Treaty itself. This is the route that was ultimately taken by both British and French courts.[88]

Legal culture is also conditioned by the specific historic role of courts within a particular society. Here German and Italian courts face specific constraints that other courts do not. The constitutional courts in both countries are specifically charged with safeguarding individual rights and the rule of law against the revival of fascism. In the German case, the commitment to Verfassungspatriotismus, or constitutional patriotism, results in the Constitutional Court's unusual willingness to decide cases with important foreign policy implications. According to Juliane Kokott, this willingness flows from the renewed German commitment to the Rechtstaat in the wake of the Second World War -- no questions are above or beyond the law. The Constitutional Court thus conceives itself as an equal participant with the political branches of the German government in the process of European integration.[89] At the same time, however, the Court's primary commitment to individual rights and the preservation of German democracy has led it to apply the brakes to that process in ways that may well constrain the German government's pursuit of its perception of the national interest.[90]

The French case study offers a striking example of national legal culture constraining normal judicial preferences. Jens Plötner argues that much of the reluctance of the French Conseil d'Etat to accept the supremacy of EC law flows from the specific training and acculturation of its members. Educated at the elite Ecole Nationale D'Administration (ENA) and trained to serve as personal advisers to the most important members of government -- to be, as the name suggests, "counselors to the state" -- they understand their function as definers and defenders of the "French national interest."[91] In the best Gaullist tradition, the Conseil d'Etat took it upon itself to combat the "virus of supranationality," holding out until the "government and even Parliament [were] urging it to change its jurisprudence."[92] By virtue of French legal culture, therefore, the interests of one particular court are subordinated to, or perhaps simply identified with, the interests of a stylized conception of the French executive. A third element of national legal culture concerns style of legal reasoning. Writing about Britain, Paul Craig notes that the "common law mode of adjudication is pragmatic and non-doctrinaire."[93] He argues that these characteristics allowed British courts early on to "acknowledge[] that they

were part of a Community legal order, and that the ECJ was the proper court to pass judgment on issues concerning the interpretation of the Treaty."[94] This acceptance included the doctrine of direct effect. At the same time, however, he asserts that the common law method helps explain why British courts had difficulty with the doctrine of indirect effect, which required them to read national legislation to be in conformity with an EC directive even when the national legislature has not implemented the directive directly. The trick is to perform this feat of construction without actually rewriting the statute, often a difficult task. The common law requirement, unlike in civil law countries, that courts write lengthy opinions explaining their reasoning to reach a particular result tends to highlight this tension in ways that lead British courts to stop short of the result desired by the ECJ.[95]

C. National Legal Doctrine

In the most general sense, to say that national judges are constrained by national legal doctrine is to say that courts are constrained by the shape and specific form of national law. Legal doctrines frame particular issues: for an American judge a question concerning abortion must be understood in terms a right of privacy or perhaps of a question of equal protection of the laws; for a German judge it must be analyzed in terms of specified textual rights to life and to human dignity.[96] They also provide the baselines against which the legitimacy of a particular judicial decision can be measured, in terms of linguistic, logical, and teleological consistency with stated principles or precedents. Specific doctrines can thus provide either obstacles or channels to achieving particular results, particularly when a national court faces the task of harmonizing a new set of doctrines laid down by another court outside the national legal system with long-standing national doctrinal traditions and formulations. The resulting constraints, where they exist, are likely to act more as temporary checks than absolute bars, as courts identify various incremental strategies to mesh apparently conflicting principles or to graft new doctrinal formulations onto old.

To some extent, particular national legal doctrines simply reflect and codify aspects of national history and culture that define the role of courts within a particular national legal system. The best example in this category is the "eternal guarantee clause" (Ewigkeitsklausel) in the German constitution, which prohibits amendment of the constitution to abridge fundamental individual rights.[97] The German Constitutional Court thus had strong textual support for its claim that the Treaty of Maastricht could only be consistent with the German constitution to the extent that it did not abridge the fundamental rights of German citizens.[98]

A less obvious way in which national legal doctrine can shape judicial identity in ways that can constrain national courts in accepting direct effect and supremacy concerns the distinction between "monism" and "dualism": between a conception of the national legal order existing as an integrated part of the international legal order and a conception of two distinct legal orders in which rules from the one must be "translated" into the other through specified processes to have any legal effect. The Netherlands has the strongest tradition of monism, leading the Dutch Supreme Court to declare in 1906 that treaties were directly applicable in Dutch law without "transformation" or transposition into national statutes by the Dutch parliament.[99] This tradition made it particularly easy for Dutch courts to accept direct effect of EC law in the wake of Van Gend en Loos. Italy, on the other hand, has a centuries-old dualist tradition, referred to in Italian law as the "plurality of legal orders."[100] After World War II, this tradition became linked with the primacy of the Italian constitution.[101] The Italian case study documents the ways in which the dualist approach hampered acceptance of EC law supremacy by the Italian Constitutional Court for decades.[102] A final example of the interrelationship between specific national legal doctrines and judicial perceptions of their ability to act as autonomous actors concerns different national conceptions of "sovereignty." Bruno de Witte documents the role of the "principle of sovereignty" in all the countries under consideration as a principle "known to all the legal systems under review" and that "can be considered part of the common traditions of European constitutional law."[103] Nevertheless, its different treatment within these national legal systems strongly affected relative receptivity to acceptance of direct effect and supremacy, as well as, more recently, acceptance of the Maastricht Treaty.

In France, Belgium, and the Netherlands, constitutional provisions and doctrinal traditions recognizing the primacy of international treaty law (another facet of a monist tradition) has meant that the absolute supremacy of EC law could be accepted as international law without a perceived infringement of national sovereignty. In

Germany and Italy, by contrast, international treaties are regarded as comprising part of a separate legal order, which cannot alter fundamental aspects of the national legal order. In both these countries supremacy was ultimately accepted on the basis of a specific constitutional provision authorizing membership in the Community. The difficulty is that the constitutional courts in both countries interpret these specific constitutional provisions as containing their own implied limits embedded elsewhere in the national constitution, limits that can be asserted as necessary against European Community law. The result is ultimately a conditional acceptance of supremacy, reserving a core of absolute power for the national courts contrary to the doctrine of the ECJ itself.[104] The German Constitutional Court reasserted this power in its Maastricht decision, in ways that will shape the next stage of development of the EC legal system.

V. CONCLUSION

This article is part retrospective, part refinement, and part prediction. We conclude that the neofunctionalist model continues to provide a remarkably accurate account of the process of legal integration, with its emphasis on a community of sub- and supranational actors pursuing their self-interest in a nominally apolitical context. However, the model must be refined and coupled with more precise specifications of the interests driving participants in the process and the constraints they face in pursuing those interests. These participants include both state and social actors as well as the ECJ. We have sought to specify those interests and constraints here, taking a preliminary look at the types of litigants most likely to use the ECJ and parsing the motives of national courts in accepting or rejecting the doctrines of direct effect and supremacy.

In the process we have noted the need to move beyond the neofunctionalist assumption of a unitary state, pointing to differences between different levels of courts as well as between courts and other state institutions. Courts are not just the relevant "face of the state" for purposes of legal integration; they are quasi-autonomous actors the wider integration process. A full explanation of this process thus requires combining the neofunctionalist framework with a model of the disaggregated state.

Along the way, we have also sought to signal a need for a shift away from contending "paradigms" toward the generation of mid-range hypotheses and to commend much of the excellent work already being done in this area. This flowering of interest among political scientists in the court and the relationship more generally between legal and political institutions in the EU may bear particular fruit when cross-pollinated with a new generation of EC legal scholarship.[105] It thus seems appropriate to conclude with a review of some new developments in legal scholarship that are likely to prove conducive to more interdisciplinary collaboration. We note five particularly relevant trends.

First, the era of respectful and unquestioning adulation of the Court is over. Where Rasmussen once walked alone, he is joined today by younger scholars such as Coppell and O'Neil,[106] as well as others following in the more measured and careful footsteps of Joseph Weiler. Documenting and encouraging this trend, Jo Shaw has challenged the traditional fusion of law and integration, articulating a "counter-principle" of disintegration[107]. From this perspective, EC law can promote diversity and difference as well as consensus, fragmentation as well as unity and cohesion, disruption of national norms as well as uniformity, and illegitimacy and weakness as well as legitimacy and authority. Fighting words these, particularly in the tightly knit web of pro-EC lawyers, judges, and academics. They reflect a new willingness to see the Court in the round and to move away from implicitly teleological scholarship.

Second, the Court itself is retrenching. Recent decisions sharply curtailing the scope of the prohibition on non-tariff barriers in Article 30 and slapping down the Commission for exceeding its powers under the Treaty have evoked howls of protest from older and more activist generation of judges such as Mancini, themselves following in the founding footsteps of Pescatore and Lecourt.[108] Legal scholars are already actively engaged in speculating about the reasons behind this shift, ranging from strategic calculation in light of the upcoming inter-governmental conference to the maturation of the Court to the emergence of a different legal vision of the Community itself.

Third, legal scholars and the Court itself increasingly recognize the need for amendment of the Community's basic legal architecture. The overload on the Court's docket is becoming painfully apparent, with accompanying calls for both doctrinal change and the creation of new EC lower courts.[109] Attention will also focus increasingly on the Court of First Instance.

Fourth, EC legal scholars will be increasingly engaged in the task so dear to the hearts of American legal academics: debating the role of a court in a democracy. Some of these debates are being powered by changing conceptions of law -- the introduction of legal realist perspectives on traditional European legal formalism. Others flow from changing conceptions of democracy -- the reevaluation of the role of non-elected institutions and their ability to serve the underlying values of the democratic process.[110]

Fifth, many analysts of EC law are likely to reengage the debate concerning the relationship of EC law to international law more generally. The revisiting of these issues will be fueled by the German Constitutional Court's rejection of the ECJ's landmark depiction of the EC legal order as sui generis in Van Gend & Loos, reemphasizing the status of a Treaty of Rome as a treaty and the role of the member states as the "masters of the treaty." As the country studies in this project demonstrate, a number of national courts and commentators never fully accepted the distinction between EC and international law. To the extent that this link is reforged, EC legal scholarship will feed more directly into international legal scholarship on EC law as emblematic of international law in a community of liberal states.

These five trends are part of a larger whole. To quote Jo Shaw, "[w]hat is slowly emerging, out of the traditions of a number of disciplines and out of interdisciplinary work, is a body of commentary which examines European legal processes and legal institutions in their broader social, economic and political context, rather than regarding legal processes as an object of study in themselves."[111] Indeed, several European legal scholars have launched the European Law Journal as a forum for such scholarship. It is appropriately subtitled a Review of European Law in Context.[112]

As political scientists focus on specific developments within national legal systems and the motives driving national and transnational litigants, even tracking the trajectory of individual cases, their work will intersect much of this new legal scholarship. They will learn to take courts more seriously, even while teaching many legal scholars to take them less seriously -- at least in terms of looking beyond the formal authority of the law as written or judicially pronounced. They may even come to understand doctrinal constraints, even if such constraints need to be filtered through the lens of judicial identity. More generally, as broad generalizations concerning "national interest" or "self-interest" give way to a more nuanced understanding of the complex interaction of multiple sub-and supra-national actors, as well the interaction of different government entities jockeying with one another while subject to international, subnational and supranational pressures, the study of legal integration will take its rightful place alongside studies of political and economic integration. With luck, the results will mirror the rich interaction of law, politics, and economics in the European Union.

III. ევროპის კავშირის ღირებულებები და ძირითადი პრინციპები

ევროპის კავშირის ღირებულებები

ევროპის კავშირი, გარდა წევრი სახელმწიფოების პოლიტიკური და ეკონომიკური კავშირისა, მათი ღირებულებითი ერთობაა. ევროპის კავშირის ღირებულებებს გააჩნიათ სახელმძღვანელო ეფექტი ევროპული ინტეგრაციისა და მისი წევრი სახელმწიფოების სამართლებრივი, ეკონომიკური და სოციალური სისტემების, პოლიტიკური რეჟიმების განვითარებაზე.

ევროპის კავშირის ღირებულებებს განსაზღვრავს ევროპის კავშირის შესახებ ხელშეკრულების მე-2 მუხლი.

„ევროპის კავშირი ეფუძნება ღირებულებებს, როგორებიცაა: ადამიანის ღირსების პატივისცემა, თავისუფლება, დემოკრატია, თანასწორობა, სამართლის უზენაესობა და ადამიანის უფლებების, მათ შორის, უმცირესობათა უფლებების პატივისცემა. კავშირის ღირებულებები საერთოა წევრ სახელმწიფოთა საზოგადოებაში, სადაც უზრუნველყოფილია პლურალიზმი, დისკრიმინაციის აკრძალვა, ტოლერანტობა, სამართლიანობა, სოლიდარობა და მამაკაცისა და ქალის თანასწორობა.“

ამ ღირებულებების განუხრელად დაცვა ევროპის კავშირში გაწევრიანების ერთ-ერთი ძირითადი პოლიტიკური წინაპირობაა. ევროპული სახელმწიფო, რომელიც მათ არ იზიარებს ან სათანადოდ არ იცავს, კავშირში ვერ გაწევრიანდება.

სახელმწიფოს ევროპის კავშირში გაწევრიანების შემდგომაც ეკისრება ინტეგრაციის ღირებულებების დაცვის ვალდებულება. იმ შემთხვევაში, თუ მათ დაცვას, რეალიზაციას მუდმივი და სერიოზული საფრთხე შეექმნება, ევროპის კავშირის შესახებ ხელშეკრულების მე-7 მუხლი ითვალისწინებს წევრი სახელმწიფოსთვის უფლების შეჩერების პროცედურას, რომელიც სამი ეტაპისგან შედგება:

- *I ეტაპი (ე.წ. „წინასწარი გაფრთხილების მექანიზმი“)* — კავშირის წევრი სახელმწიფოების ერთი მესამედის, ევროპული პარლამენტის ან ევროპული კომისიის დასაბუთებული წინადადების საფუძველზე, საბჭო უფლებამოსილია, ევროპული პარლამენტისგან თანხმობის მოპოვების შემდეგ, სრული შემადგენლობის ოთხი მეხუთედით განსაზღვროს, რომ კავშირის წევრ სახელმწიფოში არსებობს იმ ღირებულებების დარღვევის სერიოზული რისკი, რომლებსაც ეფუძნება ევროპის კავშირი. ამგვარი გადაწყვეტილების მიღებამდე საბჭო ვალდებულია, მოისმინოს ამ სახელმწიფოს პოზიცია. საბჭოს ასეთი სახელმწიფოსთვის რეკომენდაციით მიმართვის უფლება გააჩნია. ამასთანავე, იგი რეგულარულად ამოწმებს, კვლავ არსებობს თუ არა სახელმწიფოში კავშირის ღირებულებების ხელყოფის საფრთხე;
- *II ეტაპი (კავშირის ღირებულებების სერიოზული და მუდმივი დარღვევის დადგენა)* — წევრ სახელმწიფოთა ერთი მესამედის ან ევროპული კომისიის წინადადების საფუძველზე და ევროპული პარლამენტისგან თანხმობის მიღების შემდეგ ევროპული საბჭო ერთხმად იღებს წევრ სახელმწიფოში კავშირის ღირებულებების სერიოზული და მუდმივი დარღვევის დადგენის შესახებ გადაწყვეტილებას. ამგვარი გადაწყვეტილების მიღებამდე იგი ვალდებულია, მოისმინოს ამ სახელმწიფოს პოზიცია;
- *III ეტაპი (სანქციის განსაზღვრა)* — ევროპული საბჭოს მიერ მიღებული გადაწყვეტილების საფუძველზე, კავშირის საბჭო ხმათა კვალიფიციური უმრავლესობით იღებს გადაწყვეტილებას წევრი სახელმწიფოსთვის კავშირის ძირითადი ხელშეკრულებებით გათვალისწინებული ზოგიერთი უფლების (მათ შორის, საბჭოში ხმის მიცემის უფლების) შეჩერების ან არ შეჩერების შესახებ. საბჭომ, გადაწყვეტილების მიღებამდე, მხედველობაში უნდა მიიღოს უფლების შეჩერების სავარაუდო შედეგები ფიზიკური და იურიდიული

პირებისთვის. უფლების შეჩერება წევრ სახელმწიფოს არ ათავისუფლებს კავშირის ძირითადი ხელშეკრულებებით გათვალისწინებული ვალდებულებების შესრულებისგან.

იმ შემთხვევაში, თუ სანქციის დაკისრების განმაპირობებელი გარემოებები შეიცვლება, ევროპის კავშირის საბჭოს უფლება აქვს, ხმათა კვალიფიციური უმრავლესობით მიიღოს სანქციის შეცვლის ან გაუქმების შესახებ გადაწყვეტილება.

ძირითადი უფლებები — ევროპის კავშირის სამართლის ინტეგრირებული ნაწილი

ევროპული ინტეგრაციის დონეზე, მიუხედავად იმისა, რომ ძირითად უფლებათა ქარტიის მიღებამდე (2000წ.) და მის სავალდებულოდ გამოცხადებამდე (2009 წ.) ძირითად უფლებათა დაცვის ნორმატიული კატალოგი არ არსებობდა, ევროპის კავშირის პოლიტიკური ორგანოები და მართლმსაჯულების ევროპული სასამართლო აღიარებდნენ ძირითად უფლებათა მნიშვნელობას და იღებდნენ მათი დაცვის ვალდებულებას. ევროპის კავშირის ორგანოების ინსპირაციის წყაროს ადამიანის უფლებათა დაცვის სფეროში წევრ სახელმწიფოთა საერთაშორისო შეთანხმებები (მაგ.: ადამიანის უფლებათა და ძირითად თავისუფლებათა დაცვის ევროპული კონვენცია), კონსტიტუციური ტრადიციები (მაგ.: ღირსების უფლების აბსოლუტური ხასიათი, ძირითად უფლებებში ჩარევის პროპორციულობის პრინციპი და სხვა) წარმოადგენდნენ. მართლმსაჯულების ევროპული სასამართლოს პრაქტიკით, ხოლო მოგვიანებით — ევროპის კავშირის შესახებ ხელშეკრულების მე-6 მუხლის მე-3 პარაგრაფში დეკლარირებით — ადამიანის უფლებათა და ძირითად თავისუფლებათა დაცვის ევროპული კონვენციით აღიარებული უფლებები არის ევროპის კავშირის სამართლის ინტეგრირებული ნაწილი.

წარმომადგენლობითი დემოკრატია და მოქალაქეთა ინიციატივის უფლება

წარმომადგენლობითი დემოკრატია მმართველობის თანამედროვე, ყველაზე გავრცელებული რეჟიმია. იგი გულისხმობს ხალხის ძალაუფლების ხალხის მიერ არჩეული წარმომადგენლების მეშვეობით განხორციელებას. ევროპულ სახელმწიფოებში წარმომადგენლობითი დემოკრატია უზრუნველყოფილია არა მხოლოდ ეროვნულ, არამედ ევროპულ დონეზეც. წარმომადგენლობითი დემოკრატია ევროპის კავშირის ფუნქციონირების ქვაკუთხედია (TEU 10(1)). კავშირის დემოკრატიულ ცხოვრებაში მონაწილეობა ევროპის კავშირის მოქალაქის უფლებაა (TEU 10(3)). ევროპული პარლამენტი ევროპის კავშირის უმაღლესი წარმომადგენლობითი, ერთ-ერთი ძირითადი საკანონმდებლო ორგანოა, რომელიც აირჩევა პირდაპირი, თანასწორი, საყოველთაო არჩევნების საფუძველზე ფარული კენჭისყრით 5 წლის ვადით. ევროპული პარლამენტი კავშირის ფარგლებში წარმოადგენს და იცავს ევროკავშირის მოქალაქეების ინტერესებს.

ევროპის კავშირის მოქალაქეებს, რომლებიც, გარდა იმისა, რომ ევროპულ პარლამენტში თავიანთი წარმომადგენლებით ახორციელებენ საკანონმდებლო ხელისუფლებას, შესაძლებლობა აქვთ ევროპის კავშირის შესახებ ხელშეკრულების მე-11 მუხლის საფუძველზე, ევროპის კავშირის ორგანოებს მოუწოდონ საკანონმდებლო ინიციატივის განხორციელებისკენ. კავშირის, სულ მცირე, ოთხი წევრი სახელმწიფოს არანაკლებ ერთ მილიონ მოქალაქეს უფლება აქვს, ევროპულ კომისიას საკანონმდებლო ინიციატივის განხორციელებისკენ მოუწოდოს იმ საკითხის თაობაზე, რომელიც, მოქალაქეების აზრით, კავშირის ძირითადი ხელშეკრულებების მიზნების იმპლემენტაციისთვის აუცილებელია.

სამართლის უზენაესობა

სამართლის უზენაესობის პრინციპის ერთ-ერთი ძირითადი მოთხოვნაა ძალაუფლება ხორციელდებოდეს სამართლის საფუძველზე და მის შესაბამისად. იგი, მათ შორის, გულისხმობს კანონის წინაშე თანასწორობას, ძირითადი უფლებებისა და თავისუფლებების უზრუნველყოფას, პირისთვის მასთან დაკავშირებული სახელმწიფო გადაწყვეტილებების გასაჩივრების ეფექტიანი შესაძლებლობის მინიჭებას და სხვა. მართლმსაჯულების ევროპული სასამართლო სამართლის უზენაესობის პრინციპის ერთ-ერთ განზომილებას უკავშირებს, ერთი

მხრივ, ევროპის კავშირის სამართლის ეფექტიანი, შეუფერხებელი მოქმედებისა და, მეორე მხირვ, ევროპის კავშირის სამართალთან დაკავშირებულ საკითხებთან/სფეროებთან მიმართებაში წევრი სახელმწიფოების მიერ ფიზიკური და იურიდიული პირებისთვის ეფექტიანი მართლმსაჯულების სისტემის უზრუნველყოფას. სამართლის უზენაესობის პრინციპს ევროპის კავშირის დონეზე აქვს შიდა და საგარეო განზომილება. შიდა განზომილება გულისხმობს მისი კავშირის წევრ სახელმწიფოებსა და კავშირის დონეზე დაცვას, ხოლო საგარეო განზომილება უკავშირდება ამ პრინციპის ევროპის კავშირის მიერ საგარეო პოლიტიკის განხორციელების პროცესში გავრცელებასა და დაცვის ხელშეწყობას.

თანაბარი შესაძლებლობების უზრუნველყოფის პრინციპი

ევროპის კავშირის სამართლის მიზნებისთვის თანაბარი შესაძლებლობების უზრუნველყოფის პრინციპი მოიცავს ორ ელემენტს: ადამიანებისადმი თანასწორად მოპყრობის პრინციპს; მამაკაცისა და ქალის თანასწორობის პრინციპს.

თანაბარი შესაძლებლობების უზრუნველყოფის პრინციპის შესახებ დებულებებს შეიცავს ევროპული კავშირის ძირითად უფლებათა ქარტიის მე-3 თავი — „თანასწორობა“:

- კანონის წინაშე თანასწორობა — მე-20 მუხლი;
- დისკრიმინაციის აკრძალვა — 21-ე მუხლი;
- კულტურული, რელიგიური და ლინგვისტური მრავალფეროვნება — 22-ე მუხლი;
- ქალისა და მამაკაცის თანასწორობა — 23-ე მუხლი;
- ბავშვის უფლებები — 24-ე მუხლი;
- მოხუცთა უფლებები — 25-ე მუხლი;
- შეზღუდული შესაძლებლობების მქონე პირების ინტეგრაცია — 26-ე მუხლი.

ევროპული პარლამენტი და კავშირის საბჭო კავშირში თანაბარი შესაძლებლობების უზრუნველსაყოფად, უფლებამოსილნი არიან, ორდინარული საკანონმდებლო პროცედურის ფარგლებში ეკონომიკურ და სოციალურ საკითხთა ევროპულ კომიტეტთან კონსულტაციის შემდეგ განახორციელონ შესაბამისი სამართლებრივი ღონისძიებები.

სუბსიდიურობისა და პროპორციულობის პრინციპები

ევროპის კავშირი კომპეტენციებს (გარდა ექსკლუზიური კომპეტენციებისა) ახორციელებს სუბსიდიურობისა და პროპორციულობის პრინციპების ფარგლებში.

სუბსიდიურობის პრინციპის თანახმად, ევროპის კავშირი იმ სფეროებში, რომლებშიც ექსკლუზიური კომპეტენცია არ გააჩნია, უფლებამოსილია იმოქმედოს მხოლოდ მაშინ, თუ დასახული მიზნის მიღწევა კავშირის დონეზე უფრო ეფექტიანად არის შესაძლებელი, ვიდრე ადგილობრივი, რეგიონული ან ცენტრალური ხელისუფლების დონეზე. სუბსიდიურობის პრინციპის მართებულ გამოყენებაზე ზედამხედველობას ეროვნული პარლამენტები ახორციელებენ.

პროპორციულობის პრინციპის მიხედვით, კავშირის მოქმედების ფორმა, შინაარსი, ხარისხი არ უნდა იყოს იმაზე მეტი, ვიდრე ეს აუცილებელია ძირითადი ხელშეკრულებებით გათვალისწინებული მიზნების მისაღწევად.

სოლიდარობის პრინციპი

ლისაბონის ხელშეკრულებამ ევროპულ საზოგადოებაში არსებულ სოლიდარობის პრინციპს სამართლებრივი დატვირთვა შესძინა. ევროპის კავშირის ფუნქციონირების შესახებ ხელშეკრულების 222-ე მუხლის თანახმად, თუ წევრი სახელმწიფოს ტერიტორიაზე განხორციელდება ტერორისტული თავდასხმა ან მოხდება ბუნებრივი ან ანთროპოგენული კატასტროფა, მსხვერპლი ქვეყნის თხოვნის შემთხვევაში სხვა წევრ სახელმ-

წიფოებსა და ევროპის კავშირს ეკისრებათ თავიანთი ძალისხმევის ფარგლებში ამ ქვეყნის დახმარების (მათ შორის სამხედრო) ვალდებულება.

ევროპის კავშირის მიერ სოლიდარობის პუნქტის იმპლემენტაციის შესახებ წესები და პროცედურები დგინდება კავშირის საბჭოს გადაწყვეტილებით ევროპული კომისიისა და საგარეო საქმეთა და უსაფრთხოების პოლიტიკის სფეროში კავშირის უმაღლესი წარმომადგენლის საერთო ინიციატივის საფუძველზე. გარდა ამისა, გადაწყვეტილების მიღებამდე აუცილებელია ევროპული პარლამენტის ინფორმირება. იმ შემთხვევაში, თუ მსხვერპლი ქვეყანა დახმარებას სთხოვს სხვა წევრ სახელმწიფოს, მათ შორის კოორდინაცია უნდა განხორციელდეს კავშირის საბჭოს ფორმატში.

ლოიალური თანამშრომლობის პრინციპი

ლოიალური თანამშრომლობის პრინციპი ევროპის კავშირის შესახებ ხელშეკრულების მე-4 მუხლის მე-3 პარაგრაფით არის აღიარებული. ამ ნორმის თანახმად, „გულწრფელი თანამშრომლობის პრინციპის შესაბამისად, კავშირი და წევრი სახელმწიფოები ორმხრივი პატივისცემის საფუძველზე მხარს უჭერენ ერთმანეთს [დამფუძნებელი] ხელშეკრულებებით განსაზღვრული ამოცანების მისაღწევად. წევრმა სახელმწიფოებმა უნდა განახორციელონ ყველა სათანადო ღონისძიება, ზოგადი თუ კონკრეტული, რომ უზრუნველყონ [დამფუძნებელი] ხელშეკრულებებიდან ან კავშირის ორგანოების აქტებიდან მომდინარე ვალდებულებების შესრულება. წევრმა სახელმწიფოებმა ხელი უნდა შეუწყონ კავშირის ამოცანების რეალიზაციას და თავი შეიკავონ ისეთი ღონისძიებისგან, რომელმაც, შესაძლებელია, საფრთხე შეუქმნას კავშირის მიზნების მიღწევას“. ლოიალური თანამშრომლობის პრინციპი სხვადასხვა შინაარსობრივი კომპონენტებისგან შედგება. იგი უკავშირდება ევროპის კავშირის სამართლის დაცვას, კავშირის ორგანოებთან ლოიალურად თანამშრომლობას, კავშირის სახელმწიფოებს შორის არსებული დავების მხოლოდ ევროპის კავშირის სამართლის შესაბამისად გადაწყვეტას, წევრ სახელმწიფოთა კონსტიტუციური იდენტობის იმგვარად შენარჩუნებას, რომ საფრთხე არ შეექმნას ინტეგრაციის მიზნების რეალიზაციას და სხვა.

დამატებითი ლიტერატურა ევროპის კავშირის ღირებულებებთან დაკავშირებით:

1. Kaczorowska Alina, European Union Law, Second edition, Routledge, 2011, pp. 39-41.
2. Laurent Pech, Rule of law as a guiding principle of the European Union’s external action, https://www.asser.nl/media/1632/cleer2012-3web.pdf (უკანასკნელად ნანახია: 03.10.2019).
3. Marcus Klamert, The Principle of Loyalty in EU Law, https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199683123.001.0001/acprof-9780199683123#targetText=It%20distinguishes%20between%20the%20effects,of%20EU%20law%20(construction). (უკანასკნელად ნანახია: 03.10.2019).

ევროპის კავშირის მართლმსაჯულების სასამართლოს პრეცედენტულ სამართალთან დაკავშირებით:

4. Commission v Poland (Independence of The Supreme Court) (C-619/18).
5. Associação Sindical dos Juízes Portugueses C-64/16.

Strasbourg, 18 March 2016 **CDL-AD(2016)007**

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

RULE OF LAW CHECKLIST

Adopted by the Venice Commission
at its 106th Plenary Session
(Venice, 11-12 March 2016)

Endorsed by the Ministers' Deputies
at the 1263rd Meeting (6-7 September 2016)

Endorsed by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016)

on the basis of comments by

Mr Sergio BARTOLE (Substitute Member, Italy)
Ms Veronika BILKOVA (Member, Czech Republic)
Ms Sarah CLEVELAND (Member, United States of America)
Mr Paul CRAIG (Substitute Member, United Kingdom)
Mr Jan HELGESEN (Member, Norway)
Mr Wolfgang HOFFMANN-RIEM (Member, Germany)
Mr Kaarlo TUORI (Member, Finland)
Mr Pieter van DIJK (Former Member, the Netherlands)
Sir Jeffrey JOWELL (Former Member, United Kingdom)

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I. INTRODUCTION

1. At its 86th plenary session (March 2011), the Venice Commission adopted the Report on the Rule of Law (CDL-AD(2011)003rev). This report identified common features of the Rule of Law, *Rechtsstaat* and *Etat de droit.* A first version of a checklist to evaluate the state of the Rule of Law in single States was appended to this report.

2. On 2 March 2012, the Venice Commission organised, under the auspices of the UK Chairmanship of the Committee of Ministers of the Council of Europe, in co-operation with the Foreign and Commonwealth Office of the United Kingdom and the Bingham Centre for the Rule of Law, a conference on "The Rule of Law as a practical concept". The conclusions of this conference underlined that the Venice Commission would develop the checklist by, *inter alia*, including some suggestions made at the conference.

3. A group of experts made up of Mr Bartole, Ms Bilkova, Ms Cleveland, Mr Craig, Mr Helgesen, Mr Hoffmann-Riem, Mr Tuori, Mr van Dijk and Sir Jeffrey Jowell prepared the present detailed version of the checklist.

4. The Venice Commission wishes to acknowledge the contribution of the Bingham Centre for the Rule of Law, notably for the compilation of the selected standards in part III. The Commission also wishes to thank the secretariats of the Consultative Council of European Judges (CCJE), the European Commission against Racism and Intolerance (ECRI), the Framework Convention for the Protection of National Minorities and the Group of States against Corruption (GRECO), as well as of OSCE/ODIHR and of the European Union Agency for Fundamental Rights (FRA) for their co-operation.

5. The introductive part (I) first explains the purpose and scope of the report and then develops the interrelations between the Rule of Law on the one side and democracy and human rights on the other side ("the Rule of Law in an enabling environment").

6. The second part (II, benchmarks) is the core of the checklist and develops the various aspects of the Rule of Law identified in the 2011 report: legality; legal certainty; prevention of abuse of powers; equality before the law and non-discrimination and access to justice; while the last chapter provides two examples of particular challenges to the Rule of Law (corruption and conflict of interest, and collection of data and surveillance).

7. The third part (III, selected standards) lists the most important instruments of hard and soft law addressing the issue of the Rule of Law.

8. The present checklist was discussed by the Sub-Commission on the Rule of Law on 17 December 2015 and on 10 March 2016, and was subsequently adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016).

A. Purpose and scope

9. The Rule of Law is a concept of universal validity. The "need for universal adherence to and implementation of the Rule of Law at both the national and international levels" was endorsed by all Members States of the United Nations in the 2005 Outcome Document of the World Summit (§ 134). The Rule of Law, as expressed in the Preamble and in Article 2 of the Treaty on European Union (TEU), is one of the founding values that are shared between the European Union (EU) and its Member States.[1] In its 2014 New Framework to Strengthen the Rule of Law, the European Commission recalls that "the principle of the Rule of Law has progressively become a dominant organisational model of modern constitutional law and

international organisations /…/ to regulate the exercise of public powers" (pp. 3-4). In an increasing number of cases States refer to the Rule of Law in their national constitutions.[2]

10. The Rule of Law has been proclaimed as a basic principle at universal level by the United Nations – for example in the Rule of Law Indicators -, and at regional level by the Organization of American States - namely in the Inter-American Democratic Charter - and the African Union - in particular in its Constitutive Act. References to the Rule of Law may also be found in several documents of the Arab League.

11. The Rule of Law is mentioned in the Preamble to the Statute of the Council of Europe as one of the three "principles which form the basis of all genuine democracy", together with individual freedom and political liberty. Article 3 of the Statute makes respect for the principle of the Rule of Law a precondition for accession of new member States to the Organisation. The Rule of Law is thus one of the three intertwined and partly overlapping core principles of the Council of Europe, with democracy and human rights. The close relationship between the Rule of Law and the democratic society has been underlined by the European Court of Human Rights through different expressions: "democratic society subscribing to the Rule of Law", "democratic society based on the Rule of Law" and, more systematically, "Rule of Law in a democratic society". The achievement of these three principles - respect for human rights, pluralist democracy and the Rule of Law - is regarded as a single objective - the core objective - of the Council of Europe.

12. The Rule of Law has been systematically referred to in the major political documents of the Council of Europe, as well as in numerous Conventions and Recommendations. The Rule of Law is notably mentioned as an element of common heritage in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as a founding principle of European democracies in Resolution Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ), and as a priority objective in the Statute of the Venice Commission. However, the Council of Europe texts have not defined the Rule of Law, nor has the Council of Europe created any specific monitoring mechanism for Rule of Law issues.

13. The Council of Europe has nevertheless acted in several respects with a view to promoting and strengthening the Rule of Law through several of its bodies, notably the European Court of Human Rights (ECtHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of Judges of Europe (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights and the Venice Commission.

14. In its Report on the Rule of Law of 2011,[3] the Venice Commission examined the concept of the Rule of Law, following Resolution 1594(2007) of the Parliamentary Assembly which drew attention to the need to ensure a correct interpretation of the terms "Rule of Law", "Rechtsstaat" and "Etat de droit" or "prééminence du droit", encompassing the principles of legality and of due process.

15. The Venice Commission analysed the definitions proposed by various authors coming from different systems of law and State organisation, as well as diverse legal cultures. The Commission considered that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures. The Commission warned against the risks of a purely formalistic concept of the Rule of Law, merely requiring that any action of a public official be authorised by law. "Rule by Law", or "Rule by the Law", or even "Law by Rules" are distorted interpretations of the Rule of Law.[4]

16. The Commission also stressed that individual human rights are affected not only by the authorities of the State, but also by hybrid (State-private) actors and private entities which perform tasks that were formerly the domain of State authorities, or include unilateral decisions affecting a great number of people, as well as by international and supranational organisations. The Commission recommended that the Rule of Law principles be applied in these areas as well.

17. The Rule of Law must be applied at all levels of public power. *Mutatis mutandis*, the principles of the Rule of Law also apply in private law relations. The following definition by Tom Bingham covers most appropriately the essential elements of the Rule of Law: "All persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts".[5]

18. In its report, the Commission concluded that, despite differences of opinion, consensus exists on the core elements of the Rule of Law as well as on those of the Rechtsstaat and of the Etat de droit, which are not only formal but also substantive or material (materieller Rechtsstaatsbegriff). These core elements are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law.

19. Since its 2011 Report was oriented towards facilitating a correct and consistent understanding and interpretation of the notion of the Rule of Law and, therefore, aimed at facilitating the practical application of the principles of the Rule of Law, a "checklist for evaluating the state of the Rule of Law in single countries" was appended to the report, listing these six elements, broken down into several sub-parameters.

20. In 2012, at a conference which the Venice Commission organised in London under the auspices of the UK Foreign Office and in co-operation with the Bingham Centre for the Rule of Law, it launched the project to further develop the checklist as a ground-breaking new, functional approach to assessing the state of the Rule of Law in a given State.

21. In 2013, the Council of the European Union has begun implementing a new Rule of Law Dialogue with the member States, which would take place on an annual basis. It underlined that "respecting the rule of law is a prerequisite for the protection of fundamental rights" and called on the Commission "to take forward the debate in line with the Treaties on the possible need for and shape of a collaborative and systematic method to tackle these issues".[6] In 2014, the European Commission adopted a mechanism for addressing systemic Rule of Law issues in Member States of the European Union (EU). This "new EU Framework to strengthen the Rule of Law" establishes an early warning tool based on "the indications received from available sources and recognised institutions, including the Council of Europe"; "[i]n order to obtain expert knowledge on particular issues relating to the rule of law in Member States, the (European) Commission … will as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission".[7]

22. At the United Nations level, following the publication of "Rule of Law Indicators" in 2011,[8] the United Nations General Assembly adopted in 2012 a Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, recognising that the "Rule of Law applies to all States equally, and to international organizations".

23. The sustainable development agenda with its 17 Sustainable Development Goals (SDGs) and 169 targets to be delivered by 2030 was unanimously adopted by the UN General

Assembly in September 2015. The SDGs, which comprise a number of Goals, are aimed to be truly transformative and have profound implications for the realization of the agenda, envisaging "[a world] in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development…" Goal 16 commits States to "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". The achievement of Goal 16 will be assessed against a number of targets, some of which incorporate Rule of Law components, such as the development of effective accountable and transparent institutions (target 16.6) and responsive, inclusive participatory and representative decision making at all levels (target 16.7). However, it is Target 16.3, committing States to "Promote the rule of law at the national and international levels and ensure equal access to justice for all" that offers a unique opportunity for revitalizing the relationship between citizens and the State. This Checklist could be a very important tool to assist in the qualitative measurement of Rule of Law indicators in the context of the SDGs.

24. The present checklist is intended to build on these developments and to provide a tool for assessing the Rule of Law in a given country from the view point of its constitutional and legal structures, the legislation in force and the existing case-law. The checklist aims at enabling an objective, thorough, transparent and equal assessment.

25. The checklist is mainly directed at assessing legal safeguards. However, the proper implementation of the law is a crucial aspect of the Rule of Law and must therefore also be taken into consideration. That is why the checklist also includes certain complementary benchmarks relating to the practice. These benchmarks are not exhaustive.

26. Assessing whether the parameters have been met requires sources of verification (standards). For legal parameters, these will be the law in force, as well as, for example, in Europe, the legal assessments thereof by the European Court of Human Rights, the Venice Commission, Council of Europe monitoring bodies and other institutional sources. For parameters relating to the practice, multiple sources will have to be used, including institutional ones such as the CEPEJ and the European Union Agency for Fundamental Rights.

27. The checklist is meant as a tool for a variety of actors who may decide to carry out such an assessment: These may include Parliaments and other State authorities when addressing the need and content of legislative reform, civil society and international organisations, including regional ones – notably the Council of Europe and the European Union. Assessments have to take into account the whole context, and avoid any mechanical application of specific elements of the checklist.

28. 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.

29. The Rule of Law is realised through successive levels achieved in a progressive manner: the more basic the level of the Rule of Law, the greater the demand for it. Full achievement of the Rule of Law remains an on-going task, even in the well-established democracies. Against this background, it should be clear that the parameters of the checklist do not necessarily all have to be cumulatively fulfilled in order for a final assessment on compliance with the Rule of Law to be positive. The assessment will need to take into account which parameters are not met, to what extent, in what combination etc. The issue must be kept under constant review.

30. The checklist is neither exhaustive nor final: it aims to cover the core elements of the Rule of Law. The checklist could change over time, and be developed to cover other aspects or to go into further detail. New issues might arise that would require its revision. The Venice Commission will therefore provide for a regular updating of the Checklist.

31. The Rule of Law and human rights are interlinked, as the next chapter will explain. The Rule of Law would just be an empty shell without permitting access to human rights. Vice-versa, the protection and promotion of human rights are realised only through respect for the Rule of Law: a strong regime of Rule of Law is vital to the protection of human rights. In addition, the Rule of Law and several human rights (such as fair trial and freedom of expression) overlap.[9] While recognising that the Rule of Law can only be fully realised in an environment that protects human rights, the checklist will expressly deal with human rights only when they are linked to specific aspects of the Rule of Law.[10]

32. Since the Venice Commission is a body of the Council of Europe, the checklist emphasises the legal situation in Europe, as expressed in particular in the case-law of the European Court of Human Rights and also of the Court of Justice of the European Union within its specific remit. The Rule of Law is however a universal principle, and this document also refers, where appropriate, to developments at global level as well as in other regions of the world, in particular in part III enumerating international standards.

B. The Rule of Law in an enabling environment

33. The Rule of Law is linked not only to human rights but also to democracy, *i.e.* to the third basic value of the Council of Europe. Democracy relates to the involvement of the people in the decision-making process in a society; human rights seek to protect individuals from arbitrary and excessive interferences with their freedoms and liberties and to secure human dignity; the Rule of Law focuses on limiting and independently reviewing the exercise of public powers. The Rule of Law promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules.

34. The Rule of Law has become “a global ideal and aspiration”,[11] with a common core valid everywhere. This, however, does not mean that its implementation has to be identical regardless of the concrete juridical, historical, political, social or geographical context. While the main components or “ingredients”[12] of the Rule of Law are constant, the specific manner in which they are realised may differ from one country to another depending on the local context; in particular on the constitutional order and traditions of the country concerned. This context may also determine the relative weight of each of the components.

35. Historically, the Rule of Law was developed as a means to restrict State (governmental) power. Human rights were seen as rights against intrusions by holders of this power (“negative rights”). In the meantime the perception of human rights has changed in many States as well as in European and international law. There are several differences in the details, but nonetheless there is a trend to expand the scope of civil and political rights, especially by acknowledging positive obligations of the State to guarantee effective legal protection of human rights vis-à-vis private actors. Relevant terms are “positive obligations to protect”, “horizontal effects of fundamental rights” or “Drittwirkung der Grundrechte“.

36. The European Court of Human Rights has acknowledged positive obligations in several fields, for instance related to Art. 8 ECHR.[13] In several decisions the Court has developed specific positive obligations of the State by combining Art. 8 ECHR and the Rule of Law.[14] Even though positive obligations to protect could not be solely derived from the Rule of Law in these cases, the Rule of Law principle creates additional obligations of the State to guarantee that individuals under their jurisdiction have access to effective legal means to enforce the protection of their human rights, in particular in situations when private actors

infringe these rights. Thus the Rule of Law creates a benchmark for the quality of laws protecting human rights: legal provisions in this field – and beyond[15] – have to be, *inter alia*, clear and predictable, and non-discriminatory, and they must be applied by independent courts under procedural guarantees equivalent to those applied in conflicts resulting from interferences with human rights by public authorities.

37. One of the relevant contextual elements is the legal system at large. Sources of law which enshrine legal rules, thus granting legal certainty, are not identical in all countries: some States adhere largely to statute law, save for rare exceptions, whereas others include adherence to the common law judge-made law.

38. States may also use different means and procedures - for example related to the fair trial principle - in criminal proceedings (adversarial system as compared to inquisitorial system, right to a jury as compared to the resolution of criminal cases by judges). The material means that are instrumental in guaranteeing fair trial, such as legal aid and other facilities, may also take different forms.

39. The distribution of powers among the different State institutions may also impact the context in which this checklist is considered. It should be well-adjusted through a system of checks and balances. The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well-functioning judiciary, whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law.

40. At the international level, the demands and implications of the Rule of Law reflect the particularities of the international legal system. In many respects that system is far less developed than national constitutional and legal systems. Apart from special regional systems like that of the European Union, international systems have no permanent legislator, and for most cases no judiciary with obligatory jurisdiction, while the democratic characteristics in decision-making are still very weak.

41. The European Union's supranational nature led it to develop the concept of Rule of Law as a general principle of law applicable to its own legal system. According to the case law of the Court of Justice of the European Union, the Rule of Law includes the supremacy of law, the institutional balance, judicial review, (procedural) fundamental rights, including the right to a judicial remedy, as well as the principles of equality and proportionality.

42. The contextual elements of the Rule of Law are not limited to legal factors. The presence (or absence) of a shared political and legal culture within a society, and the relationship between that culture and the legal order help to determine to what extent and at what level of concreteness the various elements of the Rule of Law have to be explicitly expressed in written law. Thus, for instance, national traditions in the area of dispute settlement and conflict resolution will have an impact upon the concrete guarantees of fair trial offered in a country. It is important that in every State a robust political and legal culture supports particular Rule of Law mechanisms and procedures, which should be constantly checked, adapted and improved.

43. The Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.

II. BENCHMARKS

A. Legality[16]

1. Supremacy of the law

Is supremacy of the law recognised?

i. Is there a written Constitution?
ii. Is conformity of legislation with the Constitution ensured?
iii. Is legislation adopted without delay when required by the Constitution?
iv. Does the action of the executive branch conform with the Constitution and other laws?[17]
v. Are regulations adopted without delay when required by legislation?
vi. Is effective judicial review of the conformity of the acts and decisions of the executive branch of government with the law available?
vii. Does such judicial review also apply to the acts and decisions of independent agencies and private actors performing public tasks?
viii. Is effective legal protection of individual human rights vis-à-vis infringements by private actors guaranteed?

44. *State action must be in accordance with and authorised by the law. Whereas the necessity for judicial review of the acts and decisions of the executive and other bodies performing public tasks is universally recognised, national practice is very diverse on how to ensure conformity of legislation with the Constitution. While judicial review is an effective means to reach this goal, there may also be other means to guarantee the proper implementation of the Constitution to ensure respect for the Rule of Law, such as a priori review by a specialised committee.[18]*

2. Compliance with the law[19]

Do public authorities act on the basis of, and in accordance with standing law?[20]

i. Are the powers of the public authorities defined by law?[21]
ii. Is the delineation of powers between different authorities clear?
iii. Are the procedures that public authorities have to follow established by law?
iv. May public authorities operate without a legal basis? Are such cases duly justified?
v. Do public authorities comply with their positive obligations by ensuring implementation and effective protection of human rights?
vi. In cases where public tasks are delegated to private actors, are equivalent guarantees established by law?[22]

45. *A basic requirement of the Rule of Law is that the powers of the public authorities are defined by law. In so far as legality addresses the actions of public officials, it also requires that they have authorisation to act and that they subsequently act within the limits of the powers that have been conferred upon them, and consequently respect both procedural and substantive law. Equivalent guarantees should be established by law whenever public powers are delegated to private actors – especially but not exclusively coercive powers. Furthermore, public authorities must actively safeguard the fundamental rights of individuals vis-à-vis other private actors.[23]*

46. *"Law" covers not only constitutions, international law, statutes and regulations, but also, where appropriate, judge-made law,[24] such as common-law rules, all of which is of a binding nature. Any law must be accessible and foreseeable.[25]*

3. Relationship between international law and domestic law

Does the domestic legal system ensure that the State abide by its binding obligations under international law? In particular:

i. Does it ensure compliance with human rights law, including binding decisions of international courts?
ii. Are there clear rules on the implementation of these obligations into domestic law?[26]

47. *The principle* pacta sunt servanda *(agreements must be kept) is the way in which international law expresses the principle of legality. It does not deal with the way in which international customary or conventional law is implemented in the internal legal order, but a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"[27] or to respect customary international law.*

48. *The principle of the Rule of Law does not impose a choice between monism and dualism, but* pacta sunt servanda *applies regardless of the national approach to the relationship between international and internal law. At any rate, full domestic implementation of international law is crucial. When international law is part of domestic law, it is binding law within the meaning of the previous paragraph relating to supremacy of law (II.A.2). This does not mean, however, that it should always have supremacy over the Constitution or ordinary legislation.*

4. Law-making powers of the executive

Is the supremacy of the legislature ensured?

i. Are general and abstract rules included in an Act of Parliament or a regulation based on that Act, save for limited exceptions provided for in the Constitution?
ii. What are these exceptions? Are they limited in time? Are they controlled by Parliament and the judiciary? Is there an effective remedy against abuse?
iii. When legislative power is delegated by Parliament to the executive, are the objectives, contents, and scope of the delegation of power explicitly defined in a legislative act?[28]

49. *Unlimited powers of the executive are,* de jure *or* de facto*, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature.[29]*

5. Law-making procedures

Is the process for enacting law transparent, accountable, inclusive and democratic?

i. Are there clear constitutional rules on the legislative procedure?[30]
ii. Is Parliament supreme in deciding on the content of the law?
iii. Is proposed legislation debated publicly by parliament and adequately justified (*e.g.* by explanatory reports)?[31]
iv. Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?[32]
v. Where appropriate, are impact assessments made before adopting legislation (*e.g.* on the human rights and budgetary impact of laws)?[33]
vi. Does the Parliament participate in the process of drafting, approving, incorporating and implementing international treaties?

50. *As explained in the introductory part, the Rule of Law is connected with democracy in that it promotes accountability and access to rights which limit the powers of the majority.*

6. Exceptions in emergency situations

Are exceptions in emergency situations provided for by law?

i. Are there specific national provisions applicable to emergency situations (war or other public emergency threatening the life of the nation)? Are derogations to human rights possible in such situations under national law? What are the circumstances and criteria required in order to trigger an exception?
ii. Does national law prohibit derogation from certain rights even in emergency situations? Are derogations proportionate, that is limited to the extent strictly required by the exigencies of the situation, in duration, circumstance and scope? [34]
iii. Are the possibilities for the executive to derogate from the normal division of powers in emergency circumstances also limited in duration, circumstance and scope?
iv. What is the procedure for determining an emergency situation? Are there parliamentary control and judicial review of the existence and duration of an emergency situation, and the scope of any derogation thereunder?

51. *The security of the State and of its democratic institutions, and the safety of its officials and population, are vital public and private interests that deserve protection and may lead to a temporary derogation from certain human rights and to an extraordinary division of powers. However, emergency powers have been abused by authoritarian governments to stay in power, to silence the opposition and to restrict human rights in general. Strict limits on the duration, circumstance and scope of such powers is therefore essential. State security and public safety can only be effectively secured in a democracy which fully respects the Rule of Law.[35] This requires parliamentary control and judicial review of the existence and duration of a declared emergency situation in order to avoid abuse.*

52. *The relevant provisions of the International Covenant on Civil and Political Rights, of the European Convention on Human Rights and the American Convention on Human Rights are similar.[36] They provide for the possibility of derogations (as distinguished from mere*

limitations of the rights guaranteed) only in highly exceptional circumstances. Derogations are not possible from "the so-called absolute rights: the right to life, the prohibition of torture and inhuman or degrading treatment or punishment, and of slavery, and the nullum crimen, nulla poena *principle" among others.[37] Item II.A.6.i summarises the requirements of these treaties.*

7. Duty to implement the law

What measures are taken to ensure that public authorities effectively implement the law?

i. Are obstacles to the implementation of the law analysed before and after its adoption?
ii. Are there effective remedies against non-implementation of legislation?
iii. Does the law provide for clear and specific sanctions for non-obedience of the law?[38]
iv. Is there a solid and coherent system of law enforcement by public authorities to enforce these sanctions?
v. Are these sanctions consistently applied?

53. *Although full enforcement of the law is rarely possible, a fundamental requirement of the Rule of Law is that the law must be respected. This means in particular that State bodies must effectively implement laws. The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced.[39] The duty to implement the law is threefold, since it implies obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers.*

54. *Obstacles to the effective implementation of the law can occur not only due to the illegal or negligent action of authorities, but also because the quality of legislation makes it difficult to implement. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking* a posteriori *whether it may be and is effectively applied is very important. This means that* ex ante *and* ex post *legislative evaluation has to be performed when addressing the issue of the Rule of Law.*

55*. Proper implementation of legislation may also be obstructed by the absence of sufficient sanctions (*lex imperfecta*), as well as by an insufficient or selective enforcement of the relevant sanctions.*

8. Private actors in charge of public tasks

Does the law guarantee that non-State entities which, fully or in part, have taken on traditionally public tasks, and whose actions and decisions have a similar impact on ordinary people as those of public authorities, are subject to the requirements of the Rule of Law and accountable in a manner comparable to those of public authorities?[40]

56. *There are a number of areas where hybrid (State-private) actors or private entities exercise powers that traditionally have been the domain of State authorities, including in the fields of prison management and health care. The Rule of Law must apply to such situations as well.*

B. Legal certainty

1. Accessibility of legislation

Are laws accessible?

i. Are all legislative acts published before entering into force?
ii. Are they easily accessible, *e.g*. free of charge via the Internet and/or in an official bulletin?

2. Accessibility of court decisions

Are counts decisions accessible?

i. Are court decisions easily accessible to the public?[41]
ii. Are exemptions sufficiently justified?

57. *As court decisions can establish, elaborate upon and clarify law, their accessibility is part of legal certainty. Limitations can be justified in order to protect individual rights, for instance those of juveniles in criminal cases.*

3. Foreseeability of the laws

Are the effects of laws foreseeable?[42]

i. Are the laws written in an intelligible manner?
ii. Does new legislation clearly state whether (and which) previous legislation is repealed or amended? Are amendments incorporated in a consolidated, publicly accessible, version of the law?

58. *Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.[43]*

59. *The necessary degree of foreseeability depends however on the nature of the law. In particular, it is essential in criminal legislation. Precaution in advance of dealing with concrete dangers has now become increasingly important; this evolution is legitimate due to the multiplication of the risks resulting in particular from the changing technology. However, in the areas where the precautionary approach of laws apply, such as risk law, the prerequisites for State action are outlined in terms that are considerably broader and more imprecise, but the Rule of Law implies that the principle of foreseeability is not set aside.*

4. Stability and consistency of law

Are laws stable and consistent?

i. Are laws stable, to the extent that they are changed only with fair warning?[44]
ii. Are they consistently applied?

60. *Instability and inconsistency of legislation or executive action may affect a person's ability to plan his or her actions. However, stability is not an end in itself: law must also be capable of adaptation to changing circumstances. Law can be changed, but with public debate and notice, and without adversely affecting legitimate expectations (see next item).*

5. Legitimate expectations

Is respect for the principle of legitimate expectations ensured?

61. *The principle of legitimate expectations is part of the general principle of legal certainty in European Union law, derived from national laws. It also expresses the idea that public authorities should not only abide by the law but also by their promises and raised expectations. According to the legitimate expectation doctrine, those who act in good faith on the basis of law as it is, should not be frustrated in their legitimate expectations. However, new situations may justify legislative changes going frustrating legitimate expectations in exceptional cases. This doctrine applies not only to legislation but also to individual decisions by public authorities.[45]*

6. Non-retroactivity

Is retroactivity of legislation prohibited?

i. Is retroactivity of criminal legislation prohibited?
ii. To what extent is there also a general prohibition on the retroactivity of other laws?[46]
iii. Are there exceptions, and, if so, under which conditions?

7. Nullum crimen sine lege and nulla poena sine lege principles

Do the *nullum crimen sine lege* and *nulla poena sine lege* (no crime, no penalty without a law) principles apply?

62. *People must be informed in advance of the consequences of their behaviour. This implies foreseeability (above II.B.3) and non-retroactivity especially of criminal legislation. In civil and administrative law, retroactivity may negatively affect rights and legal interests.[47] However, outside the criminal field, a retroactive limitation of the rights of individuals or imposition of new duties may be permissible, but only if in the public interest and in conformity with the principle of proportionality (including temporally). The legislator should not interfere with the application of existing legislation by courts.*

8. Res judicata[48]

Is respect of *res judicata* ensured?

i. Is respect for the *ne bis in idem* principle (prohibition against double jeopardy) ensured?
ii. May final judicial decisions be revised?
iii. If so, under which conditions?

63. Res judicata *implies that when an appeal has been finally adjudicated, further appeals are not possible. Final judgments must be respected, unless there are cogent reasons for revising them.*[49]

C. Prevention of abuse (misuse) of powers[50]

Are there legal safeguards against arbitrariness and abuse of power (*détournement de pouvoir*) by public authorities?

i. If yes, what is the legal source of this guarantee (Constitution, statutory law, case-law)?
ii. Are there clear legal restrictions to discretionary power, in particular when exercised by the executive in administrative action?[51]
iii. Are there mechanisms to prevent, correct and sanction abuse of discretionary powers (*détournement de pouvoir*)? When discretionary power is given to officials, is there judicial review of the exercise of such power?
iv. Are public authorities required to provide adequate reasons for their decisions, in particular when they affect the rights of individuals? Is the failure to state reasons a valid ground for challenging such decisions in courts?

64. *An exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions violates the Rule of Law.*

65. *It is contrary to the Rule of Law for executive discretion to be unfettered power. Consequently, the law must indicate the scope of any such discretion, to protect against arbitrariness.*

66. *Abuse of discretionary power should be controlled by judicial or other independent review. Available remedies should be clear and easily accessible.*

67. *Access to an ombudsperson or another form of non-contentious jurisdiction may also be appropriate.*

68. *The obligation to give reasons should also apply to administrative decisions.*[52]

D. Equality before the law and non-discrimination

1. Principle

Does the Constitution enshrine the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination?

2. Non-discrimination[53]

Is respect for the principle of non-discrimination ensured?

i. Does the constitution prohibit discrimination?
ii. Is non-discrimination effectively guaranteed by law?
iii. Do the Constitution and/or legislation clearly define and prohibit both direct and indirect discrimination?

69. *The principle of non-discrimination requires the prohibition of any unjustified unequal treatment under the law and/or by law, and that all persons have guaranteed equal and effective protection against discrimination on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

3. Equality in law

Is equality in law guaranteed?

i. Does the constitution require legislation (including regulations) to respect the principle of equality in law?[54] Does it provide that differentiations have to be objectively justified?
ii. Can legislation violating the principle of equality be challenged in the court?
iii. Are there individuals or groups with special legal privileges? Are these exceptions and/or privileges based on a legitimate aim and in conformity with the principle of proportionality?
iv. Are positive measures expressly provided for the benefit of particular groups, including national minorities, in order to address structural inequalities?

70. *Legislation must respect the principle of equality: it must treat similar situations equally and different situations differently and guarantee equality with respect to any ground of potential discrimination.*

71. *For example, rules on parliamentary immunities, and more specifically on inviolability, "should … be regulated in a restrictive manner, and it should always be possible to lift such immunity, following clear and impartial procedures. Inviolability, if applied, should be lifted unless justified with reference to the case at hand and proportional and necessary in order to protect the democratic workings of Parliament and the rights of the political opposition".*[55]

72. *"The law should provide that the prohibition of discrimination does not prevent the maintenance or adoption of temporary special measures designed either to prevent or*

compensate for disadvantages suffered by persons on grounds [of belonging to a particular group], or to facilitate their full participation in all fields of life. These measures should not be continued once the intended objectives have been achieved."[56]

4. Equality before the law

Is equality before the law guaranteed?

i. Does the national legal order clearly provide that the law applies equally to every person irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status?[57] Does it provide that differentiations have to be objectively justified, on the basis of a reasonable aim, and in conformity with the principle of proportionality?[58]
ii. Is there an effective remedy against discriminatory or unequal application of legislation?[59]

73. *The Rule of Law requires the universal subjection of all to the law. It implies that law should be equally applied, and consistently implemented. Equality is however not merely a formal criterion, but should result in substantively equal treatment. To reach that end, differentiations may have to be tolerated and may even be required. For example, affirmative action may be a way to ensure substantive equality in limited circumstances so as to redress past disadvantage or exclusion.*[60]

E. Access to justice [61]

1. Independence and impartiality

a. Independence of the judiciary

Are there sufficient constitutional and legal guarantees of judicial independence?

i. Are the basic principles of judicial independence, including objective procedures and criteria for judicial appointments, tenure and discipline and removals, enshrined in the Constitution or ordinary legislation?[62]
ii. Are judges appointed for life time or until retirement age? Are grounds for removal limited to serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions? Is the applicable procedure clearly prescribed in law? Are there legal remedies for the individual judge against a dismissal decision?[63]
iii. Are the grounds for disciplinary measures clearly defined and are sanctions limited to intentional offences and gross negligence?[64]
iv. Is an independent body in charge of such procedures?[65]
v. Is this body not only comprised of judges?
vi. Are the appointment and promotion of judges based on relevant factors, such as ability, integrity and experience?[66] Are these criteria laid down in law?
vii. Under which conditions is it possible to transfer judges to another court? Is the consent of the judge to the transfer required? Can the judge appeal the decision of transfer?
viii. Is there an independent judicial council? Is it grounded in the Constitution or a law on the judiciary?[67] If yes, does it ensure adequate representation of judges as well as lawyers and the public?[68]
ix. May judges appeal to the judicial council for violation of their independence?
x. Is the financial autonomy of the judiciary guaranteed? In particular, are sufficient resources allocated to the courts, and is there a specific article in the budget relating to the judiciary, excluding the possibility of reductions by the executive, except if this is done through a general remuneration measure?[69] Does the judiciary or the judicial council have input into the budgetary process?
xi. Are the tasks of the prosecutors mostly limited to the criminal justice field?[70]
xii. Is the judiciary perceived as independent? What is the public's perception about possible political influences or manipulations in the appointment and promotion of the judges/prosecutors, as well as on their decisions in individual cases? If it exists, does the judicial council effectively defend judges against undue attacks?
xiii. Do the judges systematically follow prosecutors' requests ("prosecutorial bias")?
xiv. Are there fair and sufficient salaries for judges?

74. *The judiciary should be independent. Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation.*

75. *The European Court of Human Rights highlights four elements of judicial independence: manner of appointment, term of office, the existence of guarantees against outside pressure - including in budgetary matters - and whether the judiciary appears as independent and impartial.*[71]

76. *Limited or renewable terms in office may make judges dependent on the authority which appointed them or has the power to re-appoint them.*

77. *Legislation on dismissal may encourage disguised sanctions.*

78. *Offences leading to disciplinary sanctions and their legal consequences should be set out clearly in law. The disciplinary system should fulfil the requirements of procedural fairness by way of a fair hearing and the possibility of appeal(s) (see section II.E.2 below).*

79. *It is important that the appointment and promotion of judges is not based upon political or personal considerations, and the system should be constantly monitored to ensure that this is so.*

80. *Though the non-consensual transfer of judges to another court may in some cases be lawfully applied as a sanction, it could also be used as a kind of a politically-motivated tool under the disguise of a sanction.*[72] *Such transfer is however justified in principle in cases of legitimate institutional reorganisation.*

81. *"[I]t is an appropriate method for guaranteeing the independence of the judiciary that an independent judicial council have decisive influence on decisions on the appointment and career of judges". Judicial councils "should have a pluralistic composition with a substantial part, if not the majority, of members being judges."*[73] *That is the most effective way to ensure that decisions concerning the selection and career of judges are independent from the government and administration.*[74] *There may however be other acceptable ways to appoint an independent judiciary.*

82. *Conferring a role on the executive is only permissible in States where these powers are restrained by legal culture and traditions, which have grown over a long time, whereas the involvement of Parliament carries a risk of politicisation.*[75] *Involving only judges carries the risk of raising a perception of self-protection, self-interest and cronyism. As concerns the composition of the judicial council, both politicisation and corporatism must be avoided.*[76] *An appropriate balance should be found between judges and lay members.*[77] *The involvement of other branches of government must not pose threats of undue pressure on the members of the Council and the whole judiciary.*[78]

83. *Sufficient resources are essential to ensuring judicial independence from State institutions, and private parties, so that the judiciary can perform its duties with integrity and efficiency, thereby fostering public confidence in justice and the Rule of Law* [79] *Executive power to reduce the judiciary's budget is one example of how the resources of the judiciary may be placed under undue pressure.*

84. *The public prosecutor's office should not be permitted to interfere in judicial cases outside its standard role in the criminal justice system* – e.g. *under the model of the "Prokuratura". Such power would call into question the work of the judiciary and threaten its independence.*[80]

85. *Benchmarks xii-xiv deal, first of all, with the perception of the independence of the judiciary. The prosecutorial bias is an example of absence of independence, which may be encouraged by the possibility of sanctions in case of "wrong" judgments. Finally, fair and sufficient salaries are a concrete aspect of financial autonomy of the judiciary. They are a means to prevent corruption, which may endanger the independence of the judiciary not only from other branches of government, but also from individuals.*[81]

b. Independence of individual judges

Are there sufficient constitutional and legal guarantees for the independence of individual judges?

i. Are judicial activities subject to the supervision of higher courts – outside the appeal framework -, court presidents, the executive or other public bodies?
ii. Does the Constitution guarantee the right to a competent judge ("natural judge pre-established by law")[82]?
iii. Does the law clearly determine which court is competent? Does it set rules to solve any conflicts of competence?
iv. Does the allocation of cases follow objective and transparent criteria? Is the withdrawal of a judge from a case excluded other than in case a recusal by one of the parties or by the judge him/herself has been declared founded??[83]

86. *The independence of individual judges must be ensured, as also must the independence of the judiciary from the legislative and, especially, executive branches of government.*

87. *The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judges when applying the law. Judges should not be subject to supervision by their colleague-judges, and* a fortiori *to any executive hierarchical power, exercised for example by civil servants. Such supervision would contravene their individual independence, and consequently violate the Rule of Law*[84]*.*

88*. "The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. … It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That the order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential".*[85]

c. Impartiality of the judiciary[86]

Are there specific constitutional and legal rules providing for the impartiality of the judiciary?[87]

i. What is the public's perception of the impartiality of the judiciary and of individual judges?
ii. Is there corruption in the judiciary? Are specific measures in place against corruption in the judiciary (*e.g.* a declaration of assets)? What is the public's perception on this issue?[88]

89. *Impartiality of the judiciary must be ensured in practice as well as in the law. The classical formula, as expressed for example by the case-law of the European Court of Human Rights, is that "justice must not only be done, it must also be seen to be done".*[89] *This implies objective as well as subjective impartiality. The public's perception can assist in assessing whether the judiciary is impartial in practice.*

90. *Declaration of assets is a means of fighting corruption because it can highlight any conflict of interest and possibly lead to scrutiny of any unusual income.*[90]

d. The prosecution service: autonomy and control

Is sufficient autonomy of the prosecution service ensured?

i. Does the office of the public prosecution have sufficient autonomy within the State structure? Does it act on the basis of the law rather than of political expediency?[91]
ii. Is it permitted that the executive gives specific instructions to the prosecution office on particular cases? If yes, are they reasoned, in writing, and subject to public scrutiny?[92]
iii. May a senior prosecutor give direct instructions to a lower prosecutor on a particular case? If yes, are they reasoned and in written form?
iv. Is there a mechanism for a junior prosecutor to contest the validity of the instruction on the basis of the illegal character or improper grounds of the instruction?
v. Also, can the prosecutor contesting the validity of the instruction request to be replaced? [93]
vi. Is termination of office permissible only when prosecutors reach the retirement age, or for disciplinary purposes, or, alternatively, are the prosecutors appointed for a relatively long period of time without the possibility of renewal?[94]
vii. Are these matters and the grounds for dismissal of prosecutors clearly prescribed by law?[95]
viii. Are there legal remedies for the individual prosecutor against a dismissal decision?[96]
ix. Is the appointment, transfer and promotion of prosecutors based on objective factors, in particular ability, integrity and experience, and not on political considerations? Are such principles laid down in law?
x. Are there fair and sufficient salaries for prosecutors?[97]
xi. Is there a perception that prosecutorial policies allow selective enforcement of the law?
xii. Is prosecutorial action subject to judicial control?

91. *There is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. In conformity with the principle of legality, the public prosecution service must act only on the basis of, and in accordance with, the law.*[98] *This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle).*[99]

92. *Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.*

93. *The concerns relating to the judiciary apply,* mutatis mutandis*, to the prosecution service, including the importance of assessing legal regulations, as well as practice.*

94. *Here again,[100] sufficient remuneration is an important element of autonomy and a safeguard against corruption.*

95*. Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular on behalf of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias.*

96. *As in other fields, the existence of a legal remedy open to individuals whose rights have been affected is essential to ensuring that the Rule of Law is respected.*

e. Independence and impartiality of the Bar

Are the independence and impartiality of the Bar ensured?

i. Is there a recognised, organised and independent legal profession (Bar)?[101]
ii. Is there a legal basis for the functioning of the Bar, based on the principles of independence, confidentiality and professional ethics, and the avoidance of conflicts of interests?
iii. Is access to the Bar regulated in an objective and sufficiently open manner, also as remuneration and legal aid are concerned?
iv. Are there effective and fair disciplinary procedures at the Bar?
v. What is the public's perception about the Bar's independence?

97. *The Bar plays a fundamental role in assisting the judicial system. It is therefore crucial that it is organised so as to ensure its independence and proper functioning. This implies that legislation provides for the main features of its independence and that access to the Bar is sufficiently open to make the right to legal counsel effective. Effective and fair criminal and disciplinary proceedings are necessary to ensure the independence and impartiality of the lawyers.*

98. *Professional ethics imply* inter alia *that "[a] lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation"[102]. He or she "shall at all times maintain the highest standards of honesty, integrity and fairness towards the lawyer's clients, the court, colleagues and all those with whom the lawyer comes into professional contact",[103] "shall not assume a position in which a client's interest conflict with those of the lawyer"[104] and "shall treat client interest as paramount".[105]*

2. Fair trial[106]

a. Access to courts

Do individuals have an effective access to courts?

i. *Locus standi* (right to bring an action): Does an individual have an easily accessible and effective opportunity to challenge a private or public act that interferes with his/her rights?[107]
ii. Is the right to defence guaranteed, including through effective legal assistance?[108] If yes, what is the legal source of this guarantee?
iii. Is legal aid accessible to parties who do not have sufficient means to pay for legal assistance, when the interests of justice so require?[109]
iv. Are formal requirements,[110] time-limits[111] and court fees reasonable?[112]
v. Is access to justice easy in practice?[113] What measures are taken to make it easy?
vi. Is suitable information on the functioning of the judiciary available to the public?

99. *Individuals are usually not in a position to bring judicial proceedings on their own. Legal assistance is therefore crucial and should be available to everyone. Legal aid should also be provided to those who cannot afford it.*

100. *This question addresses a number of procedural obstacles which may jeopardise access to justice. Excessive formal requirements may lead to even serious and well-grounded cases being declared inadmissible. Their complexity may further necessitate recourse to a lawyer even in straightforward cases with little financial impact. Simplified standardised forms easily accessible to the public should be available to simplify judicial procedures.*

101. *Very short time-limits may in practice prevent individuals from exercising their rights. High fees may discourage a number of individuals, especially those with a low income, from bringing their case to court.*

102. *Responses to the preceding questions concerning procedural obstacles, should enable a preliminary conclusion to be made regarding how access to the court is guaranteed. However, a complete reply should take into account the public's perception on these matters.*

103. *The judiciary should not be perceived as remote from the public and shrouded in mystery. The availability, in particular on the internet, of clear information regarding how to bring a case to court is one way of guaranteeing effective public engagement with the judicial system. Information should be easily accessible to the whole population, including vulnerable groups and also made available in the languages of national minorities and/or migrants. Lower courts should be well-distributed around the country and their court houses easily accessible.*

b. Presumption of innocence[114]

Is the presumption of innocence guaranteed?

i. Is the presumption of innocence guaranteed by law?
ii. Are there clear and fair rules on the burden of proof?
iii. Are there legal safeguards which aim at preventing other branches of government from making statements on the guilt of the accused?[115]
iv. Is the right to remain silent and not to incriminate oneself nor members of one's family ensured by law and in practice?[116]
v. Are there guarantees against excessive pre-trial detention?[117]

104. *The presumption of innocence is essential in ensuring the right to a fair trial. In order for the presumption of innocence to be guaranteed, the burden of proof must be on the prosecution.*[118] *Rules and practice concerning the required proof have to be clear and fair. The unintentional or purposeful exercise of influence by other branches of government on the competent judicial authority by prejudging the assessment of the facts must be avoided. The same holds good for certain private sources of opinion like the media. Excessive pre-trial detention may be considered as prejudging the accused's guilt.*[119]

c. Other aspects of the right to a fair trial

Are additional fair trial standards enshrined in law and applied in practice?

i. Is equality of arms guaranteed by law? Is it ensured in practice?[120]
ii. Are there rules excluding unlawfully obtained evidence?[121]
iii. Are proceedings started and judicial decisions made without undue delay?[122] Is there a remedy against undue lengths of proceedings?[123]
iv. Is the right to timely access to court documents and files ensured for litigants?[124]
v. Is the right to be heard guaranteed?[125]
vi. Are judgments well-reasoned?[126]
vii. Are hearings and judgments public except for the cases provided for in Article 6.1 ECHR or for *in absentia* trials?
viii. Are appeal procedures available, in particular in criminal cases?[127]
ix. Are court notifications delivered properly and promptly?

105. *The right to appeal against a judicial decision is expressly guaranteed by Article 2 Protocol 7 ECHR and Article 14.5 ICCPR in the criminal field, and by Article 8.2.h ACHR in general. This is a general principle of the Rule of Law often guaranteed at constitutional or legislative level by domestic legislation, in particular in the criminal field. Any court whose decisions cannot be appealed would run the risk of acting arbitrarily.*

106. *All aspects of the right to a fair trial developed above may be inferred from the right to a fair trial as defined in Article 6 ECHR, as elaborated in the case-law of the European Court of Human Rights. They ensure that legal subjects are properly involved in the whole judicial process.*

d. Effectiveness of judicial decisions

Are judicial decisions effective?

i. Are judgments effectively and promptly executed?[128]
ii. Are complaints for non-execution of judgments before national courts and/or the European Court of Human Rights frequent?
iii. What is the perception of the effectiveness of judicial decisions by the public?

107. *Judicial decisions are essential to the implementation of the Constitution and of legislation. The right to a fair trial and the Rule of Law in general would be devoid of any substance if judicial decisions were not executed.*

3. Constitutional justice (if applicable)

Is constitutional justice ensured in States which provide for constitutional review (by specialised constitutional courts or by supreme courts)?

i. Do individuals have effective access to constitutional justice against general acts, *i.e.*, may individuals request constitutional review of the law by direct action or by constitutional objection in ordinary court proceedings?[129] What "interest to sue" is required on their part?
ii. Do individuals have effective access to constitutional justice against individual acts which affect them, *i.e.* may individuals request constitutional review of administrative acts or court decisions through direct action or by constitutional objection?[130]
iii. Are Parliament and the executive obliged, when adopting new legislative or regulatory provisions, to take into account the arguments used by the Constitutional Court or equivalent body? Do they take them into account in practice?
iv. Do Parliament or the executive fill legislative/regulatory gaps identified by the Constitutional Court or equivalent body within a reasonable time?
v. Where judgments of ordinary courts are repealed in constitutional complaint proceedings, are the cases re-opened and settled by the ordinary courts taking into account the arguments used by the Constitutional Court or equivalent body?[131]
vi. If constitutional judges are elected by Parliament, is there a requirement for a qualified majority[132] and other safeguards for a balanced composition?[133]
vii. Is there an *ex ante* control of constitutionality by the executive and or/legislative branches of government?

108. *The Venice Commission usually recommends providing for a constitutional court or equivalent body. What is essential is an effective guarantee of the conformity of governmental action, including legislation, with the Constitution. There may be other ways to ensure such conformity. For example, Finnish law provides at the same time for a priori review of constitutionality by the Constitutional Law Committee and for* a posteriori *judicial control in case the application of a statutory provision would lead to an evident conflict with the Constitution. In the specific national context, this has proven sufficient.*[134]

109. *Full judicial review of constitutionality is indeed the most effective means to ensure respect for the Constitution, and includes a number of aspects which are set out in detail above. First, the question of* locus standi *is very important: leaving the possibility to ask for a review of constitutionality only to the legislative or executive branch of government may severely limit the number of cases and therefore the scope of the review. Individual access to constitutional jurisdiction has therefore been developed in a vast majority of countries, at least in Europe.[135] Such access may be direct or indirect (by way of an objection raised before an ordinary court, which refers the issue to the constitutional court).[136] Second, there should be no limitation as to the kinds of acts which can be submitted to constitutional review: it must be possible to do so for (general) normative as well as for individual (administrative or judicial) acts. However, an individual interest may be required on the part of a private applicant.*

110. *The right to a fair trial imposes the implementation of all courts' decisions, including those of the constitutional jurisdiction. The mere cancellation of legislation violating the Constitution is not sufficient to eliminate every effect of a violation, and would at any rate be impossible in cases of unconstitutional legislative omission.*

111. *This is why this document underlines the importance of Parliament adopting legislation in line with the decision of the Constitutional Court or equivalent body.[137] What was said about the legislator and the executive is also true for courts: they have to remedy the cases where the constitutional jurisdiction found unconstitutionality, on the basis of the latter's arguments.*

112. *"The legitimacy of a constitutional jurisdiction and society's acceptance of its decisions may depend very heavily on the extent of the court's consideration of the different social values at stake, even though such values are generally superseded in favour of common values. To this end, a balance which ensures respect for different sensibilities must be entrenched in the rules of composition of these jurisdictions".[138] A qualified majority implies a political compromise and is a way to ensure a balanced composition when no party or coalition has such a majority.*

113. *Even in States where* ex post *control by a constitutional or supreme court is possible,* ex ante *control by the executive or legislative branch of government helps preventing unconstitutionalities.*

F. Examples of particular challenges to the Rule of Law

114. *There are many examples where particular actions and decisions offend the Rule of Law. However, because they are topical and pervasive at the time of the drafting of this document, two such examples are presented in this section: corruption and conflict of interest; and collection of data and surveillance.*

1. Corruption[139] and conflict of interest

a. Preventive measures

What are the preventive measures taken against corruption?

i. In the exercise of public duties, are specific rules of conduct applicable to public officials? Do these rules take into account:
   (1) the promotion of integrity in public life by means of general duties (impartiality and neutrality etc.);
   (2) restrictions on gifts and other benefits;
   (3) safeguards with respect to the use of public resources and information which is not meant to be public;
   (4) regulations on contacts with third parties and persons seeking to influence a public decision including governmental and parliamentary work?
ii. Are there rules aimed at preventing conflicts of interest in decision-making by public officals, *e.g.* by requiring disclosure of any conflicts in advance?
iii. Are all categories of public officials covered by the above measures, *e.g.* civil servants, elected or appointed senior officials at State and local levels, judges and other holders of judicial functions, prosecutors etc. ?
iv. Are certain categories of public officials subject to a system of disclosure of income, assets and interests, or to further requirements at the beginning and the end of a public office or mandate *e.g.* specific integrity requirements for appointment, professional disqualifications, post-employment restrictions (to limit revolving doors or so-called “pantouflage”)?
v. Have specific preventative measures been taken in specific sectors which are exposed to high risks of corruption, *e.g.* to ensure an adequate level of transparency and supervision over public tenders, and the financing of political parties and election campaigns?

b. Criminal law measures

What are the criminal law measures taken against corruption?

i. To what extent does bribery involving a public official constitute an offence?
ii. Is corruption defined in policy documents or other texts, in conformity with international standards? Are there criminal law provisions aimed at preserving public integrity, *e.g*. trading in influence, abuse of office, breach of official duties?
iii. Which public officials are within the scope of such measures, *e.g.* civil servants, elected or appointed senior officials including the head of State and members of government and public assemblies, judges and other holders of judicial functions, prosecutors etc. ?
iv. What consequences are attached to convictions for corruption-related offences? Do these include additional consequences such as exclusion from a public office or confiscation of profits?

c. Effective compliance with, and implementation of preventive and repressive measures

How is effective compliance with the above measures ensured?

i. How is the overall level of compliance with anti-corruption measures and policies perceived domestically?
ii. Does the State comply with the results of international monitoring in this field?
iii. Are effective, proportionate and dissuasive criminal and administrative sanctions provided for corruption-related acts and non-compliance with preventive mechanisms?
iii. Are the bodies responsible for combating corruption and preserving public sector integrity provided with adequate resources, including investigative powers, personnel and financial support? Do these bodies enjoy sufficient operational independence from the executive and the legislature?[140]
iv. Are measures in place to make the above bodies accessible to individuals and to encourage disclosure of possible corrupt acts, notably reporting hotlines and a policy on whistle-blowers[141] which offers protection against retaliation in the workplace and other negative consequences?
v. Does the State itself assess the effectiveness of its anti-corruption policies, and is adequate corrective action taken when necessary?
vi. Have any phenomena been observed in practice, which would undermine the effectiveness or integrity of anti-corruption efforts, *e.g.* manipulation of the legislative process, non-compliance and non-enforcement of court decisions and sanctions, immunities, interference with the enforcement efforts of anti-corruption and other responsible bodies – including political intimidation, instrumentalisation of certain public institutions, intimidation of journalists and members of civil society who report on corruption?

115. *Corruption leads to arbitrariness and abuse of powers since decisions will not be made in line with the law, which will lead to decisions being arbitrary in nature. Moreover, corruption may offend equal application of the law: it therefore undermines the very foundations of the Rule of Law. Although all three branches of powers are concerned, corruption is a particular concern for the judiciary, prosecutorial and law enforcement bodies, which play an instrumental role in safeguarding the effectiveness of anti-corruption efforts. Preventing and sanctioning corruption-related acts are important elements of anti-corruption measures, which are addressed in a variety of international conventions and other instruments.[142]*

116. *Preventing conflicts of interest is an important element of the fight against corruption. A conflict of interest may arise where a public official has a private interest (which may involve a third person,* e.g. *a relative or spouse) liable to influence, or appearing to influence, the impartial and objective performance of his or her official duties.[143] The issue of conflicts of interest is addressed in international conventions and soft law.[144] Legislation on lobbying and the control of campaign finance may also contribute to preventing and sanctioning conflicts of interest.[145]*

2. Collection of data and surveillance

a. Collection and processing of personal data

How is personal data protection ensured?

i. Are personal data undergoing automatic processing sufficiently protected with regard to their collection, storing and processing by the State as well as by private actors? What are the safeguards to secure that personal data are:

- processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency");
- collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes ("purpose limitation")?
- adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ("data minimisation")?
- accurate and, where necessary, kept up to date ("accuracy")?
- kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed ("storage limitation");
- processed in a way that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage ("integrity and confidentiality")?[146]

ii. Is the data subject provided at least with information on:

- the existence of an automated personal data file, its main purposes;
- the identity and the contact details of the controller and of the data protection officer;
- the purposes of the processing for which the personal data are intended;
- the period for which the personal data will be stored;
- the existence of the right to request from the controller access to and rectification or erasure of the personal data concerning the data subject or to object to the processing of such personal data;
- the right to lodge a complaint to the supervisory authority and the contact details of the supervisory authority; the recipients or categories of recipients of the personal data;
- where the personal data are not collected from the data subject, from which source the personal data originate;
- any further information necessary to guarantee fair processing in respect of the data subject.[147]

iii. Does a specific independent authority ensure compliance with the legal conditions under domestic law giving effect to the international principles and requirements with regard to the protection of individuals and of personal data?[148]

iv. Are effective remedies provided for alleged violations of individual rights by collection of data?[149]

117. *The increasing use of information technology has made the collection of data possible to an extent which was unthinkable in the past. This has led to the development of national and international legal protection of individuals with regard to automatic processing of personal information relating to them. The most important requirements of such protection are enumerated above. These are also applicable* mutatis mutandis *to data processing for security purposes.*

b. Targeted surveillance

What are the guarantees against abuse of targeted surveillance?

i. Is there a mandate in the primary legislation and is it restricted by principles like the principle of proportionality?
ii. Are there norms providing for procedural controls and oversight?
iii. Is an authorisation by a judge or an independent body required?
iv. Are there sufficient legal remedies available for an alleged violation of individual rights?[150]

118. *Surveillance may seriously infringe the right to private life. The developments of technical means make it easier and easier to use. Ensuring that it does not provide the State an unlimited power to control the life of individuals is therefore crucial.*

119. *Targeted surveillance must be understood as covert collection of conversations by technical means, covert collection of telecommunications and covert collection of metadata).*[151]

c. Strategic surveillance

What are the legal provisions related to strategic surveillance which guarantee against abuse?

i. Are the main elements of strategic surveillance regulated in statute form, including the definition of the agencies which are authorised to collect such intelligence, the detailed purposes for which strategic surveillance can be collected and the limits, including the principle of proportionality, which apply to the collection, retention and dissemination of the data collected?[152]
ii. Does the legislation extend data protection/privacy also to non-citizens/non-residents?
iii. Is strategic surveillance submitted to preventive judicial or independent authorisation? Are there independent review and oversight mechanisms in place?[153]
iv. Are effective remedies provided for alleged violations of individual rights by strategic surveillance?[154]

120. *Signals intelligence must be understood as means and methods for the interception of radio – including satellite and cell phone and cable-borne communications.*[155]

121. *"One of the most important developments of intelligence oversight in recent years has been that signals intelligence… can now involve monitoring "ordinary telecommunications" (it is "surveillance") and it has a much greater potential for affecting human rights."*[156]

d. Video surveillance

What are the guarantees against abuse of video surveillance, especially of public places?[157]

i. Is video surveillance performed on grounds of security or safety requirements, or for the prevention and control of criminal offences, and submitted in law and in practice to the requirements laid down in Article 8 ECHR?[158]
ii. Are people notified of their being surveyed in places accessible to the public?
iii. Do people have access to any video surveillance that may relate to them?

III. SELECTED STANDARDS

III.a. General Rule of Law Standards

1. Hard Law

Council of Europe, European Convention on Human Rights (1950)
http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005

European Union (EU), Charter of Fundamental Rights of the EU (2009)
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.083.01.0389.01.ENG

United Nations (UN), International Covenant on Civil and Political Rights (1966) (ICCPR)
http://www.unhcr.org/refworld/pdfid/3ae6b3aa0.pdf

Council of Europe, Statute of the Council of Europe, Preamble (1949)
http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001

OAS, American Convention on Human Rights ('Pact of San Jose') (1969)
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

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http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf

African Union (AU) Charter on Democracy, Elections and Governance (2007), Article 3
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2. Soft Law

a. Council of Europe

European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, CDL-AD (2011)003rev
http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e

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http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CM%20170_en.pdf

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http://www.coe.int/t/dghl/cooperation/cepej/series/Etudes6Suivi_en.pdf

b. European Union

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http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm

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http://www.osce.org/odihr/elections/14310?download=true

d. Rule of Law Indicators

World Justice Project Rule of Law Index
http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf

Vera-Altus Rule of Law Indicators
http://www.altus.org/pdf/dimrol_en.pdf

The United Nations Rule of Law Indicators
http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf

World Bank's World Governance Indicators
http://info.worldbank.org/governance/wgi/index.aspx#home

III.b. Standards relating to the Benchmarks

A. Legality

1. Hard Law

ECHR Articles 6ff, in particular 6.1, 7, 8.2, 9.2, 10.2 and 11.2

EU, Charter of Fundamental Rights of the EU (2009), Article 49 (concerning the principles of legality and proportionality of criminal offences and penalties)
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

UN, ICCPR Articles 14ff, in particular 14.1, 15, 18.3, 19.3, 21; 22.3

UN, International Covenant on Civil and Political Rights (1966), Article 4 (emergency derogations must be strict), 15 (nullum crimen, nullum poena)
http://www.unhcr.org/refworld/pdfid/3ae6b3aa0.pdf

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 16(4), 19
http://www2.ohchr.org/english/bodies/cmw/cmw.htm

Rome Statute of the International Criminal Court (1998), Article 22
http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

AU Charter on Democracy, Elections and Governance (2007), Article 10
http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf

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http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

2. Soft Law

UN, Universal Declaration of Human Rights (1948), Article 11(2) (concerning criminal offences and penalties)
http://www.un.org/en/documents/udhr/index.shtml

Organization of American States (OAS), American Declaration of the Rights and Duties of Man (1948), Article XXV (protection from arbitrary arrest)
http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf

Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government (1998), Principles II, VIII
http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf

Charter of the Commonwealth (2013), Sections VI, VIII
http://thecommonwealth.org/sites/default/files/page/documents/CharteroftheCommonwealth.pdf

Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (2012), para 20(2)
Available at http://aichr.org/documents

B. Legal certainty

1. Hard Law

ECHR Articles 6ff, in particular 6.1, 7, 8.2, 9.2, 10.2 and 11.2

OAS, American Convention on Human Rights ('Pact of San Jose') (1969), Article 9
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Article 7(2)
http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf

League of Arab States (LAS), Arab Charter on Human Rights (Revised) (2004), Article 16
http://www.refworld.org/docid/3ae6b38540.html

2. Soft Law

UN, Universal Declaration of Human Rights (1948), Article 11
http://www.un.org/en/documents/udhr/index.shtml

UN, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012), para 8
http://www.unrol.org/article.aspx?article_id=192

ASEAN, Human Rights Declaration (2012), para 20(3)
Available at http://aichr.org/documents

C. Prevention of abuse of powers

1. Hard Law

UN, International Covenant on Civil and Political Rights (1966), Article 17 (interference with freedoms)
http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 14 (interference with freedoms), 15 (deprivation of property)
http://www2.ohchr.org/english/bodies/cmw/cmw.htm

UN, Convention on the Rights of the Child (1989), Article 37(b) (arbitrary arrest or detention)
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Article 14
http://www.unhcr.org/refworld/pdfid/3ae6b3630.pdf

2. Soft Law

Council of Europe Committee of Ministers, 'The Council of Europe and the Rule of Law', CM(2008)170, section 46
http://www.coe.int/t/dghl/standardsetting/minjust/mju29/CM%20170_en.pdf

UN, Universal Declaration of Human Rights (1948), Articles 9, 12, 17
http://www.un.org/en/documents/udhr/index.shtml

Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government (1998), Principle VII
http://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf

ASEAN Human Rights Declaration (2012), paras 11-12, 21 (arbitrary deprivations of life, liberty, privacy)
Available at http://aichr.org/documents

D. Equality before the law and non-discrimination

1. Hard Law

a. Council of Europe

ECHR (1950), Article 14

b. European Union

Charter of Fundamental Rights of the EU (2009), Articles 20-21
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

EU Equality Directives, including Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

c. Other international organisations

UN, International Covenant on Civil and Political Rights (1966), Articles 2, 14(1), 26 (equality before courts and tribunals)
http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

UN, International Convention on the Elimination of All Forms of Racial Discrimination (CEDR) (1969), especially Article 5
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

UN, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), Articles 1, 7, 18
http://www2.ohchr.org/english/bodies/cmw/cmw.htm

UN, International Covenant on Economic, Social and Cultural Rights (1966), Article 3
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

UN, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

UN, Convention on the Rights of Persons with Disabilities (CRPD) (2006)
http://www.un.org/disabilities/convention/conventionfull.shtml

UN, Convention on the Rights of the Child (1989), Article 2
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

International Committee of the Red Cross and Red Crescent Societies, Geneva Conventions (1949), Common Article 3
https://www.icrc.org/ihl/WebART/375-590006

AU, African Charter on Human and People's Rights (Banjul Charter) (1981), Articles 3, 19
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http://www.refworld.org/docid/3ae6b38540.html

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http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)011-e

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http://www.un.org/en/documents/udhr/index.shtml

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http://www.unrol.org/article.aspx?article_id=192

UN Human Rights Committee, General Comment No. 32 (2007), Article 14: Right to equality before courts and tribunals and to a fair trial
http://www1.umn.edu/humanrts/gencomm/hrcom32.html

The Commonwealth, Harare Commonwealth Declaration (1991), para 4
http://thecommonwealth.org/sites/default/files/history-items/documents/Harare%20Commonwealth%20Declaration%201991.pdf

The Commonwealth, Singapore Declaration of Commonwealth Principles (1971), Principle 6
http://thecommonwealth.org/sites/default/files/history-items/documents/Singapore%20Declaration.pdf

ASEAN, Human Rights Declaration (2012), paras 2, 7-9
Available at http://aichr.org/documents

OAS, American Declaration of the Rights and Duties of Man (1948), Articles II, XVII
http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf

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http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

South Asian Association for Regional Cooperation (SAARC), Charter of Democracy (2011)
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E. Access to justice

1. Hard Law

ECHR (1950), Article 6

Charter of Fundamental Rights of the EU (2009), Articles 41, 47, 48, 50
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

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Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings
http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455724843769&uri=CELEX:32012L0013

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty
http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1455724901649&uri=CELEX:32013L0048

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http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

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http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx

UN, Convention on the Rights of the Child (1989), Articles 12(2), 40
http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx

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http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

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http://www.refworld.org/docid/3ae6b38540.html

LAS, The Riyadh Arab Agreement for Judicial Cooperation (1983), Articles 3-4
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a. Council of Europe

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Venice Commission, Compilation of Venice Commission Opinions and Reports concerning Prosecutors, CDL-PI(2015)009
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Council of Europe, Recommendation CM/Rec(94)12 of the Committee of Ministers to member States on the Independence, Efficiency and Role of Judges (1994)
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Council of Europe, Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system
https://wcd.coe.int/ViewDoc.jsp?id=1979395&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

Consultative Council of European Judges (CCJE), Opinion No. 1 on standards concerning the independence of the judiciary and the irremovability of judges (2001)
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Council of Europe, Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer
https://wcd.coe.int/ViewDoc.jsp?id=380771&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

b. European Union

European Network of Councils for the Judiciary, Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary (2012)
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c. United Nations

UN, Universal Declaration of Human Rights (1948), Articles 8, 10
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http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/148/94/PDF/G1314894.pdf?OpenElement

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http://www.unrol.org/article.aspx?article_id=192

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UN OHCHR, Principles relating to the Status of National Institutions (The Paris Principles) (1993), section 2 (Composition and guarantees of independence and pluralism)
http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx

UN Basic Principles on the Role of Lawyers (welcomed by General Assembly resolution 45/166, 1990)
http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx

UN Guidelines on the Role of Prosecutors (welcomed by General Assembly resolution 45/166, 1990)
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UN Draft Universal Declaration on the Independence of Justice ("Singhvi Declaration") (referenced by UN Commission on Human Rights, resolution 1989/32)
http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/03/SR-Independence-of-Judges-and-Lawyers-Draft-universal-declaration-independence-justice-Singhvi-Declaration-instruments-1989-eng.pdf

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d. The Commonwealth of Nations

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Limassol Conclusions on Combating Corruption within the Judiciary (2002)
http://www.cmja.org/downloads/limassolconclusionwithannexe.pdf

e. Organization for Security and Co-operation in Europe

Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights, 'Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia: Judicial Administration, Selection and Accountability' (2010)
http://www.osce.org/odihr/KyivRec?download=true

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http://www.oas.org/dil/1948%20American%20Declaration%20of%20the%20Rights%20and%20Duties%20of%20Man.pdf

OAS, Inter-American Democratic Charter (2001), Articles 2-4
http://www.oas.org/OASpage/eng/Documents/Democractic_Charter.htm

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g. Other

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http://www.albersconsulting.eu/justicebenchmarks.html

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F. Examples of particular challenges to the Rule of Law

1. Hard Law

a. Corruption

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Council of Europe, Civil Convention on Corruption,
http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174

Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption
http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/191

UN, Convention Against Corruption (2003)
http://www.unodc.org/unodc/en/treaties/CAC/

OAS, Inter-American Convention against Corruption (1996)
http://www.oas.org/juridico/english/treaties/b-58.html

b. Collection of data and surveillance

Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data
http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108

European Union, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN

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a. Corruption

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b. Collection of data and surveillance

European Commission for Democracy through Law (Venice Commission), Opinion on Video Surveillance in Public Places by Public Authorities and the Protection of Human Rights, CDL-AD(2007)014
http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282007%29014-e

European Commission for Democracy through Law (Venice Commission Report on the Democratic Oversight of Signals Intelligence Agencies, CDL-AD(2015)011
http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282015%29011-e

[1] See, for example, FRA (Fundamental Rights Agency) (2016), *Fundamental rights: challenges and achievements in 2015 – FRA Annual report 2013*, Luxembourg, Publications Office of the European Union (Publications Office), Chapter 7 (upcoming).
[2] Cf. CDL-AD(2011)003rev, § 30ff.
[3] CDL-AD(2011)003rev.
[4] See Parliamentary Assembly of the Council of Europe, Motion for a resolution presented by Mr Holovaty and others, The principle of the rule of law, Doc. 10180, § 10. In this context, see also the Copenhagen document of the CSCE, para. 2: "[participating States] consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression."
[5] Tom Bingham, *The Rule of Law* (2010).
[6] Council conclusions on fundamental rights and rule of law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, Justice and Home Affairs Council Meeting, Luxembourg, 6-7 June 2013, part c, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf.
[7] Communication from the European Commission to the European Parliament and the Council, 'A new EU Framework to strengthen the Rule of Law', COM(2014) 158 final/2, http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf.
[8] This document is a joint publication of the United Nations Department of Peacekeeping Operations (DPKO) and the Office of the United Nations High Commissioner for Human Rights (OHCHR).
[9] See FRA (2014), *An EU internal strategic framework for fundamental rights: joining fundamental rights: joining forces to achieve better results*. Luxembourg, Publications Office of the European Union (Publications Office).
[10] On the issue, see in particular the Report on the Rule of Law adopted by the Venice Commission, CDL-AD(2011)003rev, § 59-61. The report also underlines (§ 41) that "[a] *consensus* can now be found for the necessary elements of the Rule of Law as well as those of the Rechtsstaat which are not only formal *but also substantial or material*" (emphasis added).
[11] *Rule of Law. A Guide for Politicians,* HIIL, Lund/The Hague, 2012, p. 6.
[12] Venice Commission Report on the Rule of Law, CDL-AD(2011)003rev, § 37.
[13] See for example ECtHR, *Centro Europe 7 and di Stefano v. Italy*, 38433/09, 7 June 2012, § 134, 156; *Bărbulescu v. Romania,* 61496/08, 12 January 2016, § 52ff.
[14] See ECtHR, *Sylvester v. Austria*, 36812/97 and 40104/98, 24 April 2003, § 63; *P.P. v. Poland*, 8677/03, 8 January 2008, § 88.
[15] As Rule of Law guarantees apply not only to human rights law but to all laws.
[16] The principle of legality is explicitly recognised as an aspect of the Rule of Law by the European Court of Justice, see ECJ, C-496/99 P, *Commission v. CAS Succhi di Frutta*, 29 April 2004, § 63.
[17] This results from the principle of separation of powers, which also limits the discretion of the executive: cf. CM(2008)170, The Council of Europe and the Rule of Law, § 46.
[18] The Venice Commission is in principle favourable to full review of constitutionality, but a proper implementation of the Constitution is sufficient: cf. CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115ff. See especially the section on Constitutional Justice (II.E.3).
[19] On the hierarchy of norms, see CDL-JU(2013)020, Memorandum – Conference on the European standards of Rule of Law and the scope of discretion of powers in the member States of the Council of Europe (Yerevan, Armenia, 3-5 July 2013).
[20] The reference to « law » for acts and decisions affecting human rights is to be found in a number of provisions of the European Convention on Human Rights, including Article 6.1, 7 and Articles 8.2, 9.2, 10.2 and 11.2 concerning restrictions to fundamental freedoms. See, among many other authorities, ECtHR *Amann v. Switzerland*, 27798/95, 16 February 2000, § 47ff; *Slivenko v. Latvia*, 48321/99, 9 October 2003, § 100; *X. v. Latvia*, 27853/09, 26 November 2013, § 58; *Kurić and Others v. Slovenia*, 26828/06, 12 March 2014, § 341.
[21] Discretionary power is, of course, permissible, but must be controlled. See below II.C.1.
[22] Cf. below II.A.8.
[23] For a recent reference to positive obligations of the State to ensure the fundamental rights of individuals vis-à-vis private actors, see ECtHR *Bărbulescu v. Romania,* 61496/08, 12 January 2016, § 52ff (concerning Article 8 ECHR).
[24] Law "comprises statute law as well as case-law", ECtHR *Achour v. France*, 67335/01, 29 March 2006, § 42; cf *Kononov v. Latvia* [GC], 36376/04, 17 May 2010, § 185.
[25] ECtHR *The Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 46ff. On the conditions of accessibility and foreseeability, see, *e.g.*, ECtHR *Kurić and Others v. Slovenia*, 26828/06, 26 June 2012, § 341ff; *Amann v. Switzerland*, 27798/95, 16 February 2000, § 50; *Slivenko v. Latvia*, 48321/99, 9 October 2003, § 100. The Court of the European Union considers that the principles of legal certainty and legitimate expectations imply that "the effect of Community legislation must be clear and expectable to those who are subject to it": ECJ, 212 to 217/80, *Amministrazione delle finanze dello Stato v. SRL Meridionale Industria Salumi and Others*, 12 November 1981, § 10; or "that legislation be clear and precise and that its application be foreseeable for all interested parties": CJEU, C-585/13, *Europäisch-Iranische Handelsbank AG v. Council of the European Union*, 5 March 2015, § 93; cf. ECJ, C-325/91, *France* v *Commission*, 16 June 1993, § 26. For more details, see II.B (legal certainty).

[26] Cf. Article 26 (*pacta sunt servanda*) and Article 27 (internal law and observance of treaties) of the 1969 Vienna Convention on the Law of Treaties; CDL-STD(1993)006, The relationship between international and domestic law, § 3.6 (treaties), 4.9 (international custom), 5.5 (decisions of international organisations), 6.4 (international judgments and rulings); CDL-AD(2014)036, Report on the Implementation of Human Rights Treaties in Domestic Law and the Role of Courts, § 50.

[27] Article 27 of the Vienna Convention on the Law of Treaties; see also Article 46 (Provisions of internal law regarding the competence to conclude treaties).

[28] See Article 80 of the German Constitution; Article 76 of the Italian Constitution; Article 92 of the Constitution of Poland; Article 290.1 of the Treaty on the Functioning of the European Union, which states that "[t]he essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power".

[29] ECtHR *Sunday Times*, above note 25.

[30] On the need to clarify and streamline legislative procedures, see *e.g.* CDL-AD(2012)026, § 79; cf. CDL-AD(2002)012, Opinion on the draft revision of the Romanian Constitution, § 38ff.

[31] According to the European Court of Human Rights, exacting and pertinent review of (draft) legislation, not only *a posteriori* by the judiciary, but also *a priori* by the legislature, makes restrictions to fundamental rights guaranteed by the Convention more easily justifiable: ECtHR *Animal Defenders International v. the United Kingdom*, 48876/08, 22 April 2013, §106ff.

[32] UN Human Rights Committee, General Comment No. 25 (1996), Article 25 (Participation in Public Affairs and the Right to Vote) - The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, – provides that "[c]itizens also take part in the conduct of public affairs by exerting influence through public debate" (§ 8). Available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=453883fc22&skip=0&query=general comment 25. The CSCE Copenhagen Document provides that legislation is "adopted at the end of a public procedure" and the 1991 Moscow Document (http://www.osce.org/odihr/elections/14310) states that "[L]egislation will be formulated and adopted as the result of an open process" (§ 18.1).

[33] ECtHR *Hatton v. the United Kingdom*, 36022/97, 8 July 2003, § 128: "A governmental decision-making process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake." See also *Evans v. the United Kingdom*, 6339/05, 10 April 2007, § 64. About the absence of real parliamentary debate since the adoption of a statute, which took place in 1870, see *Hirst (No. 2) v. the United Kingdom,* 74025/01, 6 October 2005, § 79. In Finland, the instructions for law-drafting include such a requirement.

[34] Cf. Article 15 ECHR ("derogation in time of emergency"); Article 4 ICCPR; Article 27 ACHR. For an individual application of Article 15 ECHR, see ECtHR *A. and Others v. the United Kingdom*, 3455/05, 19 February 2009, § 178, 182: a derogation to Article 5 § 1 ECHR was considered as disproportionate. On emergency powers, see also CDL-STD(1995)012, Emergency Powers; CDL-AD(2006)015, Opinion on the Protection of Human Rights in Emergency Situations.

[35] CDL-AD(2006)015, § 33.

[36] Article 15 ECHR: Article 4 ICCPR; Article 27 ACHR.

[37] CDL-AD(2006)015, § 9. On derogations under Article 15 ECHR, see more generally CDL-AD(2006)015, § 9ff, and the quoted case-law.

[38] On the need for effective and dissuasive sanctions, see *e.g.* CDL-AD(2014)019, § 89; CDL-AD(2013)021, § 70.

[39] The need for ensuring proper implementation of the legislation is often underlined by the Venice Commission: see *e.g.* CDL-AD(2014)003, § 11: "the key challenge for the conduct of genuinely democratic elections remains the exercise of political will by all stakeholders, to uphold the letter and the spirit of the law, and to implement it fully and effectively"; CDL-AD(2014)001, § 85.

[40] Cf. Article 124 of the Constitution of Finland: "A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered."

[41] ECtHR *Fazlyiski v. Bulgaria*, 40908/05, 16 April 2013, § 64-70, in particular § 65; *Ryakib Biryukov v. Russia*, 14810/02, 17 January 2008, in particular § 30ff; cf. *Kononov v. Latvia*, 36376/04, 17 May 2010, § 185.

[42] ECtHR *The Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 46ff; *Rekvényi v. Hungary*, 25390/94, 20 May 1999, § 34ff.

[43] ECtHR *The Sunday Times v. the United Kingdom (No. 1)*, 6538/74, 26 April 1979, § 49.

[44] The Venice Commission has addressed the issue of stability of legislation in the electoral field: Code of Good Practice in Electoral Matters, CDL-AD(2002)023rev, II.2; Interpretative Declaration on the Stability of the Electoral Law, CDL-AD(2005)043.

[45] For example, individuals who have been encouraged to adopt a behaviour by Community measures may legitimately expect not to be subject, upon the expiry of this undertaking, to restrictions which specifically affect them precisely because they availed themselves of the possibilities offered by the Community provisions: ECJ, 120/86, *Mulder v. Minister van Landbouw en Visserij*, 28 April 1988, § 21ff. In the case-law of the European Court of Human Rights, the doctrine of legitimate expectations essentially applies to the protection of property as guaranteed by Article 1 of the First Additional Protocol to the European Convention on Human Rights: see *e.g.* ECtHR *Anhaeuser-Busch Inc. v. Portugal* [GC], 73049/01, 11 January 2007, § 65; *Gratzinger and Gratzingerova v. the Czech Republic* [GC] (dec.), 39794/98, 10 July 2002, § 68ff; *National & Provincial Building Society, Leeds Permanent Building Society and*

Yorkshire Building Society v. the United Kingdom, 21319/93, 21449/93, 21675/93, 21319/93, 21449/93 and 21675/93, 23 October 1997, § 62ff.

[46] See Article 7.1 ECHR, Article 15 ICCPR, Article 9 ACHR, Article 7.2 of the African (Banjul) Charter on Human and Peoples' Rights [ACHPR] for criminal law; Article 28 of the Vienna Convention on the Law of Treaties for international treaties.

[47] The principle of non-retroactivity does not apply when the new legislation places individuals in a more favourable position. The European Court of Human considers that Article 7 ECHR includes the principle of retrospectiveness of the more lenient criminal law: see *Scoppola v. Italy (No. 2),* 10249/03, 17 September 2009.

[48] Article 4 Protocol 7 ECHR, Article 14.7 ICCPR, Article 8.4 ACHR (in the penal field); on the respect of the principle of *res judicata*, see *e.g.* ECtHR *Brumărescu v. Romania*, 28342/95, 28 October 1999, § 62; *Kulkov and Others v. Russia*, 25114/03, 11512/03, 9794/05, 37403/05, 13110/06, 19469/06, 42608/06, 44928/06, 44972/06 and 45022/06, 8 January 2009, § 27; *Duca v. Moldova*, 75/07, 3 March 2009, § 32. The Court considers respect of *res judicata* as an aspect of legal certainty. Cf. *Marckx v. Belgium*, 6833/74, 13 June 1979, § 58.

[49] Cf. The Council of Europe and the Rule of Law - An overview, CM(2008)170, 21 November 2008, § 48.

[50] Protection against arbitrariness was mentioned by the European Court of Human Rights in a number of cases. In addition to those quoted in the next note, see *e.g. Husayn (Abu Zubaydah) v. Poland*, 7511/13, 24 July 2014, § 521ff; *Hassan v. the United Kingdom,* 29750/09, 16 September 2014, § 106; *Georgia v. Russia (I)*, 13255/07, 3 July 2014, § 182ff (Article 5 ECHR); *Ivinović v. Croatia*, 13006/13, 18 September 2014, § 40 (Article 8 ECHR). For the Court of Justice of the European Union, see *e.g.* ECJ, 46/87 and 227/88, *Hoechst v. Commission*, 21 September 1989, § 19; T-402/13, *Orange v. European Commission*, 25 November 2014, § 89. On the limits of discretionary powers, see Appendix to Recommendation of the Committee of Ministers on good administration, CM/Rec(2007)7, Article 2.4 ("Principle of lawfulness"): "[Public authorities] shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred".

[51] CM(2008)170, The Council of Europe and the Rule of Law, § 46; ECtHR *Malone*, 8691/79, 2 August 1984, § 68; *Segerstedt-Wiberg and Others v. Sweden*, 62332/00, 6 June 2006, § 76 (Article 8). The complexity of modern society means that discretionary power must be granted to public officials. The principle by which public authorities must strive to be objective ("sachlich") in a number of States such as Sweden and Finland goes further than simply forbidding discriminatory treatment and is seen as an important factor buttressing confidence in public administration and social capital.

[52] See *e.g.* Article 41.1.c of the Charter of Fundamental Rights of the European Union. Cf. also item II.E.2.c.vi and note 126.

[53] See for exemple, Article 14 ECHR; Protocol 12 ECHR; Articles 12, 26 ICCPR, Article 24 ACHR; Article ACHPR.

[54] Cf. *e.g.* CDL-AD(2014)010, § 41-42; CDL-AD(2013)032, Opinion on the Final Draft Constitution of the Republic of Tunisia, § 44ff: equality should not be limited to citizens and include a general non-discrimination clause.

[55] CDL-AD(2014)011, Report on the Scope and Lifting of Parliamentary Immunities (§ 200); ECtHR *Cordova v. Italy*, *No. 1 and No. 2*, 40877/98 and 45649/99, 30 January 2003, § 58-67.

[56] ECRI (European Commission against Racism and Intolerance) Recommendation No. 7, § 5.

[57] For example, Article 1.2 Protocol 12 ECHR makes clear that "any public authority" - and not only the legislator - has to respect the principle of equality. Article 26 ICCPR States that "All persons are equal before the law and are entitled without discrimination to the equal protection of the law". "The principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union": CJEU, C-550/07 *P, Akzo Nobel Chemicals and Akcros Chemicals v Commission*, 14 September 2010, § 54.

[58] A distinction is admissible if the situations are not comparable and/or if it is based on an objective and reasonable justification: See ECtHR *Hämäläinen v. Finland*, 37359/09, 26 July 2014, § 108: "The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see Burden v. the United Kingdom GC, no. 13378/05, § 60, ECHR 2008)".

[59] Cf. Article 13 ECHR; Article 2.3 ICCPR ; Article 25 ACHR ; Article 7.1.a ACHPR.

[60] Cf. Article 1.4 and 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination (CEDR); Article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 5.4 of the Convention on the Rights of Persons with Disabilities (CRPD).

[61] On the issue of access to justice and the Rule of Law, see SG/Inf(2016)3, Challenges for judicial independence and impartiality in the member States of the Council of Europe, Report prepared jointly by the Bureau of the CCJE and the Bureau of the CCPE for the attention of the Secretary General of the Council of Europe as a follow-up to his 2015 report entitled *"State of Democracy, Human Rights and the Rule of Law in Europe – a shared responsibility for democratic security in Europe*.

[62] CDL-AD(2010)004, § 22: "The basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts".

[63] Cf. CM/Rec(2010)12 of the Committee of Ministers to member States on judges: independence, efficiency and responsibilities, § 49ff; CDL-AD(2010)004, § 33ff; for constitutional justice, see "The Composition of Constitutional Courts", Science and Technique of Democracy No. 20, CDL-STD(1997)020, p. 18-19.

[64] "Judges… should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)": CDL-AD(2010)004, § 61.
[65] OSCE Kyiv Recommendations on Judicial Independence, § 9.
[66] Cf. CM/Rec(2010)12, § 44.
[67] The Venice Commission considers it appropriate to establish a Judicial Council having decisive influence on decisions on the appointment and career of judges: CDL-AD(2010)004, § 32.
[68] "A substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself": CDL-AD(2007)028, § 29.
[69] CDL-AD(2010)038, Amicus Curiae Brief for the Constitutional Court of the "the former Yugoslav Republic of Macedonia" on amending several laws relating to the system of salaries and remunerations of elected and appointed officials.
[70] Recommendation CM/Rec(2012)11 of the Committee of Ministers to member States on the role of public prosecutors outside the criminal justice system; CDL-AD(2010)040, § 81-83; CDL-AD(2013)025, Joint Opinion on the draft law on the public prosecutor's office of Ukraine, § 16-28.
[71] See in particular ECtHR *Campbell and Fell v. the United Kingdom,* 28 June 2014, 7819/77 and 7878/77, § 78.
[72] Cf. CDL-AD(2010)004, § 43.
[73] CDL-AD(2010)004, § 32.
[74] Cf. Recommendation (94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges (Principle I.2.a), which reflects a preference for a judicial council but accepts other systems.
[75] CDL-AD(2007)028, Report on Judicial Appointments, § 44ff. The trend in Commonwealth countries is away from executive appointments and toward appointment commissions, sometimes known as judicial services commissions. See J. van Zyl Smit (2015), The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law), available at http://www.biicl.org/documents/689_bingham_centre_compendium.pdf.
[76] CDL-AD(2002)021, Supplementary Opinion on the Revision of the Constitution of Romania, § 21, 22.
[77] See CDL-PI(2015)001, Compilation of Venice Commission Opinions and Reports concerning Courts and Judges, ch. 4.2, and the references.
[78] CDL-INF(1999)005, Opinion on the reform of the judiciary in Bulgaria, § 28; see also, *e.g.*, CDL-AD(2007)draft, Report on Judicial Appointments by the Venice Commission, § 33; CDL-AD(2010)026, Joint opinion on the draft law on the judicial system and the status of judges of Ukraine, § 97, concerning the presence of ministers in the judicial council.
[79] CM/Rec(2010)12, § 33ff; CDL-AD(2010)004, § 52ff.
[80] CDL-AD(2010)040, § 71ff.
[81] Cf. CDL-AD(2012)014, Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, § 81.
[82] CDL-AD(2010)004, § 78; see *e.g.* European Commission on Human Rights, *Zand v. Austria*, 7360/76, 16 May 1977, D.R. 8, p. 167; ECtHR *Fruni v. Slovakia*, 8014/07, 21 June 2011, § 134ff.
[83] On the allocation of cases, see CM/Rec(2010)12, § 24; CDL-AD(2010)004, § 73ff. The OSCE Kyiv Recommendations cite as a good practice either random allocation of cases or allocation based on predetermined, clear and objective criteria (§ 12).
[84] CM/Rec(2010)12, § 22ff; CDL-AD(2010)004, § 68ff; CM/Rec(2000)19 of the Committee of Ministers to member States on the role of public prosecution in the criminal justice system, § 19; CDL-AD(2010)004, Report on the Independence of the Judicial System Part I: The Independence of Judges), § 72.
[85] CDL-AD(2010)004, § 79.
[86] Article 6.1 ECHR; Article 14.1 ICCPR; Article 8.1 ACHR; Article 7.1.d ACHPR. See also the various aspects of impartiality in the Bangalore principles of judicial conduct, Value 2, including absence of favour, bias or prejudice.
[87] See *e.g.* ECtHR *Micallef v. Malta* [GC], 17056/06, 15 October 2009, § 99-100.
[88] On corruption, see in general II.F.1.
[89] See *e.g.* ECtHR *De Cubber v. Belgium*, 9186/80, 26 October 1984, § 26: *Micallef v. Malta*, 17056/06, 15 October 2009, § 98; *Oleksandr Volkov v. Ukraine*, 21722/11, 9 January 2013, § 106.
[90] CDL-AD(2011)017, Opinion on the introduction of changes to the constitutional law "on the status of judges" of Kyrgyzstan, § 15.
[91] See in particular CM/Rec(2000)19, § 11ff; CDL-AD(2010)040, § 23ff.
[92] Cf. CDL-AD(2010)040, § 22.
[93] Cf. CDL-AD(2010)040, § 53ff.
[94] CDL-AD(2010)040, § 34ff, 47ff.
[95] CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, § 39.
[96] CDL-AD(2010)040, § 52.
[97] CDL-AD(2010)040, § 69.
[98] See II.A.1.
[99] CDL-AD(2010)040, § 7, 53ff.
[100] See II.E.1.a.xiv for judges.

[101] See Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer.
[102] International Bar Association – International Principles of Conduct for the Legal Profession, 1.1.
[103] *Ibid.*, 2.1.
[104] *Ibid.*, 3.1.
[105] *Ibid.*, 5.1.
[106] Article 6 ECHR, Article 14 ICCPR, Article 8 ACHR, Article 7 ACHPR. The right to a fair trial was recognised by the European Court of Justice, as "inspired by Article 6 of the ECHR": C-174/98 P and C-189/98 *P, Netherlands and Van der Wal v Commission*, 11 January 2000, § 17. See now Article 47 of the Charter of Fundamental Rights.
[107] "The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the Rule of Law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights", ECtHR *Bellet v. France*, 23805/94, 4 December 1995, § 36; cf. ECtHR *M.D. and Others v. Malta*, 64791/10, 17 July 2012, § 53.
[108] Article 6.3.b-c ECHR, Article 14.3 ICCPR; Article 8.2 ACHR; the right to defence is protected by Article 6.1 ECHR in civil proceedings, see *e.g*. ECtHR *Oferta Plus SRL v. Moldova*, 14385/04, 19 December 2006, § 145. It is recognised in general by Article 7.1.c ACHPR.
[109] Article 6.3.c ECHR, Article 14.3.d ICCPR for criminal proceedings; the right to legal aid is provided up to a certain extent by Article 6.1 ECHR for civil proceedings: see *e.g.* ECtHR *A. v. the United Kingdom*, 35373/97, 17 December 2002, § 90ff; for constitutional courts in particular, see CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 113.
[110] For constitutional justice, see CDL-AD(2010)039rev, § 125.
[111] For constitutional justice, see CDL-AD(2010)039rev, § 112; for time limits for taking the decision, see § 149.
[112] On excessive court fees, see *e.g.* ECtHR *Kreuz v. Poland (no. 1)*¸ 28249/95, 19 June 2001, § 60-67; *Weissman and Others v. Romania*, 63945/00, 24 May 2006, § 32ff; *Scordino v. Italy*, 36813/97, 29 March 2006, § 201; *Sakhnovskiy v. Russia*, 21272/03, 2 November 2010, § 69; on excessive security for costs, see *e.g.* ECtHR *Aït-Mouhoub v. France*, 22924/93, 28 October 1998, § 57-58; *Garcia Manibardo v. Spain,* 38695/97, 15 February 2000, § 38-45; for constitutional justice, see CDL-AD(2010)039rev, § 117.
[113] On the need for an *effective* right of access to court, see *e.g. Golder v. the United Kingdom*, 4451/70, 21 January 1975, § 26ff; *Yagtzilar and Others v. Greece*, 41727/98, 6 December 2001, § 20ff.
[114] Article 6.2 ECHR; Article 15 ICCPR; Article 8.2 ACHR; Article 7.1.b ACHPR.
[115] ECtHR *Allenet de Ribemont v. France*, 15175/89, 10 February 1995, § 32ff. On the involvement of authorities not belonging to the judiciary in issues linked to a criminal file, see CDL-AD(2014)013, *Amicus Curiae* Brief in the Case of Rywin v. Poland (Application Nos 6091/06, 4047/07, 4070/07) pending before the European Court of Human Rights (on Parliamentary Committees of Inquiry). The European Court of Human Rights decided on the *Rywin* case on 18 February 2016: see in particular § 200ff. On the issue of the systematic follow-up to prosecutors' requests (prosecutorial bias), see item II.E.1.a.xiii.
[116] ECtHR *Saunders v. the United Kingdom*, 19187/91, 17 December 1996, § 68-69; *O'Halloran and Francis v. the United Kingdom*, 5809/02 and 25624/02, 29 June 2007, § 46ff, and the quoted case-law. On the incrimination of members of one's family, see *e.g.* International Criminal Court, Rules of Procedure and Evidence, Rule 75.1.
[117] Cf. Article 5.3 ECHR.
[118] "The burden of proof is on the prosecution": ECtHR *Barberá, Messegué and Jabardo v. Spain*, 10590/83, 6 December 1988, § 77; *Telfner v. Austria*, 33501/96, 20 March 2001, § 15; cf. *Grande Stevens and Others v. Italy*, 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10, 4 March 2014, § 159.
[119] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), IV.
[120] See *e.g. Rowe and Davis v. the United Kingdom,* 28901/95, 16 February 2000, § 60.
[121] See *e.g. Jalloh v. Germany,* 54810/00, 17 July 2006, § 94ff, 104; *Göçmen v. Turkey,* 72000/01, 17 October 2006, § 75; *O'Halloran and Francis v. the United Kingdom*, 5809/02 and 25624/02, 29 June 2007, § 60.
[122] Article 6.1 ECHR; Article 8.1 ACHR; Article 7.1.d ACHPR (« within reasonable time »).
[123] CDL-AD(2010)039rev, § 94. See *e.g.* ECtHR *Panju v. Belgium,* 18393/09, 28 October 2014, § 53, 62 (the absence of an effective remedy in case of excessive length of proceedings goes against Article 13 combined with Article 6.1 ECHR).
[124] This right is inferred in criminal matters from Article 6.3.b ECHR (the right to have adequate time and facilities for the preparation of one's defence): see *e.g. Foucher v. France*, 22209/93, 18 March 1993, § 36.
[125] Cf. ECtHR *Micallef v. Malta*, 17056/06, 15 October 2009, § 78ff; *Neziraj v. Germany*, 30804/07, 8 November 2012, § 45ff.
[126] "Article 6 § 1 (Article 6-1) obliges the courts to give reasons for their judgments": ECtHR *Hiro Balani v. Spain*, 18064/91, 9 September 1994, § 27; *Jokela v. Finland*, 28856/95, 21 May 2002, § 72; see also *Taxquet v. Belgium*, 926/05, 16 November 2010, § 83ff. Under the title "Right to good administration", Article 41.2.c of the Charter of Fundamental Rights of the European Union provides for "the obligation of the administration to give reasons for its decisions".
[127] On appeals procedures, see ODIHR Legal Digest of International Fair Trial Rights, p. 227.
[128] See *e.g. Hirschhorn v. Romania*, 29294/02, 26 July 2007, § 49; *Hornsby v. Greece,* 18357/91, 19 March 1997, § 40; *Burdov v. Russia,* 59498/00, 7 May 2002, § 34ff ; *Gerasimov and Others v. Russia*, 29920/05, 3553/06, 18876/10, 61186/10, 21176/11, 36112/11, 36426/11, 40841/11, 45381/11, 55929/11, 60822/11, 1 July 2014, § 167ff.

[129] CDL-AD(2010)039rev, Study on individual access to constitutional justice, § 96.
[130] CDL-AD(2010)039rev, § 62, 93, 165.
[131] CDL-AD(2010)039rev, § 202; CDL-AD(2002)005 Opinion on the Draft Law on the Constitutional Court of the Republic of Azerbaijan, § 9, 10.
[132] CDL-AD(2004)043, Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (introduction of the individual complaint to the constitutional court), § 18, 19; CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 19; CDL-AD(2011)040, Opinion on the law on the establishment and rules of procedure of the Constitutional Court of Turkey, § 24.
[133] CDL-AD(2011)010, Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the State prosecutor's office and the law on the judicial council of Montenegro, § 27; CDL-AD(2012)024, Opinion on two Sets of draft Amendments to the Constitutional Provisions relating to the Judiciary of Montenegro, § 33; CDL-AD(2009)014, Opinion on the Law on the High Constitutional Court of the Palestinian National Authority, § 13; The Composition of Constitutional Courts, Science and Technique of Democracy No. 20, CDL-STD(1997)020, pp. 7, 21.
[134] CDL-AD(2008)010, Opinion on the Constitution of Finland, § 115ff.
[135] There is only one (limited) exception in the Council of Europe member States with a constitutional jurisdiction: CDL-AD(2010)039rev, § 1, 52-53.
[136] CDL-AD(2010)039rev, § 1ff, 54-55, 56 ff.
[137] Cf. CDL-AD(2008)030, Opinion on the Draft Law on the Constitutional Court of Montenegro, § 71.
[138] CDL-STD(1997)020, p. 21.
[139] On the issue of corruption, see Group of States Against Corruption (GRECO), *Immunities of public officials as possible obstacles in the fight against corruption*, in *Lessons learned from the three Evaluation Rounds (2000-2010) - Thematic Articles.*
[140] On the issue of corruption in the judiciary, see II.E.1.c.ii.
[141] See Recommendation CM/Rec(2014)7 on the protection of whistle-blowers, of the Council of Europe's Committee of Ministers.
[142] See for example the United Nations Convention against Corruption; Criminal Law Convention on Corruption (CETS 173); Civil Law Convention on Corruption (CETS 174); Additional Protocol to the Criminal Law Convention on Corruption (CETS 191); CM/Rec(2000)10 on codes of conduct for public officials; CM/Res (97) 24 on the twenty guiding principles for the fight against corruption.
[143] CM/Rec(2000)10 on codes of conduct for public officials, Article 13.
[144] United Nations Convention against Corruption, in particular Article 8.5; CM/Rec(2000)10, Appendix - Model code of conduct for public officials, Articles 13ff; cf. CM/Res (97) 24 on the twenty guiding principles for the fight against corruption.
[145] The Venice Commission adopted in 2013 a Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying) (CDL-AD(2013)011). The European Committee on Legal Co-operation (CDCJ) carried out in 2014 a feasibility study on a Council of Europe legal instrument concerning the legal regulation of lobbying activities. It is expected that the draft recommendation will be submitted for approval to the CDCJ plenary meeting in November 2016.
[146] An early document (of 1981) is Article 5 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS 108) ; see also Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Articles 6, 7; in the meantime in the EU a "Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)" has been agreed on (Interinstitutional File 2012/0011 (COD) of Dec 15, 2015). Principles of data protection are enshrined in Art. 5. See also a "Proposal for a Directive of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purpose of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data" (Interinstitutional file: 2012/0010 (COD) of 16 December 2015. In 2013 the OECD adopted "The OECD Privacy Framework", with "principles" in Part 2.
[147] See the Proposal for a Regulation quoted in the previous footnote, Article 14; Directive 95/46/EC, Articles 10-11; CETS 108, Article 8.
[148] CDL-AD(2007)014, § 83.
[149] Cf. Articles 8 and 13 ECHR.
[150] Cf. Articles 8 and 13 ECHR.
[151] The level of the interference metadata collection involves in private life is disputed. The CJEU has extended privacy protection to metadata as well. The case law of the ECtHR so far accepts that lesser safeguards can apply for less serious interferences with private life. see CDL-AD(2015)006 §62, 63, 83. Where no prior judicial authorisation is provided for metadata collection, there must at least be strong independent *post hoc* review..
[152] CDL-AD(2015)011, § 8, 69, 129; cf. ECtHR *Liberty and others v. the United Kingdom*, 58240/00, 1 July 2008, § 59 ff; *Weber and Saravia v. Germany* (dec.) 54934/00, 29 June 2006, § 85 ff.
[153] CDL-AD(2015)011, § 24-27, 115ff, 129.
[154] Cf. Articles 8 and 13 ECHR; CDL-AD(2015)011, § 26, 126 ff.
[155] CDL-AD(2015)011, § 33.
[156] CDL-AD(2015)011, § 1.

[157] See *e.g.* CJEU, C-212/13, *František Ryneš v. Úřad pro ochranu osobních údajů*, 11 December 2014.
[158] CDL-AD(2007)014, § 82.

RECONNECT

Rule of Law Crisis in the New Member States of the EU

The Pitfalls of Overemphasising Enforcement

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Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement

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Abstract

The European Union and the Member States seem to be doing as little as they can against rule of law backsliding in some of the EU's constituent parts. Each of the EU institutions came up with their own plan on what to do, inventing more and more new soft law of questionable quality. All that is being done by the institutions seems to reveal one and only one point: there is a total disagreement among all the actors involved as to how to sort out the current impasse. This inaction helps the powers of the backsliding Member States to consolidate their assault on EU's values even further.

The core question is how to ensure that the EU's own rule of law be upheld. Authors argue that the most mature answer to the problems should necessarily involve not only the reform of the enforcement mechanisms, but the reform of the Union as such, as supranational law should be made more aware of the values it is obliged by the Treaties to respect and aspire to protect both at the national and also at the supranational levels. EU law should embrace the rule of law as an institutional ideal, which implies, inter alia, eventual substantive limitations on the acquis of the Union, as well as taking EU values to heart in the context of the day-to-day functioning of the Union, elevating them above the instrumentalism marking them today.

Keywords

Rule of law, democracy, EU values, EU law, rule of law backsliding, constitutional capture

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Introduction

The European Union (EU) and the Member States seem to be doing as little as they can to combat rule of law backsliding in some of the EU's constituent parts. Each of the EU institutions came up with their own plan on what to do, inventing more and more soft law of questionable quality. All that is being done by the institutions appears to reveal one and only one point: there is a total disagreement among all the actors involved as to how to sort out the current impasse. This inaction assists the powers of the backsliding Member States in consolidating their assault upon the EU's values even further. At least four key legal-political techniques are used to consolidate the undermining of the rule of law and democracy, as the present work shall demonstrate.

The core question is how to ensure the upholding of the EU's own rule of law. We argue that the most mature answer to the problems at hand necessarily requires a long-term perspective and involves, besides the reform of the enforcement mechanisms, also the reform of the Union as such. Supranational law should be made more aware of the values it is obliged by the Treaties to respect and protect, both at the national and supranational levels. EU law should embrace the rule of law as an institutional ideal, which implies, inter alia, eventual substantive limitations on the *acquis* of the Union, as well as taking EU values to heart in the context of the day-to-day functioning of the Union, elevating them above the instrumentalism marking them today.

Poland[1] has now joined Hungary,[2] doubling the number of the Member States where rule of law is not safeguarded. While more states could follow, the Union's position is, apparently, very weak: new soft law of questionable quality has been produced by each of the institutions,[3] while positive change is nowhere to be seen, notwithstanding even the belated activation of the Article 7(1) Treaty on European Union (hereinafter: TEU) mechanism.[4] Indeed, the situation seems to be evolving extremely fast and only in the direction of the deterioration of the rule of law and abuse by the executive of the independent institutions.[5] It seems that there is a total disagreement among essentially all the actors involved concerning what should be done, and the political will to sort out the current impasse is lacking at the level of the Member States, too. Supranational political party groups, instead of helping, seem to aggravate the situation.[6] This inaction helps the powers of the backsliding Member States consolidate their assault upon EU's values even further.

[1] Most importantly: T.T. *Koncewicz*, 'Of Institutions, Democracy, Constitutional Self-defence' (2016) 53 Common Market Law Review 1753. All websites were accessed on 20 July 2018; T.T. Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 Review of Central and East European Law 116; W. Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (2018) Sydney Law School Research Paper No. 18/01.

[2] K.L. Scheppele, 'Understanding Hungary's Constitutional Revolution', in A. von Bogdandy and P. Sonnevend (eds), Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania (Hart Publishing, 2015); Z. Szente, 'Challenging the Basic Values – The Problems with the Rule of Law in Hungary and the EU's Failure to Tackle Them', in A. Jakab and D. Kochenov (eds), The Enforcement of EU Law and Values (Oxford University Press, 2017) 456; K.L. Scheppele, 'Constitutional Coups in EU Law', in M. Adams, A. Meeuse and E. Hirsch Ballin (eds), Constitutionalism and the Rule of Law: Bridging Idealism and Realism (Cambridge University Press, 2017).

[3] Council of the EU Press Release no. 16936/14, 3362nd Council meeting, General Affairs, [2014] 20–21; European Commission, 'A New EU Framework to Strengthen the Rule of Law' [2014] COM(2014)158; European Parliament, 'Report with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights' [2016] (2015/2254(INL)). Cf. on all these instruments, D. Kochenov, A. Magen and L. Pech (eds), 'The Great Rule of Law Debate in the European Union' (2016 symposium), (2016) 54(5) Journal of Common Market Studies.

[4] K.L. Scheppele and L. Pech, 'Poland and the European Commission' (Parts I, II, and III), 3 January, 6 January, and 3 March 2017, available at http://verfassungsblog.de/author/laurent-pech/; D. Kochenov and L. Pech, 'Better Late Than Never? On the Commission's Rule of Law Framework and Its First Activation' (2016) 24 Journal of Common Market Studies 1062; P. Oliver and J. Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 24 Journal of Common Market Studies 1075; but see, E. Hirsch Ballin, 'Mutual Trust: The Virtue of Reciprocity – Strengthening the Acceptance of the Rule of Law through Peer Review', in C. Closa and D. Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press, 2016).

[5] U. Sedelmeier, 'Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession' (2014) 52 Journal of Common Market Studies 105; J.-W. Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States' (2014) 165 Revista de Estudios Políticos 141; A. von Bogdandy and P. Sonnevend (eds), Constitutional Crisis in the European Constitutional Area, *op. cit.*; C. Closa and D. Kochenov (eds), Reinforcing Rule of Law Oversight in the European Union (Cambridge University Press, 2016); A. Jakab and D. Kochenov (eds), The Enforcement of EU Law and Values: Methods to Achieve Compliance (Oxford University Press, 2017); L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3.

[6] R.D. Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' (2017) 52 Government and Opposition 211.

A previously unimaginable situation arose whereby the EU harbours Member States which, besides obviously not qualifying for Union membership if they were to apply today, work hard to undermine key principles the EU was created to safeguard and promote: democracy, the rule of law, and the protection of fundamental rights.[7] The underlying issue is the creation of a *modus vivendi* where the EU's own instrumentalist understanding of the rule of law, including principles such as mutual trust or the autonomy of EU law, reinforces and not jeopardises respect for values enshrined in Article 2 TEU.[8]

The paper starts out by defining the problem, focusing on the nature, and gravity of rule of law backsliding in Hungary and Poland in order to outline four key techniques deployed by the autocratic regimes in order to consolidate the constitutional capture and massive assault on European values. These techniques to achieve, legitimise, and consolidate the destruction of the rule of law include: appeals to national sovereignty; fetishisation of 'constitutional identity' taken out of context; appeals to national security complete with the harassment of the media, NGOs, and independent educational institutions; and international disinformation campaigns (Part 1). We proceed by discussing the state of the art with regard to values in the EU legal system (Part 2); followed by undergoing a normative assessment of how these values should preferably be approached (Part 3). Looking at supranational law, we argue that the root of the problem is the lack of a sufficient upgrade of the role played by values – including the rule of law – when the Union transformed from an ordinary treaty organisation into a constitutional system (Part 4). The EU's powerlessness is among the root causes of letting Member States slide into authoritarianism (Part 5). We conclude by arguing for shifting the focus of the discussion from the enforcement of the rule of law to the reform of the Union as such as a long-term solution (Part 6). There is time: illiberal regimes seem to be there to stay, and the options in regard to changing this reality, either supranationally or from a grass-roots level, are limited, if not non-existent: we might need to wait ten years – or thirty, for that matter – before Hungary and Poland are back on track. In the meantime, EU institutions should come to a more subtle realisation of the EU's constitutional role and should not insist on the specificities of EU law trumping all other considerations, including respect for the values the EU and the Member States are supposed to share, but should instead acknowledge the possibility of potential limitations so as to let the foundations of the EU, as provided for by the Lisbon Treaty, evolve. This could definitely be done in the context of a soft quarantine of Poland, Hungary, and any other backsliding states.

[7] As well as other values expressed in Art. 2 TEU; L. Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 EU Constitutional Law Review 359; D. Kochenov, 'The *Acquis* and Its Principles: The Enforcement of the "Law" Versus the Enforcement of "Values" in the EU', in A. Jakab and D. Kochenov (ed), The Enforcement of EU Law and Values, *op. cit*.

[8] M. Klamert and D. Kochenov, 'Article 2', in M. Kellerbauer, M. Klamer tand J. Tomkin (eds), EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford University Press, 2019).

1. The EU: From high expectations to jeopardy?

Whereas all Member States suffer from deficiencies in at least some elements of the rule of law, in light of a pattern of constitutional capture we focus on rule of law backsliders and follow the definition proposed by Pech and Scheppele, according to which rule of law backsliding is a 'process through which elected public authorities deliberately implement governmental blueprints which 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.'[9] In what follows we shall focus on the two Member States that presently satisfy these definitional elements, i.e. Hungary[10] and Poland.[11]

Even though countries acceding to the EU in 2004 had high hopes for joining the democratic world after the political changes, the enthusiasm for European values on the side of certain Central Eastern European Member States vanished on the way – a phenomenon which was unthinkable during the 1989 Eastern European 'velvet revolutions'. In all these countries, the separation of powers had been realised where parliamentary lawmaking procedure required extensive consultation with both civil society and opposition parties and crucial issues of constitutional concern required a supermajority vote of the Parliament. Independent self-governing judicial power ensured that the laws were fairly applied. Constitutional scrutiny played a special role in transitional democracies.

After the regime change, Hungary was the first 'post-communist' country to join the Council of Europe and abide by the European Convention on Human Rights and Fundamental Freedoms (ECHR or Convention) in 1990. Poland gained membership in the Council of Europe in 1991 and became party to the ECHR in 1993. Hungary and Poland established official relations with the North Atlantic Treaty Organization (hereinafter: NATO) already in the early 1990s and became NATO members in 1999. They also started accession talks with the European Union Member States and signed the EU Association Agreements in the early 1990s, which paved the way for full EU membership.[12] The Treaty of Accession to the European Union was signed in 2003. Hungary, Poland, six other Central and Eastern European countries as well as two Mediterranean islands became members of the European Union on 1 May 2004 as part of the biggest enlargement in the Union's history.[13] The European Union played an important role in the transformation of all the Eastern European states and in the context

[9] L. Pech and K.L. Scheppele, 'Illiberalism Within', *op. cit.*, at 8.

[10] L. Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary', in A. von Bogdandy and P. Sonnevend (eds), Constitutional Crisis in the European Constitutional Area, *op. cit.*; M. Bánkuti, G. Halmai and K. L. Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 Journal of Democracy 138.

[11] For an overview of political court-packing and other Polish developments, see, e.g., T. T. Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond', *op. cit.*; W. Sadurski, 'How Democracy Dies (In Poland)', *op. cit.* See also The Venice Commission for Democracy through Law, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001, Venice, 11 March 2016, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29001-e.

[12] K. Inglis, 'The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation' (2000) 37 Common Market Law Review 1173.

[13] A. Ott and K. Inglis (eds), Handbook on European Enlargement (T.M.C. Asser Press, 2002).

of their democratisation.[14] The principle of conditionality was used to achieve this, coupled with the presumption that any democratic or rule of law 'backsliding' would not be possible once the transformation was in place.[15] Alongside the Europe Agreements, the Union applied the Copenhagen criteria adopted by the 1993 Copenhagen European Council.[16] Clearly going beyond the scope of the Europe Agreements,[17] these criteria became the cornerstone of Hungary's and Poland's transformations throughout the first decade of this century, reshaping the core of EU constitutionalism in the process, too.[18] The shocking rate at which the deconstruction of the rule of law occurs in Poland and Hungary today demonstrates the importance of a constitutional culture beyond black letter law including constitutions, institutions, and procedures.

The shift came rather abruptly when, in April 2010, in a free and fair election the centre-right political parties Fidesz Hungarian Civic Union (Fidesz) and the Christian-Democratic People's Party (in Hungarian: Kereszténydemokrata Néppárt, KDNP)[19] got 53% of the votes, which translated into more than two-thirds of the seats in the unicameral Hungarian Parliament under the election law then in force.[20] The ruling party did not tolerate any internal dissent, and after forming the second Fidesz government[21] it eliminated – at least in the domestic setting – all sources of criticism by both the voters and state institutions, effectively disposing of any effective checks and balances. Should a discontent electorate now wish to correct deficiencies, it would be difficult for it to do so due to the novel rules of the national ballot, which fundamentally bring into question the fairness of future elections. Judicial oversight and most importantly the Hungarian Constitutional Court's room for correcting the failures of a majoritarian government have been considerably impaired, along the powers of other *fora* designed to serve as checks on government powers. Distortions of the media and lack of public information lead to the impossibility of a meaningful public debate and weaken the chances of restoring deliberative democracy. Support by the electorate is enhanced through emotionalism, revolutionary rhetoric, catchphrases such as 'law and order', 'family', 'tradition', 'nation', symbolic lawmaking, and identity politics in general. The friend/foe dichotomy is artificially created through punitive populism and scapegoating, partially through building on pre-existing prejudices,

[14] Cf. M. A. Vachudova: Europe Undivided (Oxford University Press, 2005).
[15] D. Kochenov, EU Enlargement and the Failure of Conditionality (The Hague: Kluwer Law International, 2008).
[16] C. Hillion, 'The Copenhagen Criteria and Their Progeny', in C. Hillion (ed) EU Enlargement: A Legal Approach (Hart Publishing, 2004)
[17] P.-C. Müller-Graff: 'Legal Framework for Relations between the European Union and Central and Eastern Europe: General Aspects', in M. Maresceau (ed), Enlarging the European Union: Relations between the EU and Central and Eastern Europe (Longman, 1997) 42; M. Maresceau, 'The EU Pre-Accession Strategies: A Political and Legal Analysis', in M. Maresceau and E. Lanon (eds), EU Enlargement and Mediterranean Strategies (Palgrave, 2001).
[18] W. Sadurski, Constitutionalism and Enlargement of Europe (Oxford University Press, 2012).
[19] The cooperation between Fidesz and KDNP shall not be regarded as a coalition, rather as a party alliance created already before the elections. According to their self-perception their relation is similar to the party alliance between CDU and CSU in the Federal Republic of Germany. KDNP is a tiny party that would probably not get into Parliament on its own. The insignificance of KDNP allows us to abbreviate for the sake of brevity: whenever the term 'Fidesz government' is used, the Fidesz–KDNP political alliance is meant.
[20] Act C of 1997 on the Election Procedure.
[21] Fidesz first governed between 1998 and 2002.

and partially by creating new enemies such as multinational companies or persons challenging Hungarian unorthodoxy on the international scene.

The changes can be traced back to the government's ideological roots. But unlike in Poland, ideology by the government is chosen by way of political convenience. Turning towards illiberalism was a necessity, for a government wishing to retain political and economic power at all costs, and capture the state to this end, cannot reconcile its ideological stance with the concept of liberal democracy. So Fidesz had to search for other role models than the democratic world, and found its allies in countries such as Turkey, and most importantly Russia. Even though illiberalism was relabelled as 'Christian democracy' after Fidesz was re-elected in April 2018, the same form of governance remains. Representing harshly opposing views within a short period of time never hurt Fidesz politicians, who are brilliant at explaining their reasons for a volte-face. The party, originally with strong anti-Russian sentiments, became pro-Putin – and still managed to retain public support.

Poland followed the path of illiberalism when the Law and Justice party (Prawo i Sprawiedliwość, PiS) entered government in 2015. The country experienced a very serious departure from liberal democratic principles and is going through the reversal of the rule of law in various fields.

The tools employed and the outcome are very similar to the ones in Hungary, but certain elements of the Polish case also make it distinct, illustrating that there was no Central Eastern European or even Visegrád pattern. First, unlike in Hungary, the Polish government does not have a constitution-making nor -amending majority, therefore – for the time being – it engages in rule of law backsliding by way of curbing ordinary laws; as Ewa Łętowska put it, the government has been 'trying to change the system through the back door'.[22] Second, Hungary is essentially a kleptocracy,[23] where the government may pick any ideology available on the political spectrum to acquire and retain economic and political powers. By contrast, the Polish government and especially PiS leader Jarosław Kaczyński, the *de facto* ruler of Poland, are more likely to truly believe in what they are preaching in terms of national interests. When justifying rule of law backsliding, a whole new worldview is developed, rewriting the democratic transition and the post-1989 Polish history as something fundamentally corrupt and poised by foreign interest in contravention to national ones.[24] For him, post-1989 Polish history, including the roundtable talks in 1989, is the result of an

[22] P. Pacula, Poland's 'July Coup' and What is Means for the Judiciary, 19 July 2017, available at: http://euobserver.com/justice/138567. Taking the President's announcement of a 2018 constitutional referendum into account, this might change in the future: L. Kelly, Polish President Wants Referendum on Constitution in Nov 2018, 24 May 2017, available at: http://www.reuters.com/article/poland-politics-president-constitution-idUSL8N1IQ6P0. For an immediate analysis see M. Matczak, Why the Announced Constitutional Referendum in Poland is not a Constitutional Referendum after all, 13 May 2017, available at: http://verfassungsblog.de/why-the-announced-constitutional-referendum-in-poland-is-not-a-constitutional-referendum-after-all/.

[23] Also referred to as a mafia state. See B. Magyar, Post-communist Mafia State: The Case of Hungary (CEU Press, 2016).

[24] J. Conelly, T.T. Koncewicz, Who are Today's Polish Traitors? Of Politics of Paranoia and Resentment and Missed Lessons from the Past, 15 November 2016, available at: http://verfassungsblog.de/who-are-todays-polish-traitors-of-politics-of-paranoia-and-resentment-and-missed-lessons-from-the-past/.

indecent compromise between the individuals and movements bringing about regime change and the outgoing Communist forces. Along these lines he sees all democratic institutions as a 'sham'; for him, 'the Third Republic is not a real state, but a phantom state built on the intellectual corruption of political elites, bribery, dysfunctional government caving Brussels and selling off Poland to strangers for peanuts.'[25] For PiS 'repolonisation' means taking over power, banks, land, and other property, and means reclaiming Poland from both foreigners and the corrupt political elites so as to bring about a true regime change.[26] Seemingly all means are allowed, and any checks or controls on power are seen as unnecessary burdens the state shall be freed from, so as to accomplish this purging exercise.

Illiberal governments are very well aware of the irreconcilability of their politics with European values. The states in question therefore lobby for exemptions.

a. Invocation of national sovereignty to undermine the institutions

A first technique is the invocation of national sovereignty without any further justification. Polish capture of the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, and ordinary courts happened under the pretext that 'reform' of the judiciary was a matter for the Member States and the EU acted *ultra vires* if it interfered. The Polish Constitutional Tribunal was the first institution to fall victim to state capture at the end of 2016.[27] Its powers have been considerably cut, changes were introduced to its structure and proceedings, budget cuts took place, and three justices elected constitutionally by the 7th Sejm (the lower chamber of the Polish Parliament) were not permitted to take oath, whereas three justices elected unconstitutionally by the 8th Sejm after PiS had won the elections were permitted to do so. After having rendered the Constitutional Tribunal irrelevant in upholding the rule of law, the government has done the same with the Supreme Court, the National Council for the Judiciary, and ordinary courts. The changes related to the reorganisation of the Supreme Court empower the executive to: prematurely end the tenure of judges, meaning forcefully retire them; determine the conditions and procedure for becoming a Supreme Court judge; control disciplinary procedures, amending the rules of procedure of the Supreme Court; change the total number of judges serving on the Supreme Court; reorganise the chambers in which Supreme Court justices are to serve; and restructure case allocation.[28] Ordinary court capture happened by subordinating all Presidents and Directors of courts, i.e. persons who decide on administrative and financial issues, to the Minister of Justice.[29] Even this short enumeration of government intrusions in

[25] Id.

[26] Freedom House, Pluralism under Attack: The Assault on Press Freedom in Poland, available at: https://freedomhouse.org/report/special-reports/assault-press-freedom-poland#sdendnote21anc.

[27] T.T. *Koncewicz*, 'Of Institutions, Democracy, Constitutional Self-Defence' (2016) 53 *Common Market Law Review 1753*.

[28] In disregard of national and international criticism, on 8 December 2017, the laws on the Supreme Court and the Council were adopted by the Sejm, and on 15 December 2017 they were approved by the Senate.

[29] Ustawa z dnia 23 marca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych [Law amending the act on the organization of common courts system], OJ 2017, item 803, available at: http://www.dziennikustaw.gov.pl/DU/2017/803 (in Polish).

to the powers of the courts which highlights only some of the milestones in judicial capture shows, in the words of the Venice Commission – the most authoritative body in Europe on the issues of the rule of law and judicial independence – that 'the constitutionality of Polish laws can no longer be guaranteed'.[30] Another example from the same jurisdiction is the dispute related to the felling of trees in the Białowieża Forest, a UNESCO World Heritage Site. In *Białowieża*, pending the judgment in the main proceedings, the Court of Justice ordered Poland to stop the forest management operations.[31] The Polish response was an intensified logging of trees, and Poland even asked for removing the forest in question from the UNESCO World Heritage List.[32] Reference to national sovereignty often comes without any further justification. As the above controversy shows, by questioning the powers of the EU the Polish government does not aim to initiate a legitimate discussion about the delineation between national and EU powers. It much rather wishes 'to break free from the supranational machinery of control and enforcement. Following the trajectory from the "exit in values" to the "exit in legality" reveals an inescapable logic. All institutions, domestic and supranational, are seen to be standing in the way, and their rejection is part of the comprehensive constitutional doctrine – the politics of resentment.'[33]

b. Appeals to constitutional identity to undermine the institutions

The second and more sophisticated technique is the attempt to package departures from the rule of law in the name of constitutional identity.[34] Back in 2017, the Hungarian Parliament failed to acquire the necessary quorum to constitutionally entrench the concept of constitutional identity, but after the Fidesz and its tiny coalition partner the Christian Democratic People's Party acquired a two thirds i.e. constitution amending majority, a modification to Article R) of the Fundamental Law referring to 'Hungarian cultural and Christian identity' has again been tabled. But the amendment is somewhat redundant, since the already captured Hungarian Constitutional Court (hereinafter: HCC) came to rescue the government, and developed its own theory of constitutional identity after the failed attempt to embed the concept into the Fundamental Law. When delivering its abstract constitutional interpretation in relation to European Council decision 2015/1601 of 22 September 2015 establishing provisional measures benefitting Italy and Greece, to support them in better coping with an emergency situation characterised by a sudden inflow of nationals of third countries in those Member States, the HCC invoked constitutional identity.[35] However tautological this may sound, according to the HCC 'constitutional identity equals the

[30] European Commission, 'Recommendation of 26.7.2017 regarding the rule of law in Poland' [2017] C(2017)5320, para. 10.
[31] Case C-441/17R *Commission v Poland* [2017] ECLI:EU:C:2017:877.
[32] In Case C-441/17 *Commission v Poland* [2018] ECLI:EU:C:2018:255, of 18 April 2018, the Court ruled that by carrying on with the logging in the Białowieża Forest, Poland failed to fulfil its obligations under EU law.
[33] T.T. Koncewicz, The *Białowieża* case. A Tragedy in Six Acts, Verfassungsblog, 17 May 2018, available at: https://verfassungsblog.de/the-bialowieza-case-a-tragedy-in-six-acts/.
[34] G. Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law' (2018) 43 Review of Central and East European Law 1, 23–42.
[35] 22/2016 (XII. 5.) HCC decision.

constitutional (self-)identity of Hungary'.[36] Its content is to be determined by the HCC on a case-by-case basis based on the interpretation of the Fundamental Law, its purposes, the National Avowal contained therein, and the achievements of the Hungarian historical constitution. This definition is so vague that it can be considered as an attempt of granting a *carte blanche* type of derogation to the executive and the legislative from Hungary's obligations under EU law.[37] Once Fidesz acquired a two thirds majority again in the 2018 parliamentary elections, it finally incorporated the constitutional identity to the Fundamental Law by way of the so-called seventh constitutional amendment.[38] Questioning claims of constitutional identity might well be criticised by those concerned as being ignorant or lacking respect, but European supervisory mechanisms should be well-suited and confident enough to tell the bluff apart from genuine claims of constitutional identity.[39]

c. Invocation of national security to undermine the institutions

The third technique is reference to national security. Labelling virtually anyone still capable of formulating dissent as foreign agents is a technique long used, but in Hungary it was taken to a whole new level in 2017 with the adoption of Lex CEU and Lex NGO,[40] targeting a private university and foreign-funded civil society organisations that are independent of government funds and thereby fit to express government criticism. The explanations of the laws attempting to force CEU out of the country and to limit public space for NGOs respectively attempt to delegitimise these entities by claiming they pose national security threats to the country. The phenomenon of a shrinking space for civil society can be traced in both Hungary and Poland. The narrative surrounding NGOs got very hostile. We are witnessing orchestrated smear campaigns against civil society members that are criticising the government or simply not fitting its ideological agenda.[41] In some cases, the smear campaigns are followed by

[36] Id.

[37] For English language analyses see G. Halmai, The Hungarian Constitutional Court and Constitutional Identity, 10 January 2017, available at: http://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/.

[38] See inserted Article R) Fundamental Law. The official government position is available at: http://www.kormany.hu/en/ministry-of-justice/news/the-chief-goal-of-the-seventh-amendment-to-the-constitution-is-the-protection-of-national-sovereignty.

[39] R.D. Kelemen, 'The Dangers of Constitutional Pluralism', in M. Avbelj and G. Davies (eds), Research Handbook on Legal Pluralism and EU Law (Edward Elgar, 2018); V. Perju, 'On Uses and Misuses of Human Rights in European Constitutionalism', in S. Vöneky and G. L. Neuman (eds), Human Rights, Democracy, and Legitimacy in a World in Disorder (Cambridge University Press, 2018); G. Halmai, Abuse of Constitutional Identity, *op. cit*.

[40] Act XXV of 2017 on the Modifications of Act CCIV of 20011 on National Higher Education and Act LXXVI of 2017 on the transparency of foreign-funded organisations. According to the law on NGOs, any association or foundation receiving foreign support above the amount of 23.200 EUR per year will have to notify the courts about this fact. EU money is exempted, but only if distributed by the Hungarian state through a budgetary institution. The respective organisation will be labelled as a so-called 'organization supported from abroad', which will need to be indicated at the entity's website, press releases, publications, etc. The law is disturbing in many aspects: it mimics Russian worst practices, which have been condemned by international organisations as violations of freedom of association and free speech.

[41] Associated Press in Warsaw, Police Raid Offices of Women's Groups in Poland After Protests, 5 October 2017, available at: https://www.theguardian.com/world/2017/oct/05/police-raid-offices-of-womens-groups-in-poland.

investigations undertaken by law enforcement or tax authorities, which may create an even more hostile environment for NGOs.[42] Governments deprive civil society of effective functioning by limiting their access to funding, including state but also foreign funding, as the Hungarian law obliges NGOs to indicate that they are 'organisations receiving support from abroad', and to display this stigmatising label on all their materials published.[43] This is getting very close to demonising dissenters as terrorists and indeed the government claims that NGOs receiving foreign support – i.e. the most professional ones – are helping asylum seekers, and among them terrorists, enter the country. A modification of the Hungarian Criminal Code ensures that criminal sanctions can be imposed on NGOs and individuals that provide legal or other types of aid to migrants arriving at to the Hungarian borders.[44] National security claims might not only fit into the ruling party's nationalistic, exclusionary rhetoric and scapegoating, but it can serve (i.e. be abused) as the basis for lobbying for exemptions from European standards. As Uitz points out, reference to national security, which is the sole responsibility of the Member States according to Article 4(2) TEU 'can be a much stronger centrifugal force in Europe than cries of constitutional identity could ever be. […] Therefore, it is all the more important that European constitutional and political actors realize: The carefully crafted new Hungarian laws use the cloak of national security to stab the rule of law, as understood in Europe, in the heart.'[45]

d. Disinformation campaigns at the service of the backsliding regimes

The fourth technique the autocrats use to undermine the rule of law is disinformation or misinterpretation of the laws and policies of the government. Again Hungary took the lead in 2011 when they sent a wrong translation to Brussels of their controversial new Constitution, the Fundamental Law, which looked more in conformity with EU laws and

[42] Hungarian Helsinki Committee et al., 'Timeline of Governmental Attacks Against Hungarian NGO Sphere', 7 April 2017, available at: https://tasz.hu/files/tasz/imce/timeline_of_gov_attacks_against_hu_ngos_07042017.pdf.

[43] For more details see M. Szuleka, 'First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland' (2018) CEPS Paper in Liberty and Security No. 2018-06.

[44] Article 353/ of Act C of 2012 on the Hungarian Criminal Code. For the official government position see: Website of the Hungarian Government, Strong Action is Required Against the Organisers of Migration, 24 May 2018, available at: http://www.kormany.hu/en/news/strong-action-is-required-against-the-organisers-of-migration.

[45] R. Uitz, The Return of the Sovereign: A Look at the Rule of Law in Hungary – and in Europe, 5 April 2017, available at: http://verfassungsblog.de/the-return-of-the-sovereign-a-look-at-the-rule-of-law-in-hungary-and-in-europe/.

values than the actual text.[46] From a more substantive view, the Polish[47] and Hungarian[48] responses to the Commission[49] and the European Parliament[50] invitation for a Council Decision on the determination of a clear risk of a serious breach by Poland and Hungary of values enshrined in Article 2 TEU also contain factual mistakes and deliberate deceit.[51] Up-to-date information following the fast legislative changes that sometimes happen literally overnight and solid legal research may deconstruct the fake information these texts contain and challenge the contention that these political forces engage in a dialogue, when all they do is produce documents or make some cosmetic changes in order to gain time and press on with their illiberal agenda.

Such 'anti-Member States' that abuse the law and Constitution to create autocracies take full part in governing the Union, benefit from unprecedented direct financial support, and abuse the international prestige which is associated with the membership of this organisation.[52] Poland will have received 86 billion euros under the current budgetary framework by 2020 and Hungary 24 billion, which is an unprecedented transfer of resources from democracies to illiberal regimes, which unquestionably contributes to the entrenchment of the regimes in power.

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[46] For a detailed enumeration of the discrepancies see a joint document by the Hungarian Helsinki Committee, the Eötvös Károly Policy Institute, and the Hungarian Civil Liberties Union, Full List of Mistakes and Omissions of the English Version of the Hungarian Draft-Constitution, available at: https://tasz.hu/files/tasz/imce/list_of_all_the_omissions_and_mistranslations.pdf. This technique is also employed the other way round: when the Venice Commission delivered its highly critical opinion of the Fundamental Law, it was interpreted by the Government, as if the Hungarian constitution was being praised. See, The Hungarian Helsinki Committee, NGOs Analyze Government Reactions Concerning the Venice Commission's Opinion on the New Constitution of Hungary, 18 July 2011, available at: https://www.helsinki.hu/en/ngos-analyze-government-reactions-concerning-the-venice-commissions-opinion-on-the-new-constitution-of-hungary/.

[47] See: Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary, 7 March 2018, available at: https://www.premier.gov.pl/files/files/white_paper_en_full.pdf.

[48] See, as made public by MEP Ujhelyi, 'Information Sheet of the Hungarian Government on the Issues Raised by the Draft Report of Judith Sargentini on 'A Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded', 2018, available at http://ujhelyi.eu/wp-content/uploads/2018/05/Information-sheet-of-the-Hungarian-Government-on-the-issues-raised-by-th....pdf.

[49] European Commission, 'Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law' [2017] COM(2017) 835 final.

[50] Committee on Civil Liberties, Justice and Home Affairs, 'Draft 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 [2017] (2017/2131(INL)), Rapporteur: Judith Sargentini).

[51] For an assessment of the Polish White Paper by the Polish Judges Association 'Iustitia', together with a team of experts, see, Response to the White Paper Compendium on the Reforms of the Polish Justice System, Presented by the Government of the Republic of Poland to the European Commission, 2018, available at: http://www.statewatch.org/news/2018/mar/pl-judges-association-response-judiciary-reform-3-18.pdf. For an assessment of the Hungarian information sheet see the lengthy criticism by R. Labanino and Z. Nagy, The Social and Political Situation in Hungary, 17 May 2018 available at: https://drive.google.com/file/d/1OcIlFUtg9s1-FLMRo_qF4MbywRxAAbt5/view.

[52] C. Closa, 'Reinforcing EU Monitoring of the Rule of Law', in C. Closa and D. Kochenov (eds), Reinforcing the Rule of Law Oversight in the European Union (Cambridge University Press, 2016), 13.

The international reactions to the current situation underline one thing: the Union is either content with the current situation or entirely powerless. The former is hardly convincing given both the size of direct economic transfers to Hungary and Poland as well as the dangers that these Member States bring into the Union, as fully expressed in the numerous public statements of the members of the College of Commissioners and heard during European Parliament debates. If a Member State breaches the EU's fundamental values, this is likely to undermine the very foundations of the Union and the trust between its Member States, regardless of the field in which the breach occurs.[53] Beyond harming the nationals of a Member State, Union citizens residing in that state will also be detrimentally affected. Moreover, the lack of limitations on 'illiberal practices'[54] may encourage other Member States' governments to follow suit and subject other countries' citizens to an abuse of their rights. In other words, violations of the rule of law may, if there are no consequences, become contagious.[55] Finally, all EU citizens will to some extent suffer due to the given state's participation in the EU's decision-making mechanisms. At the very least, the legitimacy of the Union's decision-making process will be jeopardised. Therefore, the latter explanation, i.e. the EU's powerlessness, seems to be the core of the matter. Such powerlessness is a consequence of a combination of the real difficulties, conceptual as well as practical, related to the enforcement of EU values,[56] but also, equally importantly, to the systematic misrepresentation of the Union's capacity by the Member States and the institutions unwilling to act, as a clear consensus on forceful dealing with the rule of law backsliding is apparently lacking.

The claims that little to nothing can be done under the current legal framework – which are heard with remarkable regularity, confirming the second supposition above – are entirely baseless, as Hillion, Besselink, and other scholars have consistently pointed out.[57] In making such claims, the Commission and other institutions point to the fact that this powerlessness is not caused by an absolute lack of Treaty instruments that would warrant intervention. Rather, the instruments that are available are apparently considered *too strong*, or, to put it differently, too toxic, to be used. Among possible instruments, the EU's 'nuclear' option stands out, we are told: Article 7 TEU could not be activated for a long time in fear that the fallout would have been too terrible and because the hurdles for starting the procedure were allegedly too insurmountable. Such justifications for inaction or engaging in substitute

[53] European Commission Communication, 'On Article 7 of the Treaty on European Union – Respect for and Promotion of the Values on which the Union is Based' [2003] COM(2003)606 final, p. 5.

[54] The term 'illiberal democracy' was coined long ago, but it gained practical relevance in the EU after Hungarian Prime Minister praised the concept in his speech given in Tusnádfürdő on 25 July 2014. Cf. Frans Timmermans' speech to the European Parliament: 'There is no such thing as an illiberal democracy'. F. Timmermans, EU Framework for Democracy, Rule of Law and Fundamental Rights, Strasbourg, Speech/15/4402, 12 February 2015, available at: http://europa.eu/rapid/press-release_SPEECH-15-4402_en.htm.

[55] S.a., Politico, Viktor Orbán: The Conservative Subversive, Politico 28, 2015, 12–15, 15.

[56] Cf. G. Itzcovich, 'On the Legal Enforcement of Values. The Importance of the Institutional Context', in A. Jakab and D. Kochenov (eds), The Enforcement of EU Law and Values, *op. cit.*; M. Avbelj, 'Pluralism and Systemic Defiance in the EU', in A. Jakab and D. Kochenov (eds), The Enforcement of EU Law and Values, *op. cit.*

[57] C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in C. Closa and D. Kochenov (eds), Reinforcing the Rule of Law Oversight, *op. cit*; L. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in A. Jakab and D. Kochenov (eds), The Enforcement of EU Law and Values, *op. cit.*

activity, like the invention of the new soft-law procedures, are difficult to reconcile with the radical deterioration of constitutionalism on the ground in the backsliding states.[58] Now that the Article 7(1) TEU procedure has been triggered against Poland,[59] and there are serious attempts to have it initiated against Hungary,[60] the opposite preoccupation comes to the fore, namely the inefficiency of the tool,[61] which leads to the reinvention of other tools in place. For instance, Article 258 TFEU or 259 TFEU has been given a broader appeal in the backsliding context,[62] as evidenced by the infringement proceedings pursued against Poland in the context of its destruction of the Supreme Court, which build on the newly-found *effet utile* and EU law scope-shaping significance of Article 19(1) TEU (as well as Article 47 CFR, read in conjunction with the former),[63] in opposition to the Pyrrhic victories in the otherwise similar Hungarian context.[64] Scholars expected this development,[65] which infuses Article 258 TFEU with clear new potential, all the necessary caution in interpreting it too broadly notwithstanding.

Some, like Vice President Timmermans, compare the present situation to that of the Austrian crisis at the turn of the millennium and fear that triggering Article 7 would similarly backfire.[66] The parallel drawn between the Austrian and current situations is misleading, however, for numerous reasons. The most obvious point is that the institutions could not have made use of the then non-existent preventive arm of Article 7 – currently Article 7(1) TEU – at the time the Freiheitliche Partei Österreichs (FPÖ) entered government, and there was no reason to make use of the provision as it then stood, i.e. to invoke the sanctioning arm.[67] Given the lack of a legally pre-defined preventive procedure, a political action was opted for that need not – but, very importantly, *could* – be taken vis-à-vis Hungary or Poland in light of Article 7. The political quarantine vis-à-vis Austria started right after the formation of the government, before those in power could have eroded European values,

[58] D. Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) EUI Working Paper LAW 2017/10.

[59] European Commission, 'Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law' [2017] (COM(2017) 835 final.

[60] Committee on Civil Liberties, Justice and Home Affairs, (2017/2131 (INL)), *op. cit.*

[61] As a consequence, the institutions see the solution in the power of the purse to provide disincentives for rule of law violations. See European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union's Budget in Case of Generalised Deficiencies as Regards the Rule of Law in the Member States' [2018] COM(2018)324 final.

[62] K. L. Scheppele, 'The Case for Systemic Infringement Actions', in Closa and Kochenov (eds), Reinforcing Rule of Law, *op. cit.*; D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool' (2015) 7 The Hague Journal of the Rule of Law, 153.

[63] Case C-64/16 *Associação sindical dos juízes portugueses* [2018] ECLI:EU:C:2018:117; M. Krajewski, '*Associação sindical dos juízes portugueses*: The Court of Justice and Athena's Dilemma' (2018) 3 European Papers 295.

[64] Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687 (compulsory retirement of judges). U. Belavusau, 'Case C-286/12 Commission v. Hungary' (2013) 50 Common Market Law Review 1145.

[65] C. Hillion, 'Overseeing the Rule of Law in the EU' *op. cit.*

[66] F. Timmermans, The European Union and the Rule of Law – Keynote Speech at Conference on the Rule of Law, Tilburg University, 31 August 2015, available at: https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en.

[67] K. Lachmayer, 'Questioning the Basic Values – Austria and Jörg Haider', in Jakab and Kochenov (eds), The Enforcement of EU Law and Values, *op. cit.*

and once the situation was thoroughly investigated, the Three Wise Men commissioned with this task did not find a violation of EU values, and accordingly suggested lifting the political sanctions.[68] EU Member States' hostile intervention against Austria was not backed by either a proper legal basis or political necessity: an illegal ad hoc action triggered by a democratic election result. The current Hungarian and Polish situations cannot be compared to the former Austrian one, since the former are long in the state of constitutional capture, which is well documented both by European institutions and in the academic literature.

2. The place of values in the system of EU law

Article 2 TEU, which makes reference to democracy, the rule of law, and a series of other (interrelated) values of the Union, is somewhat different in nature from the rest of the *acquis*. The same unquestionably applies to the violations of values: Article 2 TEU violations are not the same as ordinary *acquis* violations. Such differences are particularly acute in the context of one specific type of chronically non-compliant states, where, like in Hungary, non-compliance is *ideological* and cannot be explained by reference to the lacking capacity, 'simple' corruption, and outright sloppiness[69] – arguments one might deploy in the context of some South-East European countries.[70] Where chronic non-compliance is ideological, Article 260 TFEU becomes the *crux* of the whole story, as simple restatements of the breach under Article 258 TFEU (or Article 259 TFEU, for that matter)[71] will presumably not be enough,[72] even if the recent innovations mentioned in the previous section would probably allow for hope even in the context of the most cautious reading of the potential of these provisions.[73] The question of the effectiveness of the ideological choice favouring non-compliance made by the relevant Member States will remain open for the years to come, as the Court in consort with other institutions is in search of a more effective means of deploying the current instruments in the context of rule of law backsliding.

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[68] M. Ahtisaari, J. Frowein and M. Oreja, 'Report on the Austrian Government's Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPÖ' (2001) 40 International Legal Materials: Current Documents 1, 102–123, (The Wise Men Report).

[69] R. Uitz, 'Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 International Journal of Constitutional Law 279.

[70] E.g. M. Ioannidis, 'The Greek Case', in Jakab and Kochenov (eds), The Enforcement of EU Law, *op. cit*.

[71] See e.g., D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool' (2015) 7 The Hague Journal of the Rule of Law 153.

[72] On the main deficiencies of the system, see, most importantly, B. Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?' (2013) 19 European Law Journal, 19 (2013) 420; P. Wennerås, 'Sanctions Against Member States under Article 260 TFEU: Alive, but not Kicking?' (2012) 49 Common Market Law Review 145; P. Wennerås, 'Making Effective Use of Article 260 TFEU', in Jakab and Kochenov (eds), The Enforcement of EU Law and Values, *op. cit*.

[73] E.g. L.W. Gormley, 'Infringement Proceedings', in A. Jakab and D. Kochenov (eds), The Enforcement of EU Law and Values (Oxford University Press, 2017).

While the literature has focused on restating the EU's presumed rule of law nature,[74] as well as the issue of the enforcement of EU rule of law and other values in the defiant Member States,[75] it is crucial to realise that Europe's structural constitutional vulnerability stretches far beyond enforcement issues *per se*. Instead, it is rooted in the discrepancies between the EU's proclaimed constitutional structure as we find it in the Treaties and the reality marking the development of EU integration, as outlined above, fostering doubt as to whether the Union is actually abiding by the rule of law.[76] In the light of this structural deficiency, one can argue that the much-analysed systemic deficiency[77] in the area of values and especially the rule of law was bound to emerge sooner or later, whether in Hungary, Poland or elsewhere, as the Union matured.[78] Dealing with it will necessarily require moving beyond preoccupation with enforcement, which has engulfed all the recent literature on the subject – quite understandably, given the astonishing speed of the constitutional deterioration in both Hungary and Poland – and reforming the integration project at the core,[79] ensuring that democracy and the rule of law are endowed with a more important role to play in the context of the supranational law of the Union.

In this general context where the *acquis* and values are not synonymous, the application of the Copenhagen criteria in the context of the recent enlargement rounds particularly teaches a lesson of caution: the Commission has emerged as an institution that, when given all the responsibility regarding the preparedness of the new Member States for accession (values compliance outside the scope of the *acquis* included) failed the exercise.[80] Here, to the void of substance the lack of the capability to generate such a substance was also added, the lack of virtually any limitations emerging from the scope of the law notwithstanding. Besides illustrating the EU's built-in limitations with regard to its ability to generate the substance of Article 2 TEU rules, the pre-accession context also sounds the alarm bell on institutional capacity: the Commission is probably not the best actor to entrust with the internal monitoring of Member States' compliance with Article 2 TEU.

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[74] M. L. Fernández Esteban, The Rule of Law in the European Constitution (The Hague: Kluwer Law International, 1999); L. Pech, 'The Rule of Law as a Constitutional Principle'; W. Schröder (ed), Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation (Oxford: Hart Publishing, 2016).

[75] E.g., the contributions in C. Closa and D. Kochenov (eds), Reinforcing Rule of Law, *op. cit.*; A. Jakab and D. Kochenov (eds), The Enforcement of EU Law and Values, *op. cit.*; A. von Bogdandy and P. Sonnevend (eds), Constitutional Crisis in the European Constitutional Area (C.H. Beck, Hart, Nomos, 2015); J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order' (2013) Transatlantic Academy Working Paper No. 3.

[76] G. Palombella, 'The Rule of Law and its Core', in G. Palombella and N. Walker (eds), Relocating the Rule of Law (Oxford: Hart Publishing, 2009); G. Palombella, 'Beyond Legality – Before Democracy: Rule of Law Caveats in a Two-Level System', in Closa and Kochenov (eds), Reinforcing Rule of Law, *op. cit.*; D. Kochenov, 'EU Law Without the Rule of Law. Is the Veneration of Autonomy Worth It?' (2015) 34 Yearbook of European Law.

[77] A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What Has Been Done, What Can Be Done' (2014) 51 Common Market Law Review 59.

[78] See, for a broad discussion, D. Kochenov, G. de Búrca and A. Williams (eds), Europe's Justice Deficit? (Oxford: Hart Publishing, 2015).

[79] For a much more critical restatement of this particular argument, see, D. Kochenov, 'Is There EU Rule of Law?', in C. Closa and D. Kochenov (eds), Reinforcing Rule of Law, *op. cit.*; J.H.H. Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law', in C. Closa and D. Kochenov (eds), Reinforcing Rule of Law, *op. cit.*

[80] D. Kochenov, EU Enlargement and the Failure of Conditionality, *op. cit.*

3. How to approach the rule of law in the current context?

The essence of the rule of law, distinguishing it from legality, democracy, and other wonderful things, is that the law is constantly in tension with and controlled by law – how the EU is falling short of such institutional ideal will be demonstrated. Palombella's rule of law, which is *dialogical* in essence since it presupposes and constantly relies upon a constant taming of law with law, 'amounts to preventing one dominant source of law and its unconstrained whim, from absorbing all the available normativity'.[81] On this count the rule of law implies that the law – *gubernaculum* – should always be controlled by law – *jurisdictio* – lying outwith the sovereign's reach.[82] The tension is necessarily dialogical in nature since the absolute domination of either *gubernaculum* or *jurisdictio* necessarily destroys the core of the rule of law, which is the tension between the two. It goes without saying that making use of such a definition should necessarily be qualified by the wise words of Krygier: 'whatever one might propose as the *echt* meaning of the rule of law is precisely that: a proposal'.[83] The rule of law is a classic example of an essentially contested concept:[84] the EU is seemingly as hopeless at defining what it means as its Member States and the broad academic doctrine.[85] The debate is constantly ongoing,[86] but the last available definition,[87] inspired by the Venice Commission's guidelines,[88] could provide a solid illustration of the current state of the definitional debate. Whether one agrees with the Commission's approach or not, it seems to be beyond any doubt what the rule of law is not. It is not democracy, the protection of human rights, nor similar wonderful things, each of them

[81] G. Palombella, 'The Principled, and Winding, Road to Al-Dulimi. Interpreting the Interpreters' (2014) 1 Questions of International Law 17, 18. Similarly, see, D. Georgiev, 'Politics of Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4 EJIL 1, 4.

[82] For an analysis of this perspective, see, id.; G. Palombella, È possibile la legalità globale? (Bologna: Il Mulino, 2012); G. Palombella, 'The Rule of Law and its Core', in G. Palombella and N. Walker (eds), Relocating the Rule of Law (Oxford: Hart Publishing, 2009) 17. See also, G. Palombella, 'Beyond Legality – Before Democracy, *op. cit*.

[83] M. Krygier, 'Inside the Rule of Law' (2014) 3 Rivista di filosofia del diritto 77, at 78.

[84] For a brilliant outline of the history of contestation, see, J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 127.

[85] For a multi-disciplinary overview see e.g., G.K. Hadfield and B. R. Weingast, 'Microfoundations of the Rule of Law' (2014) 17 Annual Review of Political Science 21; L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper No. 04/09 (NYU Law School), and the literature cited therein. See also L. Pech, 'Promoting the Rule of Law Abroad', *op. cit.*, on the 'holistic understanding' of the rule of law. For a special 'Eastern-European' perspective, which is particularly important in the context of the on-going developments in the EU, see, J. Přibáň, 'From "Which Rule of Law?" to "The Rule of Which Law?": Post-Communist Experiences of European Legal Integration' (2009) 1 The Hague Journal on the Rule of Law 337.

[86] For key contributions, see, W. Schröder (2015), *op. cit.*; L. Morlino and G. Palombella (eds), Rule of Law and Democracy (Boston: Brill, 2010); G. Palombella and N. Walker (eds), Relocating the Rule of Law (Oxford: Hart Publishing, 2009).

[87] Commission, 'A New EU Framework to Strengthen the Rule of Law' COM (2014) 158.

[88] Venice Commission Document CDL-AD(2016)007-e 'Rule of Law Checklist' (adopted in 106th Plenary Session, Venice, 11–12 March 2016), as well as in the earlier version thereof: Venice Commission Document CDL-AD(2011)003rev-e 'Report on the Rule of Law' (adopted in 86th Plenary Session, Venice, 25–26 March 2011).

definitely boasting its own sound claim to existence as a notion independent from the rule of law.[89] And it is not mere legality, which is adherence to the law.

Once the rule of law and legality are distinguished, the basic meaning of the rule of law comes down to the idea of the subordination of the law to another kind of law, which is not up to the sovereign to change at will.[90] This idea, traceable back to mediaeval England,[91] is described with recourse to two key notions in order to reflect the fundamental duality of the law's fabric, indispensable for the operation of the rule of law as a principle of law:[92] *jurisdictio* – the law untouchable for the day-to-day rules running the legal system and removed from the ambit of the purview of the sovereign – and *gubernaculum*, which is the use of the general rule-making power.[93] As Krygier put it in his commentary on Palombella's work, 'the king was subject to the law that he had not made, indeed that made him king. For the king – for anyone – to ignore or override that law was to violate the rule of law'.[94] Even in the contemporary age of popular sovereignty, this statement is obviously true, since democracy should not be capable of annihilating the law. Indeed, this is one of the key points made by the defenders of judicial review.[95]

Unlike despotic or totalitarian regimes, where the ruler is free to do anything he pleases, or problematic EU Member States such as Hungary, where the constitution is a political tool, or Poland, where the executive ignores the constitution to undermine the separation of powers, or pre-constitutional democracies, which equate the law with legislation,[96] the majority of constitutional democracies in the world today recognise the distinction between *jurisdictio* and *gubernaculum*, thus achieving a sound approximation of Palombella's rule of law as an institutional ideal, in terms of maintaining and fostering the constant tension between these two facets of the law. The authority should be itself bound by clear legal norms which are outside of its control. Indeed, this is the key feature of post-war constitutionalism. The *jurisdictio-gubernaculum* distinction, lying at the core of what the rule of law is about, can be policed either by courts or even by the structure of the constitution itself through removing certain domains from *gubernaculum*'s scope.[97] The ideology of human rights is of

[89] One should not forget the wise words of Joseph Raz: 'We have no need to be converted into the rule of law just in order to believe … that good should triumph': J. Raz, 'The Rule of Law and Its Virtue', in J. Raz, The Authority of Law: Essays on Law and Morality (Oxford: Clarendon Press, 1979) 210.
[90] G. Palombella (2015) 'Beyond Legality – Before Democracy', *op. cit.*
[91] J.P. Reid, Rule of Law: The Jurisprudence of Liberty in the Seventeenth and the Eighteenth Centuries (DeKald: Northern Illinois University Press, 2004).
[92] G. Palombella (2012) Legalità globale?, *op. cit.*
[93] For a detailed exposé, see G. Palombella (2015) 'Beyond Legality – Before Democracy', *op. cit.* See also G. Palombella, 'The Rule of Law and its Core', in G. Palombella and N. Walker (eds), Relocating the Rule of Law (Oxford: Hart Publishing, 2009) 17, at 30, emphasising that this duality should not be disturbed by democratic outcomes and ethical choices.
[94] M. Krygier, 'Inside the Rule of Law' (2014) 3 Rivista di filosofia del diritto 77, 84.
[95] Cf. M. Kumm, 'The Idea of Socratic Contestation', *op. cit.*
[96] In a pre-constitutional state, the *Rechtsstaat* shapes a reality, in the words of Gianfranco Poggi, where 'there is a relation of near-identity between the state and its law': G. Poggi, The Development of the Modern State: A Sociological Introduction (Stanford: Stanford University Press, 1978) 238 (as cited in M. Krygier, 'Inside the Rule of Law', *op. cit.*, at 84).
[97] Y. Roznai, Unconstitutional Constitutional Amendments: The Limits of Amendment Powers, (Oxford: Oxford University Press, 2017) 179–196.

huge significance in this context.[98] Furthermore, the existence of international law and, [99] of course, supranational legal orders,[100] definitely contributes to the policing of the aforementioned duality.[101] The policing of the *jurisdictio-gubernaculum* divide is thus possible both through the means internal and external to the given legal system.

4. Supranational law and the instrumentalisation of values

From Lord Mackenzie Stuart[102] to *Les Verts*, which characterises the Treaties as 'a constitutional charter based on the rule of law',[103] what we have been hearing about on the subject of the rule of law in the EU actually amounts to compliance with own law.[104] This is an established understanding of legality.[105] Legality is not enough to ensure that the EU behaves like – and is – a true rule of law-based constitutional system. Should one submit that equating the rule of law and legality is a legitimate move, then, as Palombella correctly notes, our thinking 'shifts the issue from the rule of law to the […] respect for the laws of a legal system'.[106] Yet 'the rule of law cannot mean just the self-referentiality of a legal order',[107] which is the reason why contemporary constitutionalism is usually understood as

[98] G. Frankenberg, 'Human Rights and the Belief in a Just World' (2013) 12 I-CON 35.
[99] R. Dworkin, 'A New Philosophy of International Law' (2013) 41 Philosophy and Public Affairs 2.
[100] For an argument that numerous Central and Easters European states were actually motivated by the desire for external legal checks on their laws – a *jurisdictio* – when joining the Council of Europe, see, W. Sadurski, Constitutionalism and the Enlargement of Europe (Oxford: Oxford University Press, 2012).
[101] Palombella (2012) Legalità globale?, *op. cit.*, ch. 2.
[102] Lord Mackenzie Stuart, The European Communities and the Rule of Law (London: Stevens and Sons, 1977). See also G. Bebr, Rule of Law within the European Communities (Brussels: Institut d'Etudes Européennes de l'Université Libre de Bruxelles, 1965).
[103] Case 294/83 *Partie Ecologiste 'Les Verts' v Parliament* [1986] ECR 1339, 23. See also Opinion 1/91 EEA Agreement [1991] ECR 6097.
[104] M.L. Fernandez Esteban, The Rule of Law in the European Constitution (The Hague: Kluwer Law International, 1999); also, U. Everling, 'The European Union as a Federal Association of States and Citizens', in A. von Bogdandy and J. Bast (eds), Principles of European Constitutional Law (2nd ed.) (Oxford/Munich: Hart Publishing/CH Beck, 2010) 701; M. Zuleeg, 'The Advantages of the European Constitution', in A. von Bogdandy and J. Bast (eds), Principles of European Constitutional Law (2nd edn) (Oxford/Munich: Hart Publishing/CH Beck, 2010) 763, 772-779. EU institutions' own accounts of what is meant by the rule of law beyond the tautology of 'being bound by law' present a most diverse account, which found an expression in the EU's external action: L. Pech, 'Promoting the Rule of Law Abroad', in D. Kochenov and F. Amtenbrink (eds), The European Union's Shaping of the International Legal Order (Cambridge: Cambridge University Press, 2013) 108.
[105] E.g. the contributions in L.F.M. Besselink, F. Pennings and S. Prechal (eds), The Eclipse of Legality in the European Union (The Hague: Kluwer, 2010).
[106] G. Palombella (2015) 'Beyond Legality – Before Democracy', *op. cit.*
[107] Id. Compare with M. Krygier: 'To try to capture this elusive phenomenon by focusing on characteristics of laws and legal institutions is, I believe, to start in the wrong place and move in the wrong direction': M. Krygier, 'The Rule of Law. An Abuser's Guide', in A. Sajó (ed), The Dark Side of Fundamental Rights (Utrecht: Eleven, 2006) 129. See also B. Tamanaha, Law and Means to an End (Cambridge: Cambridge University Press, 2006).

implying, among other things, additional restraints through law:[108] restraints which are, crucially, not simply democratic or political.[109]

By and large, the rearticulation of the Union from an ordinary treaty organisation into a constitutional system was not accompanied by a sufficient upgrade of the role played by the core values it is said to build upon.[110] These values do not inform the day-to-day functioning of EU law, neither internally[111] nor externally.[112] Let us not forget that the promotion of its values, including the rule of law, is an obligation lying on the Union in accordance with the Treaties.[113] Indeed, unless we take the Commission's scribbles for granted, the EU's steering of countless issues directly related to the values at hand is more problematic than not. The EU is not about the values Article 2 TEU preaches, which any student of EU law and politics will readily confirm.[114] The EU's very self-definition is not about human rights, the rule of law or democracy.[115] EU law functions differently: there is a whole other set of principles that actually matter and are held dear: supremacy, direct effect, and autonomy are the key trio coming to mind.[116] Operating together, they can set aside both national constitutional[117]

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[108] For a clear discussion of the relationship between constitutionalism and the rule of law, see, M. Krygier, 'Tempering Power: Realist-idealism, Constitutionalism, and the Rule of Law', in M. Adams et al. (eds), Constitutionalism and the Rule of Law: Bridging Idealism and Realism (Cambridge: Cambridge University Press, 2017) 34–59.

[109] Naturally, this is not to say that we should do away with the political restraints. Indeed, the virtually complete depoliticisation of the law has been one of the key criticisms of the EU legal order: J. Přibáň, 'The Evolving Idea of Political Justice in the EU: From Substantive Deficits to the Systemic Contingency of European Society', in D. Kochenov, G. de Búrca and A. Williams (eds), Europe's Justice Deficit? (Oxford: Hart Publishing, 2015) 193 and M.A. Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries', in D. Kochenov, G. de Búrca and A. Williams (eds), Europe's Justice Deficit? *op. cit.*.

[110] A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 Oxford Journal of Legal Studies 549.

[111] J.H.H. Weiler, 'Europa: "Nous coalisons des Etats nous n'unissons pas des hommes"', in M. Cartabia and A. Simoncini (eds), La sostenibilità della democrazia nel XXI secolo (Bologna: Il Mulino, 2009) 51; A. Williams, The Ethos of Europe: Values, Law, and Justice in the EU (Cambridge: Cambridge University Press, 2012).

[112] For critical engagements, see, M. Cremona, 'Values in EU Foreign Policy', in M. Evans and P. Koutrakos (eds), Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World (Oxford: Hart Publishing, 2011), 275; P. Leino and R. Petrov, 'Between "Common Values" and Competing Universals' (2009) 15 European Law Journal 654.

[113] Art. 3(5) TEU.

[114] The crucial argument in this vein has been made, most powerfully, by Andrew Williams: A. Williams, 'Taking Values Seriously', *op. cit.* See, also, J.H.H. Weiler's unpublished paper 'Europe Against Itself: On the Distinction between Values and Virtues (and Vices) in the Construction and Development of European Integration' (2010) Integration Paper for the International Legal Theory Colloquium.

[115] See, most recently, Opinion 2/13 (ECHR Accession II) [2014] ECLI:EU:C:2014:2454, para. 170, which states that the fundamental right in the EU are 'interpret[ed] [...] within the framework of the structure and objectives of the EU'.

[116] Procedural principles cannot possibly replace the lack of substantive attention to the core values encompassed by Art. 2 TEU, including the Rule of Law, threatening to cause justice deficit of the Union: D. Kochenov, G. de Búrca and A. Williams (eds), Europe's Justice Deficit? (Oxford: Hart Publishing, 2015). Cf., D. Halberstam, '"It's the Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105; and P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', Fordham International Law Journal, 38 (2015), 955; D. Kochenov, 'Citizenship without Respect' (2010) Jean Monnet Working Paper (NYU Law School) No. 08/10.

[117] Case C-399/11, Melloni [2013] 107.

and international human rights,[118] as well as UN law constraints.[119] In the current crisis-rich environment,[120] the Union frequently stars as part of the problem, rather than part of the solution. The problem is, it behaves like a constitutional system endowed with authority relying on the ECJ to police this claim – a natural expectation of any legal order[121] – while failing, at the same time, to boast the necessary ABC of constitutionalism: when push comes to shove, its values play a foundational role in outlining neither the scope nor the substance of the law.[122]

Bringing the values back in is indispensable in order to infuse the EU's constitutional claims with credibility. In practice, this would mean a return to the promise of EU integration made in the days of the Union's inception.[123] A *fédération européenne* (the one mentioned in the Schuman Declaration) to be brought about via the creation of the internal market, stood for a line of developments significantly more far-reaching than the idea of economic integration as such. The former is value-based – while the latter is probably not (at least, not based on the values of Article 2), as Andrew Williams explained in his seminal work.[124]

Not the whole story was negative, though. Although, the Union's ambition has gradually been scaled down to the market – call it a hijacking of the ends by the means[125] – the Union started *de facto* playing, mostly through negative integration, the role of the promoter of liberal and tolerant nationhood, as rightly characterised by Kymlicka – advancing a very clear idea of constitutionalism based on proportionality, tolerance, and the taming of nationalism.[126] Besides, at the core of the Union there lay basic mutual respect among the Member States: the Union would be impossible should they obstruct the principle of mutual recognition.[127]

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[118] Opinion 2/13 (ECHR Accession II) [2014] ECLI:EU:C:2014:2454; Kochenov 'EU Law without the Rule of Law'.

[119] On the Kadi saga, see, G. de Búrca, 'The European Court of Justice and the International Legal Order after Kadi', Harvard International Law Journal, 51 (2010), 1. See also, of course, C-584/10 Kadi II [2013] ECLI:EU:C:2013:518.

[120] Three equally important facets of the current crisis can be outlined: values; justice; and economic and monetary. On the crisis of values, see e.g., Williams, 'Taking Values Seriously' and Weiler, 'On the Distinction'. On the crisis of justice: Kochenov, de Búrca and Williams (eds), Europe's Justice Deficit. On the economic side of the crisis, see e.g., A. Menéndez, 'The Existential Crisis of the European Union', German Law Journal, 14 (2013), 453; M. Adams, F. Fabbrini and P. Larouche (eds), The Constitutionalisation of European Budgetary Constraints (Oxford: Hart Publishing, 2014).

[121] J. Lindeboom, 'Why EU Law Claims Supremacy', 38 Oxford Journal of Legal Studies, 2018, 328.

[122] G. Peebles, '"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law', Law and Social Inquiry, 22 (1998), 581; D. Kochenov, 'On Tiles and Pillars', in D. Kochenov (ed), EU Citizenship and Federalism: The Role of Rights (Cambridge University Press, 2017) 3.

[123] On the key aspects of dynamics of EU's legal history see, B. Davies and M. Rasmussen, 'Towards a New History of European Law', Contemporary European History, 21 (2012), 305.

[124] Williams, The Ethos of Europe, *op. cit*.

[125] D. Kochenov, 'The Citizenship Paradigm', Cambridge Yearbook of European Legal Studies, 15 (2013), 196.

[126] W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice', in S. Benhabib, Another Cosmopolitanism (Oxford University Press, 2006), p. 134. See also G. Davies, 'Humiliation of the State as a Constitutional Tactic', in F. Amtenbrink and P. van den Bergh (eds), The Constitutional Integrity of the European Union (The Hague: T.M.C. Asser Press, 2010).

[127] M. Poiares Maduro, 'So Close Yet So Far: The Paradoxes of Mutual Recognition', Journal of European Public Policy, 14 (2007). For a very sophisticated analysis of the Union's effects on the Member States see A. Somek, 'The Argument from Transnational Effects I', European Law Journal, 16 (2010), 315 and A. Somek, 'The Argument from Transnational Effects II', European Law Journal, 16 (2010), 375.

This came down to frowning upon the ideology of 'thick' national identities, however glorified in some schoolbooks. The ultimate result is that the EU, sub-consciously as it were, emerged as a promoter of *one* particular type of constitutionalism,[128] which is based on the rule of law understood through national democracy and the culture of justification implying human rights protection and strong judicial review. To be a Member State of the EU in the context of these developments came to signify one thing: to stick to this particular type of constitutionalism, which is now reflected in Article 2 TEU and which also represents the most important condition to be fulfilled before joining the EU, as hinted at in Article 49 TEU.[129]

The EU thus emerged as a vehicle of the negative market-based approach to the 'values' question. Clearly, creating a market and questioning the state is not sufficient as a basis for a mature constitutional system, potentially creating a justice nugatory at the supranational level[130] – and perpetuating the Union's inability to help the Member States labouring hard to inflict a justice void on themselves, either through an outright embrace of Putin-style 'illiberal democracy', recently proclaimed as an ideal to strive for by the Hungarian Prime Minister Orbán,[131] an attack on the judiciary and the media, as in contemporary Poland,[132] or through failing to build a well-ordered and functioning modern state, as it the case in Greece[133] and Romania,[134] for instance. Outright defiance is thus not required to fall out of adherence to Article 2 TEU aspirations.

5. Supranational powerlessness as an element of Member State-level Belarusisation

The Union is thus generally powerless concerning the *enforcement* of values and, more importantly, is also indecisive as to their *content*. The very fact that we are now concerned with enforcing them seriously amounts to nothing else but a concession that the presumption that there is a level playing field amongst all Member States in terms of the rule of law etc. – i.e. the fact that all of them actually adhere to the specific type of constitutionalism the EU set out to promote – does not hold (any more). This is something the European Court of Human Rights has already clearly hinted at in *M.S.S. v. Belgium and Greece*.[135] Acknowledging this alongside the EU's obvious powerlessness as far as values are concerned is a potentially explosive combination in the Union built on Member State equality and the principle of mutual recognition. In a situation where the core values are not respected by

[128] V. Perju, 'Proportionality and Freedom – An Essay on Method in Constitutional Law', Global Constitutionalism, 1 (2012), 334.
[129] See e.g., D. Kochenov, EU Enlargement and the Failure, ch. 2.
[130] S. Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU', in Kochenov, de Búrca and Williams (eds), Europe's Justice Deficit?, p. 51.
[131] For the full text of the speech, see, The Budapest Beacon, 27 July 2014, http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592.
[132] Cf. Venice Commission, Report of 11 March 2016.
[133] M. Ioannidis, 'The Greek Case', in Jakab and Kochenov (eds), The Enforcement of EU Law, *op. cit*.
[134] V. Perju, 'The Romanian Double Executive', 246.
[135] MSS v. Belgium and Greece [2011] Application No. 30696/09.

Hungary, for instance, we are not dealing with a Member State that is revolting for one reason or another against a binding norm of European law. At the level of values, we are dealing with a *principally different Member State*, with the Belarusisation of the EU from the inside.[136]

Once the values of Article 2 EU are not observed, the essential presumptions behind the core of the Union do not hold any more, undermining the very essence of the integration exercise: mutual recognition becomes an untenable fiction, which the Member States are nevertheless bound by EU law to adhere to. This is the core of what the autonomy of EU law stands for, as confirmed by the Court in the infamous Opinion 2/13 vetoing EU accession to the ECHR.[137] In this Opinion on the draft accession agreement of the EU to ECHR, the Court of Justice highlighted the principle of mutual trust between Member States, which forms the cornerstone of the area of freedom, security and justice. In the Court of Justice's interpretation, this means that a Member State shall presume all other Member States to be in compliance with EU law, including the respect for fundamental rights. To be fair, it should be mentioned that the Court also referred to so-called 'exceptional circumstances', which would warrant deviations from the mutual trust principle,[138] but the exact nature of these exceptional circumstances was left open.[139] So as a general rule, the Court insists that autonomy considerations in the context of EU law are usually prone to prevail over human rights and other values – including the rule of law – cherished in the national constitutional systems of the Member States. Indeed, it would probably not be incorrect to argue that this would be the shortest possible summary of Opinion 2/13, which summarised EU law as it stands. The consequences for the rule of law are drastic: all the principles invoked by the ECJ to justify giving EU law the upper hand in Opinion 2/13 are procedural, while the problems that the reliance on the ECHR is there to solve are substantive. Curing substantive deficiencies of the EU legal order with the remedies confined to autonomy and direct effect is a logical flaw plaguing the EU legal system, which puzzles the most renowned commentators.[140] One cannot quarrel about the roses when the forests are burning. To agree with Eleanor Sharpston and Daniel Sarmiento, 'in the balance between individual rights and primacy, the Court in Opinion 2/13 has fairly clearly sided with the latter. The losers under Opinion 2/13 are not the Member State of the signatory States of the Council of Europe, but the individual citizens of the European Union'.[141] This is so, one must add, not only because of the potential reduction of the level of human rights protection. Rather, it is due to the fact that the EU, as Opinion 2/13 made clear, boasts an overwhelming potential to

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[136] U. Belavusau, 'Case C-286/12 Commission v. Hungary', Common Market Law Review, 50 (2013), 1145.

[137] This point has been forcefully restated in the ECJ's Opinion 2/13 (ECHR Accession II) [2014] ECLI:EU:C:2014:2454. See, e.g., para. 192.

[138] Id.

[139] In *Aranyosi and Căldăraru*, the Court of Justice had an opportunity to clarify what those exceptional circumstances might be and it made an attempt to do so, but ultimately opened more questions than it answered: see Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198. For an analysis see W. Van Ballegooij, and P. Bárd, 'Mutual Recognition and Individual Rights: Did the Court get it Right?' (2016) 7 New Journal of European Criminal Law 439–464.

[140] E.g. P. Eeckhout, 'Opinion 2/13', *op. cit.*; D. Halberstam, 'It's the Autonomy', *op. cit.*

[141] E. Sharpston and D. Sarmiento, 'European Citizenship and its New Union: Time to Move on?', in D. Kochenov (ed), EU Citizenship and Federalism, *op. cit.*

undermine the rule of law at the national level and this potential impact is not an empty threat.[142]

6. Enforcement is not a panacea: as a conclusion

The core question which emerges in the light of the discussion above, is how to ensure that the EU's own approach to the rule of law does not undermine, if not destroy, adherence to the principle of the rule of law in the Member States, which are, in fact, compliant with the values listed in Article 2 TEU. We submit that such an understanding of the rule of law cannot possibly lead to the much-needed solution of the outstanding problems. Instead, the most mature answer to the problems should necessarily involve not only the reform of the enforcement mechanisms, but *the reform of the Union as such*, as the supranational law should be made more aware of the values it is obliged by the Treaties to respect and also, crucially, to aspire to protect at both the national and supranational levels. Instead of hiding behind the veil of the procedural purity banners of autonomy, supremacy and the like, EU law should embrace the rule of law as an institutional ideal.[143] This implies, *inter alia*, eventual substantive limitations on the *acquis* of the Union as well as taking Article 2 TEU values to heart in the context of the day-to-day functioning of the Union, elevating the values above the instrumentalism marking them today. The result would be an emergence of a supranational constitutional system at the EU level, which would be truer to the glorious 'constitutional' label, and which would play a significantly more productive role in solving the backsliding challenges in Hungary and Poland, where the war against all what we believe in is currently on-going.

[142] See, further, D. Kochenov 'Is There EU Rule of Law?', *op. cit*.
[143] Cf. G. Palombella, È possibile la legalità globale?, *op. cit*.

RECONNECT is a four-year multidisciplinary research project on **'Reconciling Europe with its Citizens through Democracy and the Rule of Law'**, aimed at understanding and providing solutions to the recent challenges faced by the European Union (EU). With an explicit focus on strengthening the EU's legitimacy through democracy and the rule of law, RECONNECT seeks to build a new narrative for Europe, enabling the EU to become more attuned to the expectations of its citizens. Bringing together 18 academic partner institutions from 14 countries, RECONNECT focuses on key policy areas: economic and monetary governance, counter-terrorism, international trade and migration.

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BRIEFING

European Parliament

European Union electoral law

Current situation and historical background

SUMMARY

The European Parliament did not always enjoy the powers and democratic legitimacy it does now. This is clear from a quick glance at how Parliament has evolved. Starting life as an Assembly – a name reminiscent of institutions linked to international diplomacy – with members simply appointed by national parliaments of Member States, it grew into an institution, the European Parliament, directly elected by citizens and now the only one representing EU citizens directly. This transformation has taken several decades.

Despite Parliament's increased role, the current electoral rules remain only partly harmonised, to the extent that there is no uniform electoral process for all Member States. The current situation is that certain fundamental principles are enshrined in the 1976 Electoral Act, but many aspects are regulated by national law. This lack of a uniform electoral process also leads to differences in treatment between EU citizens depending on their country of origin and potentially deprives European elections of a truly European dimension.

Several reforms of the EU electoral system have been attempted over the years, but not all have resulted in legislation. The introduction of a transnational constituency in particular is a perennially controversial issue. Some consider it a step towards the genuine 'Europeanisation' of elections, others believe that it could increase the distance between the public and elected representatives.

While the co-existence of differing electoral rules under the aegis of common European principles is probably destined to last, the latest reform – adopted in 2018 – will bring in mechanisms designed to increase public participation in the EU political debate and make the appointment of one of the top EU leadership roles, president of the European Commission, more 'political', by means of the *Spitzenkandidaten* process.

In this Briefing

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Current EU electoral rules

The currently applicable rules on the election of Members of the European Parliament are contained in the Electoral Act of 1976 as amended in 2002. Council Decision (EU, Euratom) 2018/994 is a further modification of the 1976 Electoral Act, which will enter into force once all Member States have approved its provisions in accordance with their own constitutional requirements (Article 223 of the Treaty on the Functioning of the European Union – TFEU). This process is still ongoing; as of the May 2019 elections, Germany, Spain, Cyprus and Romania had still to approve it. The evolution in the rules is shown in Table 1 below.

Far from providing a harmonised or a uniform electoral procedure applicable in all Member States, EU electoral rules set out common principles or a common set of boundaries, giving the legislation of Member States a certain latitude. In this respect, the EU's electoral system has been defined as polymorphic, deriving from a combination of national and EU rules. As a result, there is no harmonisation across Member States of the rules on, for instance, the minimum age for active or passive voting or practical methods for casting a vote (post, embassy, e-voting); even the optional or obligatory nature of the right to vote remains a matter for national legislation. In addition, a further aspect that has repercussions on the vote for the European Parliament but that depends on national law is disenfranchisement, i.e. the act of depriving a citizen of the right to vote after a protracted period of residence outside their home State. Although the European Parliament has encouraged Member States to do away with this practice, and despite disenfranchisement having been the object of judicial scrutiny by the European Court of Human Rights (*Schindler v UK*) the conditions for awarding and withdrawing citizenship, and the rights and obligations pertaining to it, remain a matter of national law. The lack of a uniform electoral procedure creates discrepancies or even differential treatment of EU citizens, depending on their country of origin. Although Article 223 TFEU offers a clear legal basis for going beyond 'common rules' to establish a truly uniform electoral procedure, this has not been achieved yet, to the detriment both of a genuinely 'European' electoral process and of equal treatment of EU citizens.

The current rules set out in the 1976 Electoral Act consist of 16 detailed provisions (including additions to be made by Council Decision 2018/994 once the approval process is completed in all Member States) providing for the following:

- General provisions (Articles 1 and 2): the obligation to elect members as representatives of Union citizens; the obligation to use a proportional voting system – either a list system or a single transferable vote can be used, leaving Member States free to determine the procedure applicable in cases where a preferential list is used; the free and secret nature of elections by direct universal suffrage; Council Decision 2018/994 qualifies Members of the European Parliament as representatives of the Union citizens;
- Constituencies and minimum threshold (Articles 2 and 3): freedom for Member States to establish constituencies or to decide on the subdivision of the electoral area, provided the proportional nature of the voting system is preserved; freedom to set thresholds for the allocation of seats of no higher than 5 %; Council Decision 2018/994 provides that as from the first elections following the entry into force of the Decision (i.e. most likely the 2029 European elections), where the list system is used, Member States are obliged to set a minimum threshold of between 3 % and 5 % of valid votes for the allocation of seats in constituencies comprising more than 35 seats (at present this change would concern only six Member States);
- Creation of lists and visibility of European political parties (new Articles 3a and 3b): Council Decision 2018/994 adds two new articles providing that where national law sets a deadline for the submission of candidacies, this should be at least three weeks before the date fixed for the election period; Member States may allow the logo and name of the European political parties to which national parties or candidates are affiliated to appear on the ballot;

- Methods of voting (Article 4a): Council Decision 2018/994 adds a new article giving Member States the freedom to offer advance voting, postal voting, electronic or internet voting; in doing so they must be sure to uphold the relevant EU rules on the protection of personal data, voting secrecy and reliability of results;
- Term of office and mandate (Articles 5 and 6): Members' five-year term starts from the opening of the first session after each election, the mandate for all members ends at the same time; members vote on an individual basis, their mandate is independent, and they are subject to the Protocol on Privileges and Immunities of 8 April 1965;
- Incompatibilities (Article 7): the office of Member of the European Parliament is incompatible with that of member of government, Commissioner, judge, advocate-general or registrar of the Court of Justice of the EU or the Court of First Instance, Ombudsman, or a member of the following institutions, bodies or entities: Board of Directors of the European Central Bank (ECB), Court of Auditors, Economic and Social Committee, Committee of the Regions, member of bodies set up by the EU Treaties for the management of EU funds or carrying out of permanent direct administrative tasks, board of directors, management or staff of the European Investment Bank, or an active official or servant of the EU institutions, other specialised bodies or the ECB. Since 2004, being a member of a national parliament has also been incompatible with being an MEP. If a cause of incompatibility occurs during a Member's mandate, he or she should be replaced. National legislation may provide for further causes of incompatibility;
- Electoral procedure (Article 8): parts not covered in the Electoral Act itself should be governed by national law, without affecting the proportional nature of the voting system;
- Exercise of the right to vote (Articles 9 and 9a): double voting is prohibited and Member States should guarantee the respect of this principle with dissuasive, proportionate and effective penalties; Council Decision 2018/994 inserts a provision giving Member States the option of allowing their citizens to vote from a third country, in accordance with national rules;
- Monitoring of electoral rolls (Article 9b): Council Decision 2018/994 inserts a new article imposing on each Member State the obligation to designate a contact authority responsible for exchanging data on voters and candidates with its counterparts in other Member States, this authority should also, in accordance with EU data protection rules, transmit information on Union citizens who have been entered on the electoral roll or are standing as candidates in a host state, no later than six weeks before the first day of the electoral period;
- Electoral period (Articles 10 and 11): the exact time and date of election is fixed by each Member State, however elections are held within an 'electoral period' which is the same for all Member States, starting on a Thursday and ending on a Sunday; the results of the vote count may not be made officially public until polling has closed in the last Member State to vote;
- Determination of the 'electoral period' (Article 11): the power to determine the first 'electoral period' lays with Council acting unanimously, after consultation of Parliament; subsequent elections must take place at the end of the final year of the five-year period of Parliament's mandate. However, should it prove to be impossible to hold elections in that period, the Council, after consultation of Parliament, may determine another 'electoral period' that must not be more than two months before or one month after the one that would have fallen at the end of the five-year period; Parliament meets, without needing to be convened, on the first Tuesday one month after the end of the electoral period; until that first sitting the outgoing Parliament retains its powers;
- Seating of new members of Parliament (Article 12): credentials must be verified by the European Parliament. For that purpose it must rely on the results declared by Member States and must rule on any dispute arising from the application of the Electoral Act other than those arising out of the national provisions to which the Electoral Act refers;

- Filling vacant seats (Article 13): the cause of vacancy of a seat can result from the death, resignation or withdrawal of the mandate of a Member. In such situations, Member States must lay down the procedures to fill any seat that falls vacant during the five-year term of office. Where the law of a Member State provides for the withdrawal of the mandate of a member, the mandate shall end accordingly, however national authorities must duly inform Parliament; if the cause of the end of the mandate is death or resignation, the European Parliament should inform the national authorities immediately;
- Power to adopt measures implementing the Electoral Act (Article 14): this power lies with the Council, acting unanimously, on a proposal of the Parliament after consultation of the Commission. Council should endeavour to reach an agreement with Parliament in a conciliation committee composed of the Council and representatives of Parliament.

Legislative procedure

The procedure for determining or amending the EU's electoral rules is enshrined in Article 223 TFEU. This is one of the few cases where Parliament enjoys the power of legislative initiative. Parliament can make a proposal either to establish a uniform procedure or, following the changes introduced by the Treaty of Amsterdam (1999), to introduce rules in accordance with principles common to all Member States.

The Lisbon Treaty (2007) enhanced the European Parliament's role as representative of the EU's citizens; it also modified the procedure with which the electoral system could be amended, leaving the monopoly of legislative initiative with Parliament. Before the Lisbon Treaty, Article 190 of the Treaty establishing the European Community – TEC (as modified by the Amsterdam Treaty) provided that the Council, acting unanimously, could lay down the appropriate provisions after obtaining the assent of the European Parliament. Once this procedure at EU level was accomplished, the Council would recommend Member States adopt those rules in accordance with their constitutional requirements. Therefore, before Lisbon, the adoption of amendments to the Electoral Act involved a recommendation from Council to Member States, without any apparent binding effect.

With the entry into force of the Lisbon Treaty (2007), Article 223 TFEU clearly defined the procedure within the Council as a special legislative procedure whereby the Council acts unanimously. Adoption in Council requires prior consent of Parliament, with the latter acting by majority of its component members. A change in the legislative procedure also brought a change to the legal nature of the electoral law,[1] from an international agreement between Member States beyond the scope of review by the Court of Justice prior to Lisbon, to an act of secondary legislation, albeit of a peculiar nature. The Lisbon Treaty did not change, however, the need for the legislative act to be approved by the Member States according to their constitutional requirements ('ratification'). In addition to the aforementioned procedure, according to Article 4 of Protocol 2 on the application of the principles of subsidiarity and proportionality, Parliament is obliged to forward its draft legislative acts to national Parliaments.

The most recent amendments to the 1976 Electoral Act were proposed by Parliament in a resolution of 11 November 2015, based on a legislative report of the Committee on Constitutional Affairs (AFCO) (Rapporteurs: Danuta Maria Hübner (EPP, Poland) and Jo Leinen (S&D, Germany)). The process of discussion and finally adoption within Council was rather long, with an agreement reached in Coreper on 7 June 2018. Parliament gave its consent to the draft Council decision on 4 July 2018. Finally, on 13 July 2018, the Council adopted Council Decision 2018/994 with the abstention of two Member States (Belgium and the United Kingdom). Pending Council's adoption, seven parliamentary chambers submitted reasoned opinions on the draft legislative act, based on Protocol No 2 on subsidiarity and proportionality, contesting compliance with the principle of subsidiarity. Although at EU level the procedure is complete, for the provisions of Decision 2018/994 to enter into force, Member States must ratify it in accordance with their constitutional

requirements. As the ratification process was incomplete, Council Decision 2018/994 could not be applied at the May 2019 European elections.

European Parliament and direct elections

The path leading to the European Parliament becoming a directly elected assembly lasted almost two decades. The idea of a directly elected assembly dated back to the Hague Congress in 1948, and was supported by supporters of the federalist movement, such as Spinelli and Brugmans. The need for an assembly with direct representation, already contained in the founding Treaty of the European Coal and Steel Community (1952), became more palpable with the establishment of the European Economic Community (EEC) (1957). The Dehousse report (1960) addressed the need to elect the Assembly by direct universal suffrage (instead of delegations from national parliaments), but it also highlighted the problems of such an endeavour (incompatibilities, number of MEPs, etc.). The Dehousse report included a 'draft Convention' proposing an Assembly with 426 members, elected by universal suffrage for a five-year mandate, without dealing with the issue of the extension of the Assembly's powers, although this aspect had acquired some relevance in the debate surrounding the democratic legitimacy of the Assembly. The draft Convention explored the potential 'political' benefits of introducing direct universal suffrage. The Dehousse report was not approved by Council, owing not least to the political leadership in some Member States being more inclined to an intergovernmental approach to European integration (e.g. President de Gaulle of France).

In the aftermath of de Gaulle's resignation, the political landscape changed and with the perspective of a further enlargement to the United Kingdom, Denmark and Norway, direct European elections became a topical political issue. Members of the Assembly had decided in 1962 to refer to their institution as the European Parliament, although it was not until the 1986 Single European Act that this change was incorporated in the Treaties. The Vedel report (1972) remained quite cautious as regards expanding the Assembly's powers, as well as on establishing a uniform electoral law. Until the mid-1970s the process leading to democratic legitimacy of the Assembly remained blocked owing, once again, to national approaches, such as French President Pompidou continuing to follow de Gaulle's political line, and a certain scepticism regarding a more powerful Parliament from the United Kingdom. Changes in the political leadership in Germany and France, with Chancellor Schmidt and President Giscard d'Estaing, provided positive impetus for the Patijn report (1974). On the basis of this report, the Assembly adopted a draft Convention (1975),[2] containing practical details on seats, length of term, the electoral system and transitional provisions. However, it took some time and some political pressure from Parliament before the Council approved the Electoral Act on 20 September 1976.

The first elections of representatives of the European Parliament by direct universal suffrage finally took place between 7 and 10 June 1979. The elections were surrounded by much expectation as regarded their impact for the future of European integration. However, to the disappointment of federalists and despite the media coverage, which failed to depart from purely national issues, the turnout was 62 %, lower than expected. Although the 1984 European elections did not generate the expected turnout either, it has been acknowledged[3] that direct elections to the Parliament produced positive effects. First, they gave institutional autonomy to the Parliament, which could now claim power of representation on its own in the same way as national parliaments. Second, they gave Parliament some institutional independence vis-à-vis the mediation role of the Commission, allowing Parliament to enter dialogue directly with the Council. Third, they gave clearer democratic legitimacy to the institution, which could now claim to be the only one to represent European citizens, as opposed to nations or Member States.

Adopted and attempted reforms

The Electoral Act of 1976 was just the start of a journey meant to achieve the creation of a uniform electoral procedure in all Member States. At least, this was the original intention of Article 138(3) of

the Treaty establishing the European Economic Community. Instead, what was achieved was a set of common denominators, which were far from the uniform rules originally envisaged.

Basic act: the 1976 Electoral Act

The 1976 Electoral Act established direct universal suffrage, fixed the duration of the term of office of the Parliament's representatives at five years and prohibited certain dual mandates, e.g. that of Member of the European Parliament and member of a national government, the European Commission, the Court of Auditors, or other bodies. It established a common electoral period and prohibited double voting. It affirmed that Members' votes are individual and personal, established the electoral period and the date of the first elections, and introduced rules on the verification of credentials and on the procedure for filling vacant seats during the five-year term of office. Several provisions of the 1976 Electoral Act (e.g. Articles 11 and 12), mention, however, a specific course of action 'pending the entry into force of the uniform electoral procedure'. More specifically, Article 7 of the 1976 Electoral Act renders national electoral provisions applicable where the act itself does not regulate a matter.

A glimpse at the 1976 Electoral Act, with its 16 short articles, gives an indication of how little harmonised or uniform the electoral procedure was at the outset. Nevertheless, it was a point of departure from which further reforms were attempted. Parliament saw four successive reports fail within a decade, owing either to the opposition of a Member State which precluded Council's adoption (the Seitlinger report in 1982), to divisions among MEPs in which prevented adoption in Committee (the Bocklet report in 1984), or to the opposition of Council (the two De Gucht reports in 1991 and 1993). The 1991 de Gucht report, recognising the difficulties inherent in full harmonisation of the rules, fostered a step-by-step approach where 'uniformity' did not necessarily imply uniformity in every respect but merely a harmonisation of the basic features of electoral procedure.

Proportional representation of political aggregations was of particular importance at the time, and was deemed necessary to strengthen Parliament's political authority. The underlying idea was that the seats obtained in the House should match the votes cast by the electorate, hence providing the institution with a certain degree of stability. Proportional representation was therefore considered necessary in part to guarantee fair and balanced representation of all political dimensions, and to fulfil a political function in the absence of a real European government operating on the basis of a majority system. The United Kingdom, however, accustomed to a first-past-the-post electoral tradition and fearful of setting a precedent that could possibly be imported into national elections, did not agree on the need to introduce a proportional element to the EU's electoral system.

In the meantime, European integration advanced with important milestones, with the Treaty of Maastricht introducing the concept of European citizenship (Article 20 TFEU) and thus the right to vote and stand for elections in another Member State (Article 22 TFEU). In addition, the Treaty of Amsterdam (1999) offered a more nuanced legal basis compared with Article 138(3) TEC, by enabling the European Parliament to propose provisions for the election of its Members in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

First reform: Council Decision 2002/772/EC

All the above developments created favourable conditions for the Anastassopoulos report (1998) which led to a first set of amendments to the 1976 Electoral Act with Council Decision 2002/772/EC, after some modifications by the Council which rejected, inter alia, the idea of transnational lists. With this first reform, specific common principles were introduced, for example the proportional nature of the voting system, using either the list system or single transferrable vote, the abolition of the 'dual mandate', the preservation of the proportional character of the voting system despite references to national law for specific aspects of the electoral procedure, the freedom and secrecy of elections, freedom for Member States to establish constituencies for European Parliamentary

elections provided the proportional nature of the election was preserved, the possibility to set a national minimum threshold not exceeding 5 % of the votes cast, the possibility for Member States to set a ceiling for candidates' campaign expenses, a prohibition on making the results of the vote count public until the polls in the last voting Member State have closed, and introduction of clearer provisions for filling seats falling vacant during the five-year term of office.

The pace at which the competences of the European Parliament and EU integration developed was not matched by the development of the EU's electoral rules. Not only were the powers of Parliament strengthened, inter alia, by the Lisbon Treaty (2007), but the Treaty also deepened the link between Parliament and EU citizens. The Lisbon Treaty delivered a European Parliament that no longer represented the 'peoples of the States brought together in the Community' (Article 189 TEC) but represented European citizens directly (Article 10 of the Treaty on European Union – TEU). This fundamental change gave impetus, if not to revise the composition of Parliament on a lasting basis, to attempt further reform that would bring uniformity to the method by which its representatives were elected.

Hence, after Lisbon, a number of initiatives were attempted. An initial report was presented to the plenary in February 2011 by Andrew Duff (ALDE, United Kingdom) but then referred back to the AFCO committee to seek a broader consensus. In February 2012, a second, modified, Duff Report was presented to Parliament's plenary, but was withdrawn owing to uncertainties as to whether it would obtain enough support. Both Duff reports attempted structural reforms to the EU's electoral system, either with the introduction of the contentious concept of a pan-European constituency from which to elect 25 Members from transnational lists, with seats allocated following the Sainte-Laguë or D'Hondt method. Also, they sought to establish a durable and transparent method of seat allocation to reflect changing populations. The far-reaching nature of the proposals was also however the reason why they struggled and ultimately failed to find political support in Parliament, as Members were quite divided on these issues. Their aspiration to make a leap in such a highly political and nationally driven domain as electoral rules, has often been seen as a sign of a 'federalist' trend in European politics. Eventually, a third Duff report was discussed within the AFCO committee and presented to plenary where it was endorsed by a large majority of members in July 2013. The third Duff report, however, was less ambitious than its predecessors as it addressed practical arrangements in view of the 2014 elections, such as the publication of candidates' lists, gender balance among candidates, and appearance of the names of European political parties on the ballot. This third Duff report nevertheless paved the way for the *Spitzenkandidaten* process as a method for selecting the candidate for the position of president of the Commission.

Second reform: Council Decision (EU) 2018/994

There was renewed appetite for electoral reform in the aftermath of the 2014 elections. The AFCO committee took the opportunity to examine a set of modifications to the Electoral Act of 1976 with the Hübner-Leinen report, which was submitted to and adopted by plenary in November 2015. This time, the two co-rapporteurs' original proposal was rather limited in scope, dealing with the establishment of a threshold of between 3 % and 5 % for constituencies and single-constituency Member States with more than 26 seats, the determination of a deadline to establish electoral lists (12 weeks before the start of the elections), visibility of affiliation of national parties with European political parties, the right of EU citizens to vote from a third country, the obligation to ensure a gender balance, the fixing of a uniform end time for the elections (21.00 central European time (CET) on 'election Sunday'). As a result, the Hübner-Leinen report did not come up against major difficulties and was adopted by Parliament.

Some important changes were made however when the draft decision contained in the adopted report passed through Council. Here some of Parliament's proposals intended to achieve uniformity of rules were not retained by Council, e.g. a uniform deadline for the establishment and finalisation of the electoral roll eight weeks before the first election day, the obligation on political parties to select candidates in a transparent and democratic way, the obligation to ensure gender balance, or

the fixing of a uniform end time for the election. Also, a more sensitive proposal according to which Parliament would have determined the electoral period, after consultation of the Council, was rejected. The Council also modified some of Parliament's proposals, such as the possibility to set thresholds. The Council set these at between 2 % and 5 % in Member States where the list system is used for constituencies with more than 35 seats, while Parliament had originally proposed a higher threshold of between 3 % and 5 % for constituencies with more than 26 seats; Council meanwhile shortened the deadline for establishing candidate lists, which Parliament wanted set to at least 12 weeks, to at least three weeks before the electoral period where national law establishes a deadline for submission. While Parliament had also proposed a binding obligation to give equal visibility on ballot papers to names and logos of national and European parties, and to make that affiliation visible during the electoral campaign on television and radio or in electoral material, Council made it optional for Member States to allow the display of the name and logo of European political parties of affiliation. Furthermore, Parliament had proposed that Member States be obliged to enable EU citizens residing in a third country to be given the right to vote, whereas Council made it optional for Member States to organise this.

There were two more important changes in the (modified) text adopted by Council on 7 June 2018 compared with the text adopted by Parliament on 11 November 2015 on the reform of the 1976 Electoral Act.

The first change relates to the lack of any reference in the text adopted by Council to the *Spitzenkandidaten* process, which had been part of Parliament's proposal (Article 3f) for a Council decision, and would have made it compulsory for European political parties to nominate their candidates for the position of president of the Commission at least 12 weeks before the start of the electoral period. The contentious, yet new, *Spitzenkandidaten* process experiment can be seen as an issue that divided the two institutions: Parliament seeing it as a successful and democratic method worthy of official validation in the Electoral Act, and Council seeing it as a non-essential or non-binding process.

A second clear change relates to transnational lists. The introduction of a joint constituency was proposed in the text adopted by Parliament in November 2015 (Article 2a of the proposed Council decision and paragraph Q of the accompanying resolution), but was not retained in the text adopted by Council in June 2018. This outcome is probably linked to another reform closely linked to electoral rules, i.e. that concerning the composition of Parliament. Indeed, a few months before adoption by Council of the decision on electoral rules, Parliament adopted a resolution and draft decision during its plenary session of 7 February 2018 on the composition of Parliament, that did not retain the introduction of a joint constituency as contained in the original AFCO committee report (Article 4 of the report and paragraphs G, H, I and J). It is likely that this outcome in Parliament in February 2018 on the composition of Parliament influenced a parallel outcome in Council on the reform of the Electoral Act of 1976.

Council reached an agreement on the draft Council decision modifying the Electoral Act of 1976 two and a half years after the end of Parliament's procedure, on 7 June 2018. Despite Council modifications to Parliament's original proposal reducing its broader original scope, Council Decision (EU) 2018/994 is a step towards making the EU's electoral process more transparent, facilitating a higher degree of engagement by raising the electorate's awareness in good time ahead of 'election day', and taking advantage of technological developments while upholding voting secrecy and personal data protection standards.

Table 1– Overview of the Electoral Act of 1976 and subsequent changes

	Electoral Act (Decision 76/787 EEC)	Council Decision 2002/772/EC	Council Decision 2018/994
General provisions	- Members of the Assembly are representatives of the States brought together in the Community. - establishment of direct and universal suffrage - definition of start and end of the five-year term of office - individual and personal nature of a Member's vote, independence of Members from instructions, enjoyment of privileges and immunities - indication of number of seats attributed to each Member State	- Members of the Assembly become 'Members of the European Parliament' - establishment of a proportional voting system using the list system or single transferrable vote. Preferential lists are allowed based on procedures established by national legislation. - freedom and secrecy of elections - Member States may establish constituencies for elections, or subdivide the electoral area, provided the proportional nature of voting is maintained. - possibility for Member States to set a threshold of 5 % for allocation of seats, and a ceiling for campaign expenses	- Members of the European Parliament become representatives of the citizens of the Union. - In addition to the existing 5 % threshold, Member States in which the list system is used are obliged to set a minimum threshold for the allocation of seats for constituencies of more than 35 seats. This threshold should be no lower than 3 % and no higher than 5 % of the valid cast votes in the constituency concerned, including single-constituency Member States. - Where there is a national deadline for the submission of candidacies, this deadline shall be at least three weeks before the date of the European elections in that Member State. - Member States may allow the name and logo of the European political parties to which candidates or national parties are affiliated to be displayed on ballot papers
Incompatibilities	Establishment of incompatible dual mandates for MEPs: membership of a national government, the Commission, the Court of Justice (including registrar and advocate general), the Consultative Committee of the European Coal and Steel Committee, Economic and Social Committee, other committees and bodies set up by the Treaties, the board of directors, management committees or staff of the European Investment Bank, active servant or official of the institutions or one of their specialised bodies.	Additional incompatible dual mandates for MEPs were added: - member of the Board of Directors of the ECB - judge of the Court of First Instance - EU Ombudsman - active official or servant of the ECB - as from 2004, member of a national parliament (there were transitional provisions concerning certain members of the Irish or UK Parliaments)	
Power to amend electoral procedure/adopt implementing measures **Monitoring measures**	Based on Article 138 EEC, Parliament to draw up a proposal for a uniform electoral procedure. Pending that, where not provided by the Electoral Act, national law should apply - implementing measures of the Electoral Act to be adopted by Council on a proposal of Parliament after consultation of the Commission, with the aid of a conciliation committee composed of the Council and representatives of Parliament	Clearer phrasing stating that, subject to the provisions of the Electoral Act, the electoral procedure is governed by national provisions that may, if appropriate, take into account the specific situation in a Member State, subject to respect for the proportional nature of the voting system	Member States are to designate a contact authority responsible for exchanging data on voters. This authority should also, in accordance with EU data protection rules, transmit no later than six weeks before the first day of the electoral period, information on Union citizens who, in a host state, have been added to the electoral roll or are standing as candidates.
Exercise of vote	- prohibition of double voting - first ever election dates fixed by Member States within an 'electoral period' (Thursday morning to Sunday) to be fixed by Council after consultation of Parliament; subsequent election dates to fall at the end of the five-year mandate. If that is not possible the Council, after consultation of the Assembly, is to determine another period falling no more than two months	- replacement of the provision forbidding the counting of votes starting before the close of polling in the last Member State to vote with a provision that instead forbids countries from making the results of the vote officially public before the last-voting Member State has closed the polls	- Member States to take deterrent measures against double voting - Member States may take measures, in accordance with their national procedures, to allow their citizens to vote from a third country. - Member States may offer the possibility to vote in advance, using postal voting, or electronic or internet voting, provided they ensure

	before or one month after the date that would fall at the end of the five-year mandate - Counting of votes may start only when polling has closed in the last country to vote - Parliament shall convene without convocation after the elections on the first Tuesday following one month after the end of the 'electoral period'.		the result is reliable, and uphold voting secrecy and EU legislation on personal data protection.
Start of electoral mandate/vacancy of seats	- The Assembly is competent to verify the credentials of members based on results declared by national authorities. - Procedures to fill vacancies during the five-year mandate are established by national law subject to provisions of the Electoral Act.	- Reasons for a vacancy must be specified: resignation, death or withdrawal of the mandate. - Where national legislation provides for the withdrawal of a mandate, the mandate may end in accordance with national provisions, and national authorities shall inform Parliament. - In the event of the resignation or death of an MEP the European Parliament should inform national authorities.	

Composition of Parliament

The issue of the democratic election of Parliament is closely connected with the composition of the institution itself. In this respect, Parliament's composition has reflected the various enlargements that have occurred over the years but is also the fruit of political bargaining among Member States. Few Treaty provisions deal with the composition of Parliament. Article 14(2) TEU qualifies its members as representatives of Union citizens and determines the maximum number as 750 plus the President (751). Within that range, each Member State should not be allocated fewer than 6 or more than 96 seats, in accordance with the principle of degressive proportionality. This principle was not defined by the Treaties, and it was not until the Lamassoure-Severin report (2007) that an explicit definition was set out. Accordingly, degressive proportionality is the (somewhat circular) concept according to which 'the ratio between the population and the number of seats of each Member State must vary in relation to their respective populations in such a way that each Member from a more populous Member State represents more citizens than each Member from a less populous Member State and conversely, but also that no less populous Member State has more seats than a more populous Member State'. Translating digressive proportionality into a concrete allocation of seats involves complex mathematical formulae.

In 2011, the AFCO committee examined a formula recommended by a group of experts and referred to as the 'Cambridge Compromise', including one of its mathematical variants, but without reaching a definitive position. As a result, the composition of Parliament for the 2014 elections was set in a Council Decision of 28 June 2013, and was based on a practical solution rather than on a stable, durable and transparent method, as Parliament had wished. More recently, triggered by the prospect of vacant seats following the United Kingdom's withdrawal from the EU, and also taking into account the current imperfect translation of the digressive proportionality principle into seat allocation, the AFCO committee examined further proposals put forward by experts (the Cambridge proposal and the Power proposal). Far from being a sterile mathematical discussion, the issue of finding an appropriate allocation formula is of crucial political importance as it might also imply, as experts have highlighted, the need to revise qualified majority rules in Council in order to achieve a better interinstitutional balance and avoid the risk of penalising middle-sized Member States.

The AFCO committee report on the composition of Parliament (Rapporteurs: Danuta Maria Hübner (EPP, Poland) and Pedro Silva Pereira (S&D, Portugal)) adopted by Parliament on 7 February 2018 and submitted to Council, contained a proposal for a Council decision that acknowledged the lack of political maturity for a permanent system of allocation, took stock of the future withdrawal of the

United Kingdom from the EU and proposed to redistribute 27 of the 73 seats that will become vacant following Brexit, among some Member States to re-balance the current imperfect application of digressive proportionality. The remaining 46 seats would be available for possible future enlargements. This partial re-distribution would cause no loss of seats for any Member State and would take into account recent demographic shifts. As a result, the report proposed to reduce the number of seats from 751 to 705. The resolution adopted by Parliament was smaller in scope than the AFCO report on which it was based, as the latter had included the possibility to re-allocate the remaining 46 seats to a possible joint constituency based on transnational lists in future elections. References to joint constituencies were removed from the resolution adopted by Parliament with the consequences highlighted previously. Since, according to Article 14(2) TEU, the decision determining the composition of Parliament must be adopted, on a proposal of Parliament, by the European Council unanimously, subject to Parliament's consent, the European Council adopted the decision at its meeting on 28 June 2018, following Parliament giving its consent on 13 June 2018.

'Europeanisation' of the electoral process

The lack of a uniform EU electoral law, and the corresponding desire, notwithstanding that, to enhance the European dimension of the elections has spurred the proposal or establishment of mechanisms or practices intended to 'Europeanise' the electoral process.

One such mechanism has been the idea of **transnational lists** for pan-European constituencies, set up by European parties. This idea emerged for the first time with the Anastassopoulos report (1998) and was proposed again with the Duff report in 2011 to 2012. The Duff report intended to reserve 25 seats for a pan-European constituency, to be elected with a second vote through transnational lists (either closed or semi-open), on which candidates originated from at least one third of Member States. The idea that this could strengthen the link between Parliament's members and the citizens was advocated by several parties. In February 2018, the European Commission considered transnational lists an opportunity to create a political space for public debate, and some Member States supported it (France (President Macron's speech at the Sorbonne university in September 2017), and the southern European countries). On the other hand, opponents consider transnational lists a potentially 'elitist' exercise (EPP, Visegrad States). Transnational lists through which to elect members in joint constituencies have often been a controversial issue where differing positions depend not only on political affiliation, but may also differ within the same political family.

As a further 'Europeanising' practice, the ***Spitzenkandidaten*** process was first established ahead of the 2014 elections and recently repeated before the 2019 elections with the intention to enhance the political meaning of the process leading to the appointment of the president of the Commission. The *Spitzenkandidaten* idea builds on the enhanced role of the European Parliament established by the Lisbon Treaty (2007), whereby Article 17(7) TEU tasks the European Council, acting by qualified majority and after holding the appropriate consultations, with proposing to the European Parliament a candidate for President of the Commission. The crucial novelty is that in making such a proposal, account should be taken of the elections to the European Parliament. This intentional link with the political composition of the European Parliament was meant to establish a political and institutional connection between the European Parliament and the Commission, enhancing the latter's democratic legitimacy.

The European Parliament hoped therefore to design a method whereby European political parties would contribute to the process by appointing lead candidates for the position of Commission president. The *Spitzenkandidaten* process has attracted support from some, praising the increased visibility and democratisation of the appointment of the highest EU executive position. This is supposed to create a broader platform for debate among candidates bringing not only increased transparency and political legitimacy to the role of Commission president, but also greater involvement and awareness of EU citizens in the process. Notwithstanding these benefits, the *Spitzenkandidaten* process also attracted criticism focused on its 'elitist' nature, making the process difficult for EU citizens to understand, the risk of excessive 'politicisation' of the Commission

president role, and, most importantly, the shift of the institutional balance away from the prerogatives of the European Council which, according to the Treaties, remains the institution empowered to propose the candidate for Commission president. The *Spitzenkandidaten* process took place ahead of the 2014 and 2019 elections with mixed results. Commentators noted that positive effects could have been noticed in the 2014 elections, where turnout was seen to have stabilised and the downward spiral was mitigated. With respect to 2019, there was a percentage increase in the turnout from 42.61 % to 50.99 %, although this might be also due to the historic importance of the 2019 elections and the polarisation of the recent electoral context.

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BRIEFING

European Parliament

Rules on political groups in the EP

SUMMARY

Members of the European Parliament (MEPs) may form political groups; these are organised not by nationality, but by political affiliation. Since the first direct elections in 1979, the number of political groups has fluctuated between seven and ten. Following the 2019 elections, the number, size and composition of political groups is likely to continue to fluctuate, as a result of the possible dissolution of some political groups and the creation of new ones.

To form a political group, a minimum of 25 MEPs, elected in at least one quarter (currently seven) of the EU's Member States is required. Those Members who do not belong to any political group are known as 'non-attached' (*non-inscrits*) Members.

Although the political groups play a very prominent role in Parliament's life, individual MEPs and/or several MEPs acting together, also have many rights, including in relation to the exercise of oversight over other EU institutions, such as the Commission. However, belonging to a political group is of particular relevance when it comes to the allocation of key positions in Parliament's political and organisational structures, such as committee and delegation chairs and rapporteurships on important dossiers. Moreover, political groups receive higher funding for their collective staff and parliamentary activities than the non-attached MEPs.

Political group funding, however, is distinct from funding granted to European political parties and foundations, which, if they comply with the requirements to register as such, may apply for funding from the European Parliament.

This briefing updates an earlier one, of June 2015, by Eva-Maria Poptcheva.

In this Briefing

EPRS | European Parliamentary Research Service

Author: Laura Tilindyte
Members' Research Service

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EN

Evolution and role of political groups

Members of the European Parliament sit in political groups. These are not organised by nationality, but by political affiliation. This is the legacy of the European Coal and Steel Community (ECSC) Common Assembly – the precursor of the European Parliament (EP) – which, as early as 1953, recognised three trans-national political groups (Christian democrats, socialists and liberals) in its internal rules of procedure. Several years later, the Assembly abandoned alphabetical seating order in favour of seating by political affiliation, making it a genuine transnational parliament organised along ideological lines.[1]

Political groups – which are to be distinguished from European political parties (see below) – are central to the work of the European Parliament. Through the creation of political blocs, groups make a significant contribution to the Parliament's operational capability, by preventing too great a fragmentation and facilitating the decision-making process. Political groups are essential for building majorities in Parliament, and in organising, coordinating and supporting the activities of their members. The vast majority of the total 232 national political parties represented in the outgoing Parliament were integrated in a political group.

The EP political groups do not operate as strong a system of group discipline as in most national parliaments. Nonetheless, EP groups have achieved high levels of **voting cohesion**: research has suggested that, generally, the groups of the Greens/European Free Alliance, the European People's Party and the Progressive Alliance of Socialists and Democrats have achieved the highest levels of cohesion (95.62 %, 93.71 % and 91.99 % respectively), whereas the Europe of Freedom and Direct Democracy group had demonstrated the lowest.[2]

Since the first direct elections in 1979, the number of political groups has fluctuated between **seven and ten**. The centre-right Group of the European People's Party (EPP) and the centre-left Group of the Progressive Alliance of Socialists and Democrats (S&D) have traditionally been the largest groups, flanked by smaller ones to the left, right and in the centre. The combined share of the EPP and the S&D groups in the Parliament amounted to a record 66 % during the 1999-2004 parliamentary term. Since then, however, it has been on the decrease, dropping to 54.8 % after the 2014 elections (see chart below). After the May 2019 elections, the EPP/S&D share dropped further, to 44.2 %.

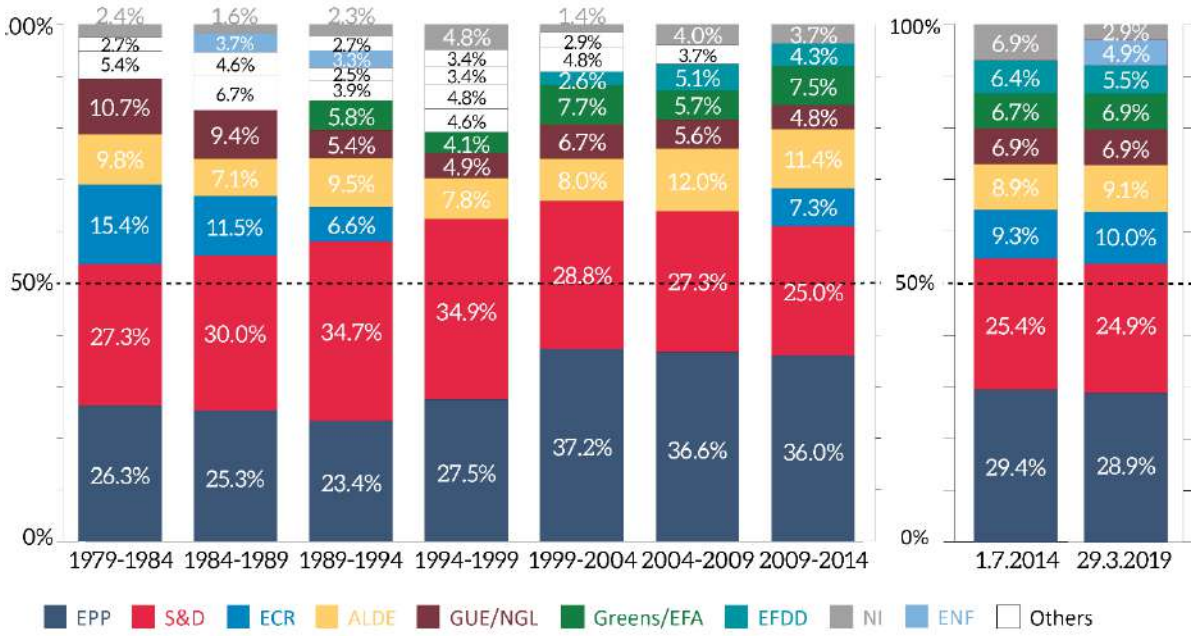
At the beginning of the 2014-2019 parliamentary term, there were seven political groups, but June 2015 saw the creation of an eighth – the Europe of Nations and Freedom (ENF) group. The number, size and composition of political groups will continue to fluctuate in the near future, not only due to the outcome of the 2019 elections but also due to the prospect of Brexit and the departure of the British Members. Furthermore, ALDE group leader Guy Verhofstadt had already announced in May 2019 that the ALDE group would dissolve to form a new pro-European, centrist group together with the 'Renaissance' list established by the President of France, Emmanuel Macron.

The eight political groups in the outgoing 2014-2019 Parliament in order of size were:

- Group of the European People's Party (Christian Democrats) (EPP), 219 MEPs,
- Group of the Progressive Alliance of Socialists and Democrats in the European Parliament (S&D), 189 MEPs,
- European Conservatives and Reformists Group (ECR), 70 MEPs,
- Group of the Alliance of Liberals and Democrats for Europe (ALDE), 68 MEPs,
- Group of the Greens/European Free Alliance (Greens/EFA), 52 MEPs,
- Confederal Group of the European United Left – Nordic Green Left (GUE/NGL), 51 MEPs,
- Europe of Freedom and Direct Democracy Group (EFDD), 44 MEPs,
- Europe of Nations and Freedom (ENF), 36 MEPs.

In addition, some MEPs sat as non-attached Members (*Non-inscrits* – NI, 20 MEPs).

Strengths of the political groups, July 1979 - March 2019



Source: European Parliament: Facts and Figures, EPRS, April 2019.

NB: The figures for the first seven terms relate to the constituent sessions, in July of the first year indicated.

Formation and dissolution of political groups

The rules for the formation of political groups are stipulated in Parliament's Rules of Procedure, which provide that 'Members may form themselves into groups according to their political affinities' (Rule 33). Parliament does not normally assess the political affinity of members of a group, taking this as read unless the Members concerned indicate otherwise (interpretation of Rule 33). To form a political group, a minimum of 25 MEPs elected in at least one quarter of the EU's Member States (currently seven) is required. A Member may not belong to more than one political group.

Recent changes to the Rules of Procedure require all members of a new group to declare in a written statement 'that they share the same **political affinity**' (Rule 33(5)). A group's formation must be notified in a statement to the President of Parliament. Such a statement must contain: (a) the name of the group, (b) a political declaration, setting out the purpose of the group and (c) the names of its members and bureau members. Most recently, the Parliament decided on 17 April 2019 to confirm the following interpretation regarding the requirement of the political declaration (point b above):

> *The political declaration of a group shall set out the values that the group stands for and the main political objectives which its members intend to pursue together in the framework of the exercise of their mandate. The declaration shall describe the common political orientation of the group in a substantial, distinctive and genuine way.*

The definition of 'political affinity' has long been a contentious issue, underpinned by the wish to prevent the formation of purely technical groups, created to take advantage of the benefits offered by belonging to a group. In 1999, Parliament rejected the creation of a Technical Group of Independent Members (TDI). When challenged, this decision was upheld by the European Court of First Instance, which considered it as justified in order to allow Parliament to ensure its proper functioning.

If during the legislative term, a group falls below the required threshold, the President, with the agreement of the Conference of Presidents, may allow it to continue to exist until Parliament's next constitutive sitting, under two conditions: namely, that the Members continue to represent at least one fifth of the Member States, and that the group has existed for a period longer than one year.

This exception is not applied if there is sufficient evidence to suspect that it is being abused (Rule 33). The President must announce the establishment as well as the dissolution of political groups in Parliament.

Non-attached MEPs do not establish a separate political group, as is the case in some national parliaments, which have a 'mixed group'. Members may change political groups or become non-attached Members, as happens regularly during a term.

Rights of political groups and of non-attached Members

Advantages of belonging to a political group

Belonging to a political group is of particular relevance for the allocation of key positions in Parliament's political and organisational structures. For example, nominations for the EP President, the 14 Vice-Presidents and the 5 Quaestors may only be made by a political group or Members reaching at least the 'low threshold', which is currently (June 2019) defined as 1/20th of Parliament's Members, i.e. 38 MEPs (Rule 15). Non-attached Members can nominate individuals to **committees and delegations** (Rule 209), but they are unlikely to be elected to positions as committee chairs or to be appointed rapporteurs on significant dossiers. However, the smallest political groups also obtain very few committee chairs.

Belonging to a political group is also important when it comes to the allocation of **speaking time in plenary debates**. For the first part of a debate, a first block of speaking time is divided equally among all political groups; a further share is then divided among the political groups in proportion to their size. Finally, the non-attached Members are allocated an overall speaking time based on the fractions allocated to each political group (Rule 171). Similarly, only political groups or a group of 38 MEPs (low threshold) may request that an extraordinary debate be placed on the Parliament's agenda (Rule 161).

Rights of individual Members or groups of Members acting together

Although the political groups play a very prominent role in Parliament's life, individual MEPs and/or several MEPs acting together also have numerous rights, provided for in the Parliament's Rules of Procedure. For instance, although only the chairs of the political groups, together with the President, are members of the Conference of Presidents – Parliament's political body responsible inter alia for drafting the agenda for plenary sessions – one non-attached Member is invited to attend its meetings, but does not have a vote (Rule 26).

Like any other Member, non-attached MEPs can table **amendments** for consideration in committee (Rule 218). Moreover, they can participate, like political groups, in the **oversight of other EU institutions**. Acting together, 38 MEPs (1/20th of Parliament's members) can, for instance, put questions to, inter alia, the Council or the Commission for oral answer with debate (Rule 136), whilst any Member may put questions for written answer to these and other EU institutions (Rule 138). Moreover, any Member is entitled to participate in question time with the Commission in plenary (though it should be noted that such sessions have rarely been held in recent years). The President is required to ensure, as far as possible, that Members holding different political views and coming from different Member States are given the opportunity to put a question to the Commission during such sessions (Rule 137).

Members can put a question to another Member by raising a 'blue card' during that Member's speech (Rule 171) and make one-minute-long explanations of vote (Rule 194). Furthermore, at least 40 MEPs can ask for a vote to establish whether the **quorum** is present, whereas political groups are not entitled to make such a request on behalf of their Members (Rule 178).

Any Member may table a legislative proposal on the basis of the (indirect) right of initiative conferred upon Parliament under Article 225 of the Treaty on the Functioning of the European Union (TFEU) (Rule 47). However, **legislative own-initiative reports** must be adopted by a parliamentary committee. The decision to request authorisation to draw up such a report is prepared by the political group coordinators in the committee concerned. While non-attached Members do not participate in coordinators' meetings, they must be guaranteed access to information regarding the proceedings (interpretation of Rule 214).

Financing and staff

The budget of the European Parliament is the sole source of funding for political groups and non-attached MEPs. Allocations to political groups and non-attached MEPs are subject to rules laid down by the Bureau of the Parliament. Appropriations are made available under budget item 400 of the general budget of the Union, and amount to €64 million for 2019. They are intended to cover both administrative and operational expenditure of the secretariats of political groups and non-attached Members, and expenditure on political and information activities conducted in connection with the Union's activities. They cannot be used to fund European political parties (these are funded under a different budget line, see below) or any European, national, regional or local electoral campaign, but rather for staffing and other parliamentary activities. The budget is allocated at the beginning of each year by the Bureau, on the basis of the number of Members in each group (and the number of non-attached Members) as at 1 January of the year in question, according to a proposal from the chairs of the political groups.

The payment of salaries to MEPs' accredited assistants is covered by separate budget items, with every MEP having the same amount at their disposal to spend on assistants regardless of group membership.

(Article 33(4), Implementing measures for the statute for MEPs)

Changes in the composition of groups

Changes in the composition of political groups (or non-attached Members) during the course of the financial year results in a re-allocation from the beginning of the following month, but effectively takes place only at the beginning of the following financial year, when the appropriations are paid (and any recovery of sums paid is effected). Where a non-attached Member joins a political group, the balance of appropriations not used by the non-attached Member is, if appropriate, transferred to the group concerned.

Accordingly, if a new political group is formed in the course of a legislative term, its allocations for the calendar year of its formation would be funded partly from allocations paid to any non-attached MEPs joining the group and partly from a redistribution of allocations to the existing groups, with the latter taking effect only at the beginning of the following financial year, unless the Bureau decides otherwise.

Each political group receives its annual budget for political and information activities at the beginning of the year, and is responsible for the management of its expenditure. In contrast, Parliament's secretariat settles expenditure for non-attached Members either through direct payments to suppliers or through reimbursement of the Members. The Directorate-General for Finance verifies that all such expenditure for non-attached Members complies with the rules, and will not pay or reimburse if this is not the case. The audited annual statements of revenue and expenditure of the political groups, together with consolidated statements for all non-attached Members prepared by Parliament's secretariat, are delivered to the Bureau and to the Committee on Budgetary Control, and published on Parliament's website. Up to 50 % of the annual appropriations not used by groups or by the non-attached Members may be carried over to the following year. Any amount exceeding this limit is returned to Parliament. **Years in which European elections are held** are split into two budgeting periods (1 January to 30 June and 1 July to 31 December). In such years, for the purpose of calculating the carry-over for groups that continue

to exist after the elections, the two half-yearly periods are aggregated and regarded as a single financial year.

Each political group is provided with a secretariat, funded from Parliament's budget. The number and grades of the – predominantly temporary – staff are determined in proportion to the number of Members in the group. Non-attached MEPs too are provided with a secretariat paid from Parliament's budget. Political groups may also employ contractual staff using funding under item 400, whereas non-attached Members may not use such funding for this purpose.

European political parties and foundations

The political groups in the European Parliament are not identical to the European political parties. Most of the national parties represented within a given political group are also members of the corresponding political party at EU level; however, in some political groups there is more than one European political party (e.g. the ALDE group, and the Greens/EFA group). Moreover, one and the same political group may house several national parties from the same country. MEPs can normally join a political group in the Parliament, even if they do not belong to a national party that is a member of the related European political party, under conditions laid down in the rules of the group concerned.

European political parties are (con-)federations of national political parties sharing a political affiliation. The role of political parties at EU level is set out in Article 10(4) TEU and Article 12(2) of the EU Charter of Fundamental Rights, stipulating that 'Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union'. The importance of European political parties for democracy at EU level is thus twofold. On the one side, they represent the link between Union citizens and the public power in the European institutions.[3] On the other, European political parties function as channels for a truly European public debate in a transnational public space. European political parties came into the spotlight in the 2014 and 2019 European elections, with most European political families nominating lead candidates for the position of the President of the European Commission.

Since July 2004, European political parties have been able to receive annual funding from the European Parliament for their activities at EU level. The rules governing the European political parties and their funding are laid down in Regulation 1141/2014, adopted by the Parliament and Council following the ordinary legislative procedure (Article 224 TFEU). This regulation was last amended in May 2018 (see an EPRS briefing of September 2018). The maximum available for grants to European political parties in 2019 amounts to a total of €50 million, compared to €32.44 million in 2018 (item 402 of the budget of the EU).

European political **foundations** must be affiliated to European political parties. They are intended to contribute to the debate on European public policy issues, inter alia, by organising conferences and conducting studies. They can apply for funding from Parliament through the European political party to which they are affiliated and that is represented in Parliament by at least one MEP. In 2019, the maximum available budget for European political foundations amounted to €19.7 million (budget item 403).

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Transparency of lobbying at EU level

SUMMARY

Lobbying has become an increasingly prominent issue in the European Union (EU) political and institutional debate over the past 20 years, with many comparing Brussels to Washington DC in this regard. The principal reason for this phenomenon is almost certainly the growing role of the EU as a policy-maker. As the EU institutions have expanded their regulatory competence in areas such as environmental law, the single market and consumer protection, and policy proposals have become more complex, they have increasingly come to rely on technical expertise to draft legislation, provided by outside interest groups among others.

In parallel, criticism of the balance of interests represented through lobbying in EU decision-making has grown. Concerns relate to the lack of official (and reliable) estimates of the number and type of interest groups, the amount of money spent on lobbying, and possible conflicts of interest. It is difficult to calculate the cost of opaque (or under-regulated) lobbying, either in monetary terms or in loss of confidence in EU institutions, but it may be argued that regulation of lobbying could have an impact in both these regards. Efforts to improve transparency of lobbying at EU level are on-going. A revised European Transparency Register was launched in January 2015, and the European Commission has published a roadmap for the adoption of a mandatory register, whilst the Council of the EU launched discussions on initial steps towards joining the transparency register already established by the Commission and Parliament.

In this briefing:

Glossary of terms

Advocacy: in legal terms, advocacy refers to all attempts by civil society organisations (e.g. non-governmental organisations, foundations, think-tanks, consultancies, or religious bodies) to influence policy and decision-making processes.

EU lobbying: all activities carried out with the objective of influencing the policy-making and decision-making processes of the European Union institutions (Source: European Commission).

Interest group: Behavioural theory defines interest groups on the basis of their activities related to influencing policy outcomes; an alternative definition of interest groups focuses on their organisational characteristics and presents them as voluntary, democratically accountable organisations based on individuals (Source: Salzburg Centre of European Union Studies).

Lobbyist: someone carrying out interest representation, working in a variety of organisations, such as public-affairs consultancies, law firms, non-governmental organisations, think-tanks, corporate lobby units ('in-house representatives') or trade associations (Source: European Commission).

Regulating lobbying at EU level

Lobbying has become an increasingly prominent issue in the European Union (EU) political and institutional debate over the past 20 years, with many comparing Brussels to Washington DC in this regard. The principal reason for this phenomenon is almost certainly the **growing role of the EU as a policy-maker**. As the EU institutions have expanded their regulatory competence in areas such as environmental law, the single market and consumer protection, and policy proposals have become more complex,[1] they have increasingly come to rely on technical expertise to draft legislation, provided by outside interest groups among others. This process appears to have had several effects.

This process has created a **stronger relationship** between interest groups, which want access to the EU legislative process, Members of the European Parliament (EP), and EU officials more widely, who often welcome information that reduces uncertainty about policy outcomes and provides support for the policy process.[2] It has encouraged **moves towards greater transparency and accountability** in EU policy-making. Indeed, regulatory efforts to address lobbying practices may in fact also be explained as an attempt to respond to criticism regarding the transparency and accountability of EU decision-making, especially in the aftermath of scandals involving undue influence on EU policy-makers, such as 'Dalligate' and the 'cash-for-laws' scandals. It has favoured **inclusivity** of interests from the business and civil society sectors. Pressure groups have provided European citizens a 'voice' between elections, helping to overcome the democratic deficit within the EU.[3] Finally, it has encouraged **plurality** of EU decision-making. Not only do big corporations, trade unions and non-governmental organisations (NGOs) lobby the EU, but so too do smaller and weaker pressure groups, which have been able to access EU policy-making and provide to under-represented minorities a greater say in EU law-making.

Progress in regulation of lobbying in the EU

The first official recognition of lobbying activities at EU level dates back to 1988, when a report issued by the European Commission – the 'Cecchini Report' on completing the single market[4] – recommended that business interests participate more actively and directly in EU policy-making. In 1995, the EP set up a register for interest

representatives, followed by the European Commission in 2008. The two registers were merged in 2011, becoming a *Joint European Transparency Register* (TR).

Since 2008, the EP has repeatedly called for a *mandatory* TR. In 2014, the newly elected Commission President, Jean-Claude Juncker, put the issue of transparency of lobbying regulation on the political agenda, promising to introduce a proposal for a mandatory register by 2016.[5] This register would replace the current voluntary lobby register: on this point, the Commission's First Vice-President, Frans Timmermans, promised to introduce a draft interinstitutional agreement for a mandatory register, which would cover not only the Commission and the EP, but would also include the Council (which thus far remains only an observer in the system). In addition, since 1 December 2014, the Commission has undertaken to publish information regarding meetings held with lobbyists by Commissioners, members of their private offices, and/or Directors-General.

EU lobbying timeline

1995 – European Parliament institutes its Transparency Register

2006 – European Transparency Initiative is launched

2008 – European Commission institutes its Transparency Register

2011 – Joint Transparency Register unifies the transparency registers of the Parliament and the Commission

Effective regulation

What effective regulation of lobbying should mean in practice is itself contested. On the one hand, regulation is supposed to favour the flow of information and data from interest group representatives to decision-makers. On the other, there are calls to guarantee transparency about who is influenced by whom, and with respect to which policy.

In the case of the EU, there are **four main concerns** with regard to the transparency and accountability of lobbying practices: (1) estimates of the number of interest groups that lobby the EU institutions; (2) information on the typology of EU interest groups; (3) information on lobbying expenditure; and (4) conflicts of interest.

The Centre for Public Integrity (CPI), a not-for-profit organisation that champions investigative journalism, has created an index to measure the robustness of regulatory systems against 48 criteria, with a point-scale ranging from 1 (minimum robustness) to 100 (maximum robustness). The earlier Commission (2008) and EP (2006) lobby registers scored poorly on the CPI index, at **24** and **15 points** respectively. The current TR gets **31 points**, a significant improvement, although this still puts it towards the lower end of 'medium-regulated systems' (regulatory systems scoring between 30 and 59 points).

Another example of such analysis is a report entitled 'Lobbying in Europe', published by Transparency International in April 2015. It ranks the transparency and accountability of the Commission, the EP and the Council, giving them an **average of 36% for quality of lobbying regulation**. According to the report, the Council is the institution with the worst performance, with a **score of 19%** (17% for transparency, 29% for integrity), whereas the Commission and the EP score significantly better in quality of lobbying regulation, at **53%** and **37%**, respectively.

Number of interest groups

Estimates of the number and distribution of EU interest groups vary greatly. This is due to the fact that no single source of data exists on lobbying activities at EU level. Instead, a **variety of sources** includes: the TR, various Commission directories (e.g. CONECCS – the Commission's former database on consultation by the European Commission with

civil society), directories managed by private organisations operating in Brussels, and datasets published by non-EU entities, such as the list of international NGOs which enjoy participatory status within the Council of Europe.[6] These directories not only gather data from different recipients, they also categorise and systematise them according to different methodologies. In consequence, no reliable and 'certified' information exists on the number of lobbyists operating at EU level.

As of 1 December 2015, the TR includes a total of **8 728 registrants**. Although the number of registered lobbyists in the TR has grown by around **60%** since 2011, this figure underestimates the actual total population of EU interest groups. TR registration is not compulsory, which is reflected in the fact that TR coverage is estimated at around **75% of business-related organisations** and around **60% of NGOs**.[7]

Unofficial estimates abound - and often report different figures. Corporate Europe Observatory (CEO) – a not-for-profit organisation devoted to research and advocacy of transparent lobbying – estimated in a 2011 study that between **15 000 and 30 000** lobbyists were targeting EU decision-makers in Brussels. In 2001, the Commission estimated that Commission and EP officials face **20 000 lobbyists** on a daily basis.[8] Recent Politico research looked at the meetings with lobbyists declared by European Commissioners and their private offices between December 2014 and April 2015: in only five months, a total of **2 100 meetings** (of which 570 involved Commissioners) were reported.

Typology of interest groups

The typology of EU interest groups also varies considerably. According to the TR, lobbyists working for businesses and trade/business/professional associations account for over **50%** of registrants (**4 427 out of 8 728**), which may explain why they make up a majority of the meetings with the EU institutions. (According to Transparency International,[9] of the 4 318 lobby meetings declared by the Commission between December 2014 and June 2015, more than **75%** were held with corporate lobbyists.) NGOs make up the second largest share (**2 252 registrants**, and 18% of meetings with the Commission), followed by professional consultancies, law firms and self-employed consultants (**1 015 registrants**).

The accuracy of these data, however, is contested. Law firms are a case in point. These are considered among the most dynamic consultancies operating in Brussels (having multiplied **over five times** since 1995, and currently accounting for **53%** of the consultancy market in the EU).[10] At present, however, not only are there fewer than **100 law firms** registered in the TR, but the information they provide is often incomplete.

Other studies report different balances between EU pressure groups. According to a 2007 survey based on CONECCS, individual players (for example, think-tanks, companies and public relations firms), rather than business/trade associations, account for over **40%** of interest representation at the Commission and Parliament.[11] Other research from the same year reported that **75%** of EU lobbyists (**3 500** of the estimated **5 000** interest groups operating in the EU) represented businesses and professional organisations, whereas **only 20% represented civil society**.[12]

Spending on lobbying

Scarcity of information also affects expenditure on lobbying at EU level. At present, little information is available, and available data tend to be sector-specific. According to a

2013 report, for instance, the financial services industry spends over **€120 million a year** lobbying EU institutions. Another report, published in 2014, examined lobbying expenditure in three sectors: the automobile industry, aviation and energy, concluding that between 2008 and 2013, these sectors increased their spending by around **70%**.[13]

Lobbyfacts, a website that collects and aggregates data from the TR, reports that the top 10 companies engaged in EU lobbying spend a combined total of **€39 billion a year**. Philip Morris, ExxonMobil and Microsoft are the top three lobbying spenders in Brussels (over **€4.5 million per year** on lobbying each).

Conflicts of interest and 'revolving doors'

According to a widely used definition, conflicts of interest are 'a set of circumstances that creates a risk that professional judgement or actions regarding a primary interest will be unduly influenced by a secondary interest'.[14] With regard to lobbying practices, the primary concern is what is referred to as '**revolving doors**' – the practice of professionals moving from political or administrative posts to roles in the private sector, or vice-versa. Revolving doors are generally seen as an issue, either because of concerns regarding exploitation of former civil servants' insider knowledge by their new private-sector employers to gain privileged access to and influence in the EU institutions, or because public officials with a past in the private sector could be improperly influenced when carrying out their duties, thus compromising the integrity of public decisions.

Alter-EU – a civil society organisation focused on analysis of lobbying – has repeatedly denounced the lax rules in place at EU level to tackle the revolving-door phenomenon. According to Alter-EU, as many as **50%** of the staff who work at the biggest lobby firms in Brussels have a background in one of the EU institutions. A recent report by Alter-EU indicates that in 2009-10, **6 of 13** departing Commissioners moved from public office into corporate or lobbying roles.

The issue of revolving doors is addressed in the EU institutions' **codes of conduct**. The first code of conduct (1999) of the Commission introduced an obligation for Commissioners to declare their financial interests and a one-year 'cooling-off' notification period whenever a Commissioner left public office. This code was amended in 2004 and again in 2011, following an EP study underlining the shortcomings of the existing rules. In its latest version, the code of conduct prohibits (for a period of 18 months) Commissioners who leave office from lobbying on the same issues as covered by their previous EU portfolio. The EP has its own code of conduct banning former Members from using their life-long pass to access the EP for lobbying purposes. Finally, the Staff Regulations for officials and other staff in all the EU institutions include a 12-month cooling-off period for senior officials on lobbying jobs, a ban on lobbying activities during sabbatical periods (introduced in 2013), and a specific procedure for screening new staff for potential conflicts of interest.

Economic impact

It is very difficult to provide anything more than general estimates of the financial impact of the shortcomings of the regulation of EU lobbying practices. Transparency itself is a difficult concept to quantify, as proven by the extreme variability of the indices providing access to records, information or policies. It may be assumed, however, that the economic impact of opaque (or under-regulated) lobbying includes direct and indirect consequences, mainly as a result of sub-optimal policy-making.

Direct impact

Direct impact has immediate consequences for the EU economy. Corruption is probably the most obvious and easily quantified example. According to the Commission, corruption costs the European economy **€120 billion a year**. It is not by chance that the 2014 EU anti-corruption report includes 'illegal lobbying' among the causes of corruption in the EU, and stresses that more transparent lobbying would decrease the likelihood of corrupt practices. Direct economic impact may also be incurred in EU institutions' efforts to address conflicts of interests (ethics training, internal auditing, etc.). Related to this, one should consider the increased efforts put by the EU institutions to tackle forms of corruption and, on a more general level, to boost transparency of decision-making.

Indirect impact

Indirect impact does not affect directly on the EU budget. However, in the long-term, they may still negatively affect European public finances. It is noted, for instance, that lack of transparency may lead to the emergence of 'interest niches' (policy areas dominated by a small set of actors) that may hamper efficiency, growth and productivity.[15] In 2006, a study reported that European professional associations enjoyed the highest level of representation at the Commission (**43%** access rate, **38%** for the EP and **11%** for the Council), whereas national associations were the least represented. According to a study on state and interest group activity in the EU, **72%** of those with a seat on the Commission's consultative committees represent business interests.[16] Integrity Watch reports that almost all companies that had more than 10 high-level meetings with the Commission from January to June 2015 had declared at least €900 000 per year in lobbying expenditure. This prompts accusations of unbalanced representation: **75%** vs **25%** in favour of business (with the financial markets and the digital economy considered the most unbalanced portfolios, where respectively, 90% and 89% of meetings were with business representatives).

A recent study cites the example of the revised Tobacco Product Directive (TDI); where negotiations saw a significant shift away from the NGO position towards that of the tobacco industry (e.g. reduction in the size of pictorial health warnings from 75% to 65% of carton size, and rejection of the ban on slim cigarettes).

Economic benefits

The potential economic benefits of increasing transparency in the regulation of lobbying activities should also be acknowledged. Open Data is a case in point. The Commission estimates that the full use of data in an open format in the 23 largest EU member-state governments could **reduce administrative costs by 15% to 20%**. In a study released by Transparency International in 2014, the impact of Open Government was measured according to four variables (participation, co-production, transparency and economy), each graded on a 0/100 point scale. The generally positive economic impact of introducing Open Government was graded at **54.2 points**.

Outlook

There has been a sustained effort to make regulation of lobbying at EU level more efficient, in order to decrease (direct and indirect) costs and to increase benefits. This is, however, an on-going task: policies introduced by the Commission to increase lobbying transparency are currently being implemented, and the TR was revised in 2014. While the TR remains a voluntary register, new rules were introduced on financial disclosure (introducing a level playing field for all registrants concerning financial information) and

to encourage lobbyists to register. A 2014 study commissioned by the EP found that **Article 352** of the Treaty on the Functioning of the European Union would be an adequate legal base for making the TR a mandatory register,[17] although this would require unanimity within the Council.

Directive 2014/95/EU was also approved in 2014. This concerns the **disclosure of non-financial and diversity information** by certain large undertakings and groups (500 employees or more), notably on policies, and anti-corruption and bribery issues. The Directive (to become operational in 2017) is expected to apply to some **6 000 organisations** across the EU.

Following the TR revision, in April 2014 an official statement by the European Ombudsman called for further reform of the register and for greater transparency. She called on the Council to participate in the TR and encouraged the Commission to adopt stronger incentives to convince lobbyists to register, following the example of the EP (for example, by restricting access to its premises for non-registered organisations). She also called on the Commission to improve the monitoring and comparability of data in the register (to avoid TR-related cases of mismanagement).

Within the EP, a timetable to prepare negotiations for the further reform of the TR has been drafted by the EP Committee on Constitutional Affairs (AFCO). Earlier this year, the Commission released a roadmap leading to the adoption of a mandatory TR. Six Council members submitted a 'non-paper' to the preparatory 'Working Party on Information'. The paper, 'Enhancing Transparency in the EU', contains practical proposals to enhance transparency in the Council. One proposal concerns initial steps towards a Council register on lobbying. The document states that 'it is essential that all co-legislators apply the same standards for transparency, which implies that the Council joins the transparency register used by the Commission and the EP'.

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Endnotes

[1] See H. Kluver, The contextual nature of lobbying: Explaining lobbying success in the European Union, 12(4) European Union politics, 2011, p.483-506.

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[3] See, for instance, European Economic and Social Committee, The Civil Society Organised at European Level, Brussels 1999.

[4] See Commission of the European Communities, Europe 1992: The Overall Change, SEC 88(524) final, 1988.

[5] This decision followed the positions taken by the European Commission and the Parliament. See, for instance, European Parliament, Directorate-General for Research, Lobbying in the European Union: current rules and practices, 2004. The document states that 'lobbying is a legitimate part of the democratic system, regardless of whether it is carried out by citizens, companies, or firms working on behalf of third parties, think tanks, lawyers, public affairs professionals'.

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[13] See M. Crepaz, R. Chari, The EU's initiatives to regulate lobbyists: good or bad administration?, in S. Novak, The surprising effects of transparency on the EU legislative process, IEE, 2014.

[14] See F. Zibold, Conflicts of interest in public administration, European Parliamentary Research Service, 2013.

[15] See F.R. Baumgartner, B.L. Leech, J.M. Berry, M. Hojnacki and D.C. Kimball, Lobbying and policy change: who wins, who loses, and why, Chicago University Press, 2001.

[16] See C. Mahoney, The power of institutions: State and interest group activity in the European Union, 5 European Union Politics, 2004.

[17] See M. Nettesheim, Interest representatives' obligation to register in the Transparency Register: EU competencies and commitments to fundamental rights, Brussels 2014. Article 352 permits the use of a special legislative procedure in cases in which EU action is necessary to attain a specific objective and there is no specific legal basis in the Treaties. The study assumes that transparency could be the objective pursued by the EU.

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COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

2020 Rule of Law Report
The rule of law situation in the European Union

{SWD(2020) 300-326}

The rule of law helps protect people from the rule of the powerful.
It is the guarantor of our most basic of every day rights and freedoms.
It allows us to give our opinion and be informed by a free press.

President von der Leyen, State of the Union Address 2020

1. Introduction

The European Union is based on a set of shared values, including fundamental rights, democracy, and the rule of law.[1] These are the bedrock of our societies and common identity. No democracy can thrive without independent courts guaranteeing the protection of fundamental rights and civil liberties, nor without an active civil society, and a free and pluralistic media. Globally, the EU is recognised as having very high standards in these areas.[2] Nevertheless, these high standards are not always equally applied, improvements can be made, and there is always a risk of a backwards step. Standing up for our fundamental values is a shared responsibility of all EU institutions and all Member States, and all should play their part.

What is the rule of law?[3]

The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the common values for all Member States. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. These principles have been recognised by the European Court of Justice and the European Court of Human Rights. In addition, the Council of Europe has developed standards and issued opinions and recommendations which provide well-established guidance to promote and uphold the rule of law.

The rule of law is a well-established principle. While Member States have different national identities, legal systems and traditions, the core meaning of the rule of law is the same across the EU. Respect for the rule of law is essential for citizens and business to trust public institutions, and its key principles are supported by citizens in all Member States.[4] The rule of law has a direct impact on the life of every citizen. It is a precondition for ensuring equal

[1] Article 2 of the Treaty on European Union. The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

[2] World Justice Project – Rule of Law index; World Economic Forum – The global competitiveness report; Transparency International – Corruption perceptions index; Reporters Without Borders – World press freedom index.

[3] See COM(2019) 163 "Further strengthening the rule of law in the Union: state of play and possible next steps", and COM(2019) 343 "Strengthening the rule of law within the Union: a blueprint for action". Recent case law of the European Court of Justice is also of particular importance.

[4] Special Eurobarometer 489 – rule of law.

treatment before the law and for the defence of EU citizens' rights. It is essential to the implementation of EU laws and policies, and central to a Union of equality, opportunity and social fairness. The particular circumstances of 2020 have brought additional challenges to citizens' rights, and some restrictions on our freedoms, such as freedom of movement, freedom of assembly or freedom to conduct a business, had to be applied to address the COVID-19 pandemic. Effective national checks and balances upholding respect for the rule of law are key to ensuring that any such restrictions on our rights are limited to what is necessary and proportionate, limited in time and subject to oversight by national parliaments and courts.

Strengthening the rule of law: a priority for an effective functioning of the Union

The EU is based on the rule of law. Threats to the rule of law challenge its legal, political and economic basis. Deficiencies in one Member State impact other Member States and the EU as a whole. Ensuring respect for the rule of law is a primary responsibility of each Member State, but the Union has a shared stake and a role to play in resolving rule of law issues wherever they appear. Respect for the rule of law is also at the core of the functioning of the internal market, of the cooperation in the justice area based on mutual trust and recognition, and of the protection of the financial interests of the Union as recently underlined by the European Council.[5] If the EU is to succeed in the task of a sustainable and resilient recovery, it is critical that its tools and instruments can work in an environment grounded in the rule of law.

The rule of law is also an important theme for the EU beyond its borders. The EU will continue to pursue a strong and coherent approach between its internal rule of law policies and how the rule of law is embedded in the work with accession and neighbourhood countries as well as in all its external action, at bilateral, regional and multilateral level.

Guided by the universal values and principles embedded in the UN Charter and international law, the EU is a staunch defender of human rights, democracy and the rule of law throughout the world as demonstrated by the new EU Action Plan for Human Rights and Democracy 2020-2024,[6] and in line with the Sustainable Development Goals.[7] Upholding the rule of law at global level includes strengthening cooperation on rule of law issues with international and regional organisations, such as the United Nations, the Council of Europe and the Organisation for Security and Cooperation in Europe.

In the last decade, the EU has developed and tested a number of instruments to help enforce the rule of law.[8] Further debates at EU and national level on how to strengthen the EU's ability to address such situations were triggered by severe rule of law challenges in some Member States. In its Communication of July 2019, the Commission proposed that the EU and its Member States should increase efforts to promote a robust political and legal culture supporting the rule of law, and should develop instruments preventing rule of law problems from emerging or deepening.[9]

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5 Conclusions of European Council of 17-21 July 2020: "*The Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU* [Treaty on European Union]. *The European Council underlines the importance of the protection of the Union's financial interests. The European Council underlines the importance of the respect of the rule of law.*"

6 JOIN(2020) 5 final

7 https://www.un.org/sustainabledevelopment/

8 Rule of law toolbox at EU level. https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf.

9 See the Commission communications cited in footnote 3.

The European Rule of Law Mechanism

The Political Guidelines of President von der Leyen set out the intention to establish an additional and comprehensive rule of law mechanism as a key building block in the common commitment of the EU and the Member States to reinforce the rule of law. The mechanism is designed as a yearly cycle to promote the rule of law and to prevent problems from emerging or deepening. It focuses on improving understanding and awareness of issues and significant developments in areas with a direct bearing on the respect for the rule of law – justice system, anti-corruption framework, media pluralism and freedom, and other institutional issues linked to checks and balances. Identifying the challenges will help Member States to find solutions that protect the rule of law, with cooperation and mutual support from the Commission, other Member States, and stakeholders such as the Venice Commission.

The approach is based on close dialogue with national authorities and stakeholders, bringing transparency and covering all Member States on an objective and impartial basis. This is brought together each year in a rule of law report, including Member State-by-Member State assessment in 27 country chapters. This rule of law mechanism further reinforces and complements other EU instruments that encourage Member States to implement structural reforms in the areas covered by its scope, including the EU Justice Scoreboard[10] and the European Semester[11], and now the Next Generation EU instrument. The assessments provided in the annual report would be a reference point for these instruments. Other elements in the EU's rule of law toolbox will continue to provide an effective and proportionate response to challenges to the rule of law where necessary.[12]

As well as deepening common understanding through dialogue, the rule of law mechanism will frame the Commission's support to Member States and national stakeholders in addressing rule of law challenges. Several instruments and funding help support structural reforms through technical assistance and funding of projects in the field of public administration, justice, anti-corruption and media pluralism. Specific and direct grants for civil society and networks (such as judicial, journalists) are also available for projects with a European dimension. Reforms would also benefit from expertise from recognised international bodies, in particular the Council of Europe, as well as from exchanges with practitioners from other Member States.

Deepening the EU's work on the rule of law needs close and continuous cooperation between EU institutions and Member States. A core objective of the European rule of law mechanism is to stimulate inter-institutional cooperation and encourage all EU institutions to contribute in accordance with their respective institutional roles. This is central to a European rule of law mechanism and reflects a long-standing interest both from the European Parliament[13] and

[10] The EU Justice Scoreboard is an annual comparative information tool aiming to assist the EU and Member States improving the effectiveness of their national justice systems by providing objective, reliable and comparable data on a number of indicators relevant for the assessment of the efficiency, quality and independence of justice systems in all Member States.

[11] Issues related to the rule of law are considered in the European Semester to the extent that these issues have an impact on the business environment, investment, economic growth and jobs.

[12] The European rule of law mechanism should be distinguished from other instruments such as the Article 7(1) TEU procedures or infringement procedures.

[13] 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; Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights.

the Council.[14] Its common and objective basis, looking at all Member States equally, is designed with this aim. The Commission looks forward to supporting the work now under way in both institutions, including looking at following up on the European Parliament resolution currently under preparation.[15] The European rule of law mechanism will help to streamline discussions on the rule of law at EU level and strengthen inter-institutional cooperation, allowing for an annual rhythm in the work of the European Parliament and the Council and a structured and targeted follow-up, as well as cooperation with national parliaments.

The rule of law mechanism is one element of a broader endeavour at EU level to strengthen the values of democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. It will be complemented by a set of upcoming initiatives including the European Democracy Action Plan, the renewed Strategy for the Implementation of the Charter of Fundamental Rights, and targeted strategies to address the needs of the most vulnerable in our societies to promote a society in which pluralism, non-discrimination, justice, solidarity and equality prevail.

The first Rule of Law Report[16]

Through this report, including its 27 country chapters presenting the Member State-specific assessments, the aim of the Commission is to set out first key elements of the situation in the Member States, on which the new cycle of the rule of law mechanism and future reports will be able to build.

The assessment contained in the 27 country chapters, which are an integral part of this rule of law report, has been prepared in line with the scope and methodology discussed with Member States.[17] The work focused on four main pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances. For each pillar, the methodology recalled the EU law provisions relevant for the assessment. It also refers to opinions and recommendations from the Council of Europe, which provide useful guidance. These four areas were identified in the preparatory process as key interdependent pillars for ensuring the rule of law. Effective justice systems and robust institutional checks and balances are at the heart of the respect for the rule of law in our democracies. However, laws and strong institutions are not enough. The rule of law requires an enabling ecosystem based on respect for judicial independence, effective anti-corruption policies, free and pluralistic media, a transparent and high-quality public administration, and a free and active civil society. Preventive policies and grassroots campaigns raise citizens' awareness and maintain respect for the rule of law high on the agenda. Investigative journalists, independent media and the scrutiny of civil society are vital to keeping decision-makers accountable.

The report is the result of close collaboration with Member States, both at political level in the Council and through political and technical bilateral meetings, and relies on a variety of sources. This methodology will become part of the annual process for the rule of law mechanism. A network of national rule of law contact points has been established to help setting up the mechanism and its methodology, and to act as an ongoing channel of

[14] The Presidency conclusions of the General Affairs Council in November 2019 underlined that the Commission's reports could serve as a basis for the annual Council rule of law dialogue. https://www.consilium.europa.eu/media/41394/st14173-en19.pdf.

[15] The establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INL)).

[16] https://ec.europa.eu/info/publications/2020-rule-law-report-communication-and-country-chapters_en

[17] https://ec.europa.eu/info/files/2020-rule-law-report-methodology_en

communication. The network has met two times. All Member States participated in the process of preparing the report, providing written contributions in early May[18] and joining dedicated virtual country visits held in May until July.[19] During these country visits, the Commission discussed rule of law developments with Member States' national authorities, including judicial and independent authorities, law enforcement, as well as other stakeholders, such as journalists' associations and civil society. Prior to the adoption of this report, Member States have been given the opportunity to provide factual updates on their country chapter.

A targeted stakeholder consultation was also carried out, providing valuable horizontal and country-specific contributions from a variety of EU agencies, European networks, national and European civil society organisations and professional associations and international and European actors.[20] These include the Fundamental Rights Agency, the European Network of Councils for the Judiciary, the European Network of the Presidents of Supreme Courts of the EU, the European Network of National Human Rights Institutions (ENNHRI), the Council of Bars and Law Societies of Europe (CCBE), the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE), and the Organisation for Economic Co-operation and Development (OECD), as well as national and international civil society and journalists' organisations.

The country chapters rely on a qualitative assessment carried out by the Commission, focusing on a synthesis of significant developments since January 2019 introduced by a brief factual description of the legal and institutional framework relevant for each pillar. The assessment presents both challenges and positive aspects, including good practices. The Commission has ensured a coherent and equivalent approach by applying the same methodology and examining the same topics in all Member States, while remaining proportionate to the situation and developments. The country chapters do not purport to give an exhaustive description of all relevant elements of the rule of law situation in Member States but to present significant developments.[21] Based on this first experience and on the evolution of the situation in Member States, other relevant aspects can be included or further developed in future years.

The assessment also refers to EU law requirements, including the rulings from the European Court of Justice. In addition, the recommendations and opinions of the Council of Europe provide a useful framework of reference for standards and best practices. The Council of Europe further contributed to the assessment in the country chapters by providing an overview of its recent opinions and reports concerning EU Member States.[22]

The assessment in the rule of law report draws on this process of dialogue, consultation and expert input. It offers a solid and well-documented basis for discussion with and further work of the European Parliament and the Council. The European rule of law mechanism is set to evolve and continue to improve through inter-institutional discussions and dialogue with Member States, as a collective learning exercise and as a trigger for EU support.

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[18] https://ec.europa.eu/info/publications/2020-rule-law-report-input-member-states_en

[19] More detailed information on the country visits can be found in the country chapters.

[20] https://ec.europa.eu/info/publications/2020-rule-law-report-targeted-stakeholder-consultation_en

[21] Examples of elements which have not been systematically examined this year concern accountability mechanisms for law enforcement, the role and independence of public service media, as well as measures taken to ensure that public authorities effectively implement the law and to prevent abuse of administrative powers.

[22] https://ec.europa.eu/info/files/2020-rule-law-report-stakeholder-contribution-council-europe_en

The COVID-19 pandemic: a stress test for rule of law resilience

Beyond the immediate health and economic impact, the COVID-19 crisis created a wide variety of challenges for society, and more specifically for public administrations and legal and constitutional systems. The crisis has proven to be a real-life stress test for the resilience of national systems in times of crisis. All Member States have taken exceptional measures in order to protect public health, and most have declared some form of public emergency, or granted special emergency powers, under constitutional provisions or public health protection laws. Changing or suspending customary national checks and balances can pose particular challenges for the rule of law, and these developments became a major issue of public debate in certain Member States. As a result, the Commission has been closely monitoring the application of emergency measures and this is reflected in the country chapters, where appropriate.

The Commission has underlined that responses to the crisis must respect our fundamental principles and values as set out in the Treaties. Key tests for the emergency measures have included whether measures were limited in time, whether safeguards were in place to ensure that measures were strictly necessary and proportionate, and whether parliamentary and judiciary oversight as well as media and civil society scrutiny could be maintained.[23] As the most acute phase of the crisis has eased, another key issue has been the way in which these powers have been scaled down or phased out. With the pandemic still ongoing, emergency regimes or emergency measures are still in place in a number of Member States. It will therefore be necessary for the Commission to continue its monitoring. The situation is also being examined by international organisations,[24] and the European Parliament has requested the Venice Commission for an opinion on the measures taken in Member States and their impact on democracy, the rule of law and fundamental rights.[25]

Reactions to the crisis showed overall strong resilience of the national systems. In many Member States, courts have scrutinised emergency measures and political and legal debates took place on whether the emergency regimes applied were justified and proportionate, whether decisions were lawful, and whether the right procedures and instruments had been used. The ongoing monitoring of the Commission and national debates already point to a number of findings and reflections which can further feed the national debates and improve the legal and political response.

A first reflection would be on the rule of law culture and on the level of trust in the checks and balances in Member States. This concerns in particular the interplay between national institutions and their sincere cooperation, the role of parliamentary scrutiny and opportunities to maintain consultation and transparency rules for citizens. The COVID-19 pandemic has highlighted the importance of ensuring that urgent and effective decision-making necessary for the protection of public health does not mean by-passing established checks and balances

[23] The Council of Europe provided a useful guidance on the criteria to consider. These include whether the laws and emergency regimes were adopted in line with the applicable procedures, whether a state of emergency and the emergency measures are all strictly limited in time, a narrow definition of emergency powers, whether the "easing" of checks and balances is limited and proportionate, and on the indispensable parliamentary control of executive action. https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40 and https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e.

[24] See for example the Council of Europe's Venice Commission "respect for democracy, human rights and the rule of law during states of emergency – reflections", 26 May 2020, CDL-PI(2020)005rev.

[25] www.venice.coe.int/webforms/events/?id=2967

– including Parliaments – in particular when measures affect the fundamental freedoms and rights of the population as a whole.

A second reflection would be on the implications for the work of media and civil society when exercising democratic scrutiny. When emergency powers lower institutional checks on the decision makers, the scrutiny of public decisions by media and civil society becomes all the more important. However, in certain Member States, media and civil society have been facing new obstacles. Such situations have, among others, contributed to spreading disinformation and lowering trust in public authorities, which are damaging to the rule of law.[26]

A third reflection is on the resilience of the justice system. Access to an independent court and judicial review is a fundamental element of the rule of law. The partial closure of national courts – which also act as Union courts when applying EU law – has revealed a major vulnerability. A number of Member States have taken measures to reduce the impact of the pandemic and were able to re-start hearings applying distancing rules or videoconferencing techniques. The pandemic also gave a boost to the digitalisation of proceedings in a number of Member States.

These reflections echo broader rule of law debates in a number of Member States on the resilience of their national systems.[27] In that sense, the COVID-19 pandemic has underlined how the rule of law has a direct impact on people's daily lives.

2. Key aspects of the rule of law situation in Member States

Member States' constitutional, legal and political systems generally reflect high rule of law standards. The key principles of the rule of law – legality, legal certainty, prohibiting the arbitrary exercise of executive power, effective judicial protection by independent and impartial courts, including respect for fundamental rights, separation of powers, and equality before the law– are enshrined in national constitutions and translated in legislation. However, there are also serious challenges, cases where the resilience of rule of law safeguards is being tested and where shortcomings become more evident.

Looking at the four pillars identified for the mechanism, the next four sections highlight a number of significant common themes and trends, specific challenges and positive developments.[28] Examples of developments in Member States which stand out in particular are given, drawn from the assessment for all 27 Member States to be found in the country chapters.[29] The aim is to stimulate a constructive debate on consolidating the rule of law and encourage all Member States to examine how challenges can be addressed, learn from each other's experiences and show how the rule of law can be further strengthened in full respect for national traditions and national specificities.

[26] See also Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling COVID-19 disinformation - Getting the facts right, 10.6.2020, JOIN(2020) 8 final.

[27] Other potential issues include the resilience of the anti-corruption framework to corruption-related risks in the area of public procurement during situations of emergency.

[28] Nevertheless, the analysis does not represent an exhaustive overview of all developments in Member States. See also footnote 18.

[29] The developments referred to in the examples should be read in their context described in the relevant country-chapters. Hyperlinks have been added to facilitate such a contextual reading.

2.1 Justice systems

Effective justice systems are essential for upholding the rule of law. Independence, quality and efficiency are the defined parameters of an effective justice system, whatever the model of the national legal system and tradition in which it is anchored. Whilst the organisation of justice in the Member States falls within the competence of the Member States, when they are exercising that competence, Member States must ensure that their national justice systems provide for effective judicial protection.[30] The independence of national courts is fundamental to ensuring such judicial protection.[31] National courts ensure that the rights and obligations provided under EU law are enforced effectively. As re-affirmed by the European Court of Justice, the very existence of effective judicial review to ensure compliance with EU law is of the essence for the rule of law.[32] Effective justice systems are also the basis for mutual trust, which is the bedrock of the common area of freedom, justice and security,[33] an investment friendly environment, the sustainability of long-term growth and the protection of EU financial interests. The European Court of Justice has further clarified the requirements stemming from EU law regarding judicial independence. The case-law of the European Court of Human Rights also provides for key standards to be respected to safeguard judicial independence.

The functioning of the justice system is high on national political agendas, as illustrated by the fact that almost all Member States are engaged in justice reforms,[34] even if their objective, scope, form and state of implementation vary. The areas of reform range from structural constitutional changes, such as establishing a council for the judiciary or new courts, to concrete operational measures, for example on the digitalisation of case management in courts. The dialogue has shown that Member States follow closely reforms and rule of law developments in other Member States, and the evolving case law of the European Court of Justice and the European Court of Human Rights.

Perceived judicial independence across the EU

In Eurobarometer surveys conducted among both companies and the general public in 2020,[35] the same Member States tend to cluster around the higher and lower end of the scale. The latest Eurobarometer survey shows that the perception of independence among the general public is very high (above 75%) in six Member States. These ratings have remained more or less stable over the past four years. At the same time, the level of perceived independence has decreased in nine Member States over the past year and in a few Member States, the level of perceived judicial independence remains very low (below 30%).

Efforts aimed at strengthening structural safeguards for judicial independence are ongoing

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30 Judgement of 24 June 2019, *Commission* v *Poland*, C-619/18, EU:C:2019:531, paragraphs 52 and 54; Judgement of 5 November 2019, *Commission* v *Poland*, C-192/18, EU:C:2019:924, paragraphs 102 to103.

31 Judgement of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117; Judgement of 7 February 2019, *Escribano Vindel*, C-49/18, EU:C:2019:106

32 Judgement of 28 March 2017, *Rosneft* C-72/15, EU:C:2017:236, paragraph 73; Judgement of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 36; Judgement of 25 July 2018, *LM*, C-216/18, EU:C:2018:586, paragraph 51; Judgement of 24 June 2019, *Commission* v *Poland*, C-619/18, EU:C:2019:531, paragraph 46; Judgement of 19 November 2019, *A.K.*, C-585/18, C-624/18, and C-625/18, EU:C:2019:982 paragraph 120.

33 Judgement of 25 July 2018, *LM*, C-216/18, EU:C:2018:586, paragraph 49.

34 See also Figure 1, 2020 EU Justice Scoreboard.

35 2020 EU Justice Scoreboard. Eurobarometer surveys FL 483 and 484 of January 2020. The Commission has also used other sources, such as the World Economic Forum.

Efforts are under way in a number of Member States aiming at strengthening judicial independence and reducing the influence of the executive or legislative power over the judiciary. These include setting up or strengthening an independent national council for the judiciary. The method for the appointment of judges is one of the elements which can have an impact on judicial independence and public perceptions of independence. A number of Member States have envisaged or adopted reforms aimed at strengthening the involvement of the judiciary in the procedure, or defining clear criteria or judicial review mechanisms. Reforms of disciplinary procedures for judges and prosecutors also demonstrate an increased attention to the need for a balance that provides essential safeguards while preserving accountability.

In Malta, for example, a number of reforms of the justice system have recently been adopted by Parliament to strengthen judicial independence. In Czechia, reforms under preparation seek to increase transparency in the appointment, promotion and dismissal of judges. In Cyprus, since July 2019, the appointment of judges is subject to new detailed criteria, and further changes are under discussion. In Latvia, new powers have been granted to the Council for the Judiciary with a view to strengthening judicial independence.

Debates, reflections and reform plans on strengthening legal and constitutional safeguards for judicial independence are also taking place in Member States where judicial independence has traditionally been seen as high or even very high.[36] Member States where the separation of powers and respect for judicial independence relies more on political tradition than on detailed legal safeguards reported that developments in other Member States have been one reason behind steps to apply more formal systems.

In Ireland, for example, an independent Judicial Council was established at the end of 2019 to safeguard judicial independence. In Luxembourg, a planned revision of the Constitution aims at introducing new elements to strengthen judicial independence. In Finland, in January 2020, an independent agency responsible for the administration of the courts, the National Courts Administration, has taken over functions previously exercised by the Ministry of Justice. In the Netherlands, reforms are envisaged to limit the influence of the executive and the legislature in the appointment of Supreme Court judges and members of the Council of the Judiciary. In Sweden, a Commission of Inquiry on 'Strengthening the protection of democracy and the independence of the judiciary' was set up in February 2020 with the objective to bring forward proposals for legislative and constitutional reforms.

The independence of the prosecution with regard to the executive is increasingly discussed as it has important implications for the capacity to fight crime and corruption

While there is no single model in the EU for the institutional set-up of the prosecution service, or for appointment, dismissal or disciplinary procedures for prosecutors at different levels, institutional safeguards can help to ensure that the prosecution is sufficiently independent and free from undue political pressure.[37] A judgment of the European Court of Human Rights[38] recently underlined that the independence of prosecutors is a key element for the maintenance of judicial independence.

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[36] See previous footnote.

[37] Council of Europe standards. The Venice Commission notes in its Rule of Law Checklist, concerning the prosecution service, that '[t]here is no common standard on the organisation of the prosecution service, especially about the authority required to appoint public prosecutors, or the internal organisation of the public prosecution service. However, sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence'.

[38] Judgment of 5 May 2020, Kövesi v. Romania, application no. 3594/19, § 208.

Reforms to strengthen the independence of the prosecution are ongoing in Malta, where a fully separate prosecution service is being set up, ending the traditional role of the prosecutor general also acting as legal advisor to the government. Cyprus is also preparing legislative changes which aim at restructuring the Law Office of the Republic with the creation of separate, self-contained directorates within the Law Office.

The right of the executive to give formal instructions to the prosecution, including in individual cases, has been a particular topic of debate in certain Member States such as Germany and Austria,[39] in particular following the European Court of Justice case law on the European Arrest Warrant.[40] In Poland, the double role where the Minister of Justice is also the Prosecutor General has raised particular concerns, as it increases the vulnerability to political influence as regards the organisation of the prosecution service and the investigation of cases. The role of the Prosecutor General towards lower-ranking prosecutors is also a source of concerns in certain Member States. In Bulgaria, for example, legislative procedures to answer long-standing concerns about an effective accountability regime for the Prosecutor General remain to be finalised.

Judicial independence remains an issue of concern in some Member States

Despite reform efforts in a number of Member States to enhance judicial independence, developments raise concerns in a few of them. These concerns vary in the type of measures they relate to and in their intensity and scope. They range from concerns about the capacity of councils for the judiciary to exercise their functions to more structural concerns over an increasing influence of the executive and legislative branch over the functioning of the justice systems, including constitutional courts or Supreme Courts. Some of these developments have led the Commission to launch infringement proceedings or express concerns in the context of the Article 7(1) TEU procedures.

In some Member States, the direction of change has given rise to serious concern about the impact of reforms on judicial independence. This was one of the issues raised in the Article 7(1) TEU procedure initiated by the European Parliament regarding Hungary. In particular, the independent National Judicial Council faces challenges in counter-balancing the powers of the President of the National Office for the Judiciary in charge of the management of the courts; the election of a new President may open the way for reinforced cooperation. Other concerns related to new rules allowing for the appointment to the Supreme Court of members of the Constitutional Court, elected by Parliament, outside the normal appointment procedure. Poland's justice reforms since 2015 have been a major source of controversy, both domestically and at EU level, and have raised serious concerns, several of which persist. This led the Commission to launch the procedure under Article 7(1) TEU in 2017, which is still under consideration by the Council. In 2019 and 2020, the Commission launched two infringement procedures to safeguard judicial independence and the Court of Justice has granted interim measures to suspend the powers of the Supreme Court's Disciplinary Chamber with regard to disciplinary cases concerning judges.

Challenges also remain in certain other Member States. In Bulgaria,[41] the composition and functioning of the Supreme Judicial Council and the Inspectorate to the Supreme Judicial

[39] The right of the executive is accompanied by institutional safeguards or long-standing conventions limiting in practice the risk that this power could be abused by the executive.

[40] Notably the Judgment of 27 May 2019, *OG and PI*, Joined C-508/18 and C-82/19 PPU, EU:C:2019:456 (on the European Arrest Warrant).

[41] Since accession to the EU in 2007, Bulgarian reforms in areas including justice and anti-corruption have been followed by the Commission through the Cooperation and Verification Mechanism (CVM). The

Council have also raised concerns which are still pending. In Romania,[42] controversial reforms enacted in 2017-2019 with a negative impact on judicial independence continue to apply.[43] In 2020, the government expressed its commitment to restore the path of judicial reform after the backtracking of previous years, leading to a significant decrease in tensions with the judiciary. In Croatia, low administrative capacity creates difficulties for the State Judicial Council and the State Attorney's Council in fulfilling their mandate, with their role with respect to the appointment of judges and prosecutors having been reduced and an upgraded IT system for the verification of asset declarations lacking. In Slovakia, there are long-standing concerns regarding the independence and integrity of the justice system. In April 2020, the government announced important reform plans to strengthen judicial independence and integrity, as well as the appointment process for the Constitutional Court.

Political attacks and media campaigns against judges and prosecutors are frequently reported in some Member States. Measures, including disciplinary ones, have also been taken affecting the freedom of judges to submit preliminary references to the Court of Justice of the European Union. Such attacks and measures can have a chilling effect and a negative impact on public trust in the judiciary, affecting its independence.[44] In a number of cases, the attacks target judges and prosecutors who are taking public positions to denounce developments which could damage the judiciary as a whole. In its recent decision of 5 May 2020, the European Court of Human Rights reaffirmed the freedom of expression for prosecutors and judges to participate in public debates on legislative reforms affecting the judiciary, and more generally on issues concerning the independence of the judiciary.[45]

The COVID-19 pandemic has further highlighted the importance of digitalisation of justice systems

For a number of years, Member States have been striving to make the best use of ICT tools to facilitate the communication of courts with parties and lawyers, for an efficient management of workload, and to increase transparency, including on-line access to court decisions. Many initiatives are ongoing in Member States to deliver real improvements for the users of justice systems. The COVID-19 pandemic has given an extra impetus to these efforts, showing the importance of accelerating reforms to digitalise the handling of cases by the judicial institutions, the exchange of information and documents with parties and lawyers, and the continued and easy access to justice for all. A number of initiatives are being taken ranging from allowing court users to monitor on-line the stages of proceedings to modelling judgments according to a standard enabling their machine-readability.

Some Member States are already well advanced in the implementation of such systems. For example, in Estonia and Latvia, the justice systems are characterised by some of the most advanced information and communication technologies used in courts. They provide a high

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Communication on strengthening the rule of law (COM(2019) 343) states that once the CVM mechanism ends, monitoring should continue under horizontal instruments. The rule of law mechanism provides the framework for taking these issues forward in the future.

42 Since accession to the EU in 2007, Romanian reforms as regards justice and anti-corruption have been followed by the Commission through the Cooperation and Verification Mechanism (CVM). The Communication on strengthening the rule of law (COM(2019) 343) states that once the special CVM mechanism ends, monitoring should continue under horizontal instruments. The rule of law mechanism provides the framework for taking these issues forward in the future.

43 An example of this is the Prosecutorial Section for Investigation of Offences in the Judiciary, tasked exclusively with the prosecution of crimes committed by judges and prosecutors, which continues to operate.

44 This is especially the case where an official reaction or effective possibilities for redress are lacking.

45 Judgment of 5 May 2020, Kövesi v. Romania, application no. 3594/19, §§ 201, 205, and 209. See also judgment of 23 June 2016, Baka v. Hungary, application no. 20261/12, §§ 156-157 and 164-167.

degree of accessibility and flexibility to court uses, and have also contributed greatly to the continued functioning of the courts with relatively little disruption during the COVID-19 pandemic. In Slovenia, the digitalisation of the justice system for case management is well advanced and further developments are ongoing to improve electronic communication between courts and parties. Hungary also has a high level of digitalisation of justice, with a high availability of electronic means as regards online access to published judgements. In Portugal, an amendment to the Code of Civil Procedure implemented the principle of 'digital by default' to all civil proceeding. In Italy, a draft reform of the civil procedure is ongoing to provide for an exclusive online filing and a wider range of electronic means, including online payment of court fees. The Commission has underlined the importance of the digitalisation of justice systems in the context of the recovery plan.[46] These efforts could be supported through the future Digital Europe Programme and the Next Generation EU instrument.

Investing in justice is more than ever necessary for addressing efficiency challenges

Effective justice systems rely on adequate human and financial resources. While government expenditure on the justice system is in general increasing[47], in a number of Member States the judiciary has to cope with limited resources. Investment in justice systems is also indispensable for addressing the efficiency challenges that certain Member States still face. The excessive length of proceedings and backlogs in the justice systems need to be addressed through appropriate measures. The economic and social effects of the COVID-19 crisis has underlined the need to strengthen the resilience of the justice system, namely because caseload can be expected to increase. Inefficiency can generate mistrust in justice systems, which can become a pretext for inadequate justice reforms affecting the rule of law. Planned investments in the efficiency and quality of justice systems which benefit the business environment can be facilitated by the Next Generation EU programmes and the Recovery and Resilience Facility. In some Member States, the need for additional resources has been officially recognised in government programmes. For example, Germany is implementing a 'Pact for the Rule of Law', which includes significant additional resources, both at the federal level and the level of the *Länder*. Initiatives in Austria and France also aim at increasing the resources for the justice system.

2.2 Anti-corruption framework

The fight against corruption is essential for maintaining the rule of law. Corruption undermines the functioning of the state and of public authorities at all levels and is a key enabler of organised crime[48]. Effective anti-corruption frameworks, transparency and integrity in the exercise of state power can strengthen legal systems and trust in public authorities. Fighting corruption needs to be based on evidence about its prevalence and form in a given country, the conditions that enable corruption and the legal, institutional and other incentives that can be used to prevent, detect and sanction corruption.

The fight against corruption cannot be reduced to a standard 'one-size-fits-all' set of measures. It also needs to take into account specific risk factors, which may vary between different Member States. Nevertheless, all Member States need tools in place to prevent, detect, curb and sanction corruption. The need for comprehensive prevention strategies that increase transparency and integrity in all sectors of society and focus on root causes, has long

[46] Europe's moment: Repair and Prepare for the Next Generation (COM(2020) 456 final)
[47] 2020 EU Justice Scoreboard
[48] EU Serious and Organised Crime Threat Assessment (EU SOCTA), 2017 Europol.

been recognised by the EU.[49] Such strategies should be based on an assessment of threats, vulnerabilities and risk factors. Likewise, the need for reliable and effective integrity measures, efficient corruption prevention systems and effective, accountable and transparent public institutions at all levels is also part of the EU approach to fighting corruption.

A comprehensive approach to fighting corruption must rely on a combination of prevention and repressive measures. This calls for independent and impartial justice systems that effectively enforce anti-corruption legislation by conducting impartial investigations and prosecutions, and effective, proportionate and dissuasive sanctions including the effective recovery of proceeds of corruption.[50] This in turn requires a robust legal and institutional framework, sufficient administrative and judicial capacity, as well as the political will for enforcement measures. Independent and pluralistic media, in particular investigative journalism and an active civil society, play an important role in the scrutiny of public affairs, detecting possible corruption and integrity breaches, raising awareness and promoting integrity. The fight against corruption also has an important EU dimension as it is linked to the protection of the financial interests of the Union[51]. The European Public Prosecutor Office will play a crucial role in this regard.[52] Over the past few years, EU legislation was adopted to strengthen the fight against corruption, including standards to protect whistleblowers against all forms of retaliation.[53] Revised rules against money laundering, notably by setting up beneficial ownership registries of companies[54], and further steps to help the exchange of financial information and to speed up financial investigations[55], all have an important impact on facilitating the fight against corruption.

Corruption perceptions across the EU

The results of the Corruption Perception Index[56] show that ten Member States are in the top twenty of the countries perceived as least corrupt in the world, while the average score of the EU is globally good. Several Member States have improved their score compared to previous years, whereas others continue to score significantly lower than the other European countries.

The latest Eurobarometer perception surveys[57] show that corruption remains a serious concern for EU citizens and businesses. Over seven in ten Europeans (71%) believe that

[49] Council document 14310/19.

[50] Idem.

[51] According to Article 325 TFEU, the Union and its Member States have to take appropriate measures to counter fraud and any other illegal activities affecting the financial interests of the Union. While fraud and corruption are distinct legal concepts, fraud cases against the EU budget might involve corruption. At the EU level, the EU's Anti-Fraud Office OLAF conducts internal and external investigations for the purpose of fighting fraud, corruption and other illegal activities affecting the financial interests of the Union.

[52] The European Public Prosecutor's Office, currently being set up, will be an independent prosecution office of the EU, with the competence to investigate, prosecute and bring to judgment crimes against the EU budget, such as fraud, corruption or serious cross-border VAT fraud. The Member States currently participating in the European Public Prosecutor Office are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Spain and Slovenia.

[53] Directive 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law.

[54] Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and Directive (EU) 2018/1673 of 23 October 2018 on combating money laundering by criminal law.

[55] Directive (EU) 2019/1153 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences.

[56] https://www.transparency.org/en/news/cpi-western-europe-and-eu.

[57] Special Eurobarometer 502 'Corruption', June 2020 and Flash Eurobarometer 482 'Businesses' attitudes towards corruption in the EU', December 2019.

corruption is widespread in their country and over four in ten Europeans (42%) consider that the level of corruption has increased in their country. In the meantime, only 34% of respondents are of the opinion that their government's efforts to combat corruption are effective. In addition, more than six in ten European companies (63%) consider that the problem of corruption is widespread in their country and a majority of companies (51%) think that it is unlikely that corrupt people or businesses in their country would be caught, or reported to the police or prosecutors.

National anti-corruption strategies

A strategic anti-corruption framework offers the opportunity to translate political commitment and vision into concrete actions. National anti-corruption strategies can ensure that individual legislative or institutional loopholes are not addressed in isolation and that anti-corruption provisions are mainstreamed in all relevant policy sectors in order to have an effective impact on the ground. Several Member States have adopted comprehensive new or revised anti-corruption strategies with specific and measurable objectives, clear-cut budget and well-defined responsibilities of specialised institutions, as well as a strong involvement of relevant stakeholders.

For example, in January 2020, France adopted a multiannual national plan to fight corruption (2020-2022), covering both the preventive and repressive dimensions of corruption. Other Member States, such as Bulgaria, Croatia, Czechia, Estonia, Greece, Italy, Lithuania, Romania, and Slovakia have had comprehensive national anti-corruption strategies in place for several years. Whilst developing anti-corruption plans and strategies is important, their effective implementation and monitoring is key to ensure that progress is made.

Other Member States are in the process of preparing national anti-corruption strategies. In Ireland, the government has announced its intention to tackle corruption more effectively, by following up on the ongoing comprehensive assessment of the various State bodies involved in preventive and repressive anti-corruption measures and the procedures in criminal law enforcement. Discussions are ongoing also in Portugal, where a working group was established to prepare a national anti-corruption strategy. Finland and Sweden, which have relied less on a strategic approach and more on practices, traditions and high standards of integrity and transparency to prevent corruption, are also now in the process of preparing national anti-corruption plans.

Strengthening the capacity of the criminal justice system to fight corruption

Some Member States have also carried out reforms to align their criminal legislation with international anti-corruption standards. Latvia, for example, has recently amended its criminal law as regards the definition of several corruption offences, eliminating certain restrictions from the scope of bribery and trading in influence.

It is also of key importance for the institutions entrusted with enforcement of criminal law to work in an effective and impartial manner. It is fundamental for the judiciary, prosecution and law enforcement bodies to be equipped with adequate funding, human resources, technical capacity and specialised expertise. Measures to strengthen the capacity of the institutional framework to fight corruption and to reduce obstacles to effective prosecution have been introduced in some Member States. For example, the anti-corruption law adopted in January 2019 in Italy has tightened sanctioning for corruption crimes and suspended limitation periods after the first instance judgments. In addition, a comprehensive reform to streamline criminal procedure is being discussed in Parliament, as the dissuasive impact of sanctions is hampered by the excessive length of criminal proceedings. Spain has also sought to increase the capacity of prosecution by allocating additional resources and updating

criminal legislation to extend the statute of limitations for serious offences and introduce more severe sanctions for corruption-related crimes. Similarly, France has recently taken measures to reorganise the financial police, and a 2020 report showed that corruption-related cases have increased significantly as a proportion of all cases.

Striking the right balance between the privileges and immunities of public officials and ensuring that these are not used as obstacles to effective investigation and prosecution of corruption allegations is also important. Greece has taken measures to eliminate some important obstacles to the prosecution of high-level corruption related to immunities and special statutes of limitation by way of a constitutional review in 2019.

Significant efforts are ongoing in other Member States, often in response to specific challenges or societal pressure. Examples include Malta, where the ongoing investigation and separate public inquiry into the assassination of investigative journalist Daphne Caruana Galizia unveiled deep corruption patterns and sparked a strong public demand for significantly strengthening the capacity to tackle corruption and wider rule of law reforms. A broad reform project has now been launched to address gaps and strengthen the institutional anti-corruption framework, including as regards law enforcement and prosecution. Similarly, in Slovakia, the government announced a range of reforms in response to public outcry over the revelations made in the context of investigations into the murder of journalist Ján Kuciak and his fiancée Martina Kušnírová. Judicial procedures are still ongoing.

In some cases, ongoing reforms also respond to specific concerns in areas such as corruption or money laundering. For example, in Austria, following certain high profile corruption cases, the government envisages possible reforms to further strengthen the control of political party financing by the Court of Audit. There are also several initiatives under way in the Netherlands aimed at further strengthening the framework to detect, investigate and prosecute corruption, in particular in relation to the financial sector. The joint analysis of files by the Anti-Corruption Centre and the Financial Intelligence Unit in the Netherlands, ensuring a sharing of know-how and a more efficient and broader analysis of unusual transactions related to corruption, constitutes a good example of identifying shortcomings to be addressed.

Criminal investigations and the application of sanctions for corruption still face challenges

The lack of uniform, up to date and consolidated statistics across all Member States makes it difficult to track the comparative success of the investigation and prosecution of corruption offences. Two European Commission pilot data collections of official statistics on the criminal treatment of corruption cases in Member States have shown that there are still obstacles to gather comparative data across the EU on the treatment of corruption cases in various stages of the criminal procedure in Member States. The collected data received from participating Member States has shown that there are notable differences between Member States in definitions of offences, availability of data, and methodology for recording data.[58]

[58] Through the expert group on policy needs for data on crime, the Commission has worked with Member States to identify those indicators where official statistics from the crime and criminal justice process are sufficiently widely available to warrant an EU-wide data collection. Responses were received from 26 Member States for the collection related to the reference years 2011, 2012 and 2013. The final version of the data collection of official statistics on the treatment of corruption cases in the criminal justice system in Member States was published in January 2016, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/docs/official_corruption_statistics_2011_2013_jan16_en.pdf. A second data collection was launched in June 2018 to update the data collection for the reference years 2014, 2015 and 2016 received responses from 22 Member States.

Monitoring shows that there are concerns about the effectiveness of the investigation, prosecution and adjudication of corruption cases, including high-level corruption cases, in several Member States. Examples include Bulgaria, where a reform of its legal and institutional anti-corruption frameworks has led to improved cooperation between the relevant authorities, however, important challenges remain before these institutions can build a solid reputation of impartiality, objectivity and independence. A solid track record of final convictions in high-level corruption cases remains to be established. In Croatia, the efforts of the specialised anti-corruption services to fight corruption are hampered by a lack of specialised investigators and by the inefficiency of the justice system, as lengthy court proceedings and appeals often impede closure of cases, including against high-level officials. Similarly, in Slovakia, only few high-level corruption cases have been investigated or prosecuted in recent years, with weak whistleblower protection and limited capacity of the specialised anti-corruption institutions to investigate and prosecute being important challenges.

Concerns that high-level corruption cases are not pursued systematically are also present in Czechia, where investigations and audits are currently ongoing at both national and European level into potential conflicts of interests and the use of EU funds. In Hungary, while there is prosecution of high-level corruption in some cases, it remains very limited and there appears to be a consistent lack of determined action to start criminal investigations and prosecute corruption cases involving high-level officials or their immediate circle when serious allegations arise. The treatment of high-level corruption cases also presents shortcomings in Malta, where criminal files against holders of top executive functions reportedly remain in the early stages of criminal proceedings and where recent reforms seek to address challenges to investigation and prosecution.

Measures to strengthen the corruption prevention and integrity framework

Corruption prevention policies cover many areas, typically including ethical rules, awareness-raising measures, rules on asset disclosures, incompatibilities and conflicts of interest, internal control mechanisms, rules on lobbying, and revolving doors. Transparency, access to public information, the protection of whistleblowers and an overall culture of integrity in public life are key elements enabling the prevention and detection of corruption. Many Member States have taken or are envisaging measures to strengthen the prevention and integrity framework. Examples include Bulgaria, Ireland, Greece, Malta, Czechia, Poland and Portugal. Legislation under way covers areas including obligations for asset declarations, conflict of interest rules for all public officials (including Members of Parliament), transparency in public office, or setting up dedicated transparency entities and offices tasked with the monitoring and verification of asset declarations and conflicts of interests. In certain other Member States, such as Denmark, Finland and Sweden, corruption prevention relies essentially on a strong integrity culture, with few formal rules and controls.

In order to be effective, such measures need to be based on a careful diagnosis of risks and vulnerabilities and contain mechanisms that ensure adequate enforcement of and follow-up on integrity incidents. Prevention measures lead to visible results when they are part of a comprehensive approach and are streamlined across all relevant policy sectors. Challenges remain in several countries when it comes to enforcement or the control mechanisms to verify and possibly sanction integrity incidents relating to asset declarations, lobbying, conflicts of interest and revolving doors.

2.3 Media pluralism and media freedom

All Member States have legal frameworks in place to protect media freedom and pluralism and EU citizens broadly enjoy high standards of media freedom and pluralism. Freedom of expression, media freedom and pluralism and the right of access to information are generally enshrined in the Constitution or in secondary law. Media pluralism and media freedom are key enablers for the rule of law, democratic accountability and the fight against corruption. The murders of journalists who were investigating high-level corruption and organised crime allegations have been a wake-up call reminding Member States of the obligation to guarantee an enabling environment for journalists, protect their safety and pro-actively promote media freedom and media pluralism.

Developments caused by the COVID-19 pandemic have further confirmed the key role of free and pluralistic media and the essential service they provide to society by supplying fact-checked information – and thereby contributing to the fight against disinformation – and maintaining democratic accountability. They also underlined the potential risks arising from restrictions on freedom of expression and on access to information. The crisis has revealed that the measures designed to tackle the 'infodemic' can be used as a pretext to undermine fundamental rights and freedoms or abused for political purposes.[59] It has also amplified the already difficult economic situation of the sector due to a dramatic fall in advertising revenue, despite increased audiences. The situation is particularly difficult for vulnerable smaller players and local and regional media outlets. The strength and diversity of the media sector within the EU risk being weakened as a result.

The monitoring in the first rule of law report focuses on some fundamental elements of media freedom and pluralism with a particular bearing on the rule of law, such as the independence of the media regulatory authorities, transparency of media ownership, state advertising, the safety of journalists and access to information. Other aspects of the media landscape not yet covered in this first report, such as for example the role and independence of public service media, are also critical in a rule of law context and will be further developed in future years. The monitoring in the rule of law report will also be complemented by actions to be proposed in the upcoming European Democracy Action Plan and Media and Audiovisual Action Plan.

The Media Pluralism Monitor[60]

The Media Pluralism Monitor assesses risks to media freedom and pluralism in all EU Member States, focusing on four areas -basic protection of media freedom, market plurality, political independence and social inclusiveness of media. The latest results of the Monitor (MPM 2020) highlight, in particular, that journalists and other media actors continue to face threats and attacks (both physical and online) in several of the Member States monitored. The results further show that not all media regulators can be considered to be free from influence, both due to the manner of appointment of their boards and when implementing their remit. According to the report, the transparency of media ownership presents on average medium risk across the Member States, due to a lack of effectiveness of legal provisions and/or to the fact that information is provided only to public bodies, but not to the public. Results also

[59] JOIN(2020)8 final.

[60] The Media Pluralism Monitor 2020 has been an important source for the 2020 Rule of Law Report. The Media Pluralism Monitor is a scientific and holistic tool to document the health of media ecosystems, detailing threats to media pluralism and freedom in Member States and some candidate countries, and is co-financed by the European Union. It has been implemented, on a regular basis, by the Centre for Media Pluralism and Media Freedom, since 2013/2014. The Commission has also used other sources, such as the World Press Freedom Index, as referenced in the country chapters.

highlight that news organisations continue to be vulnerable to political interference, especially when economic conditions for the news organisations are unstable.

Independence of media authorities

Media authorities are key actors for enforcing media pluralism. When implementing media specific regulation and media policy decisions, their independence from economic and political interests and the impartiality of their decisions have a direct impact on market plurality and on the political independence of the media environment.

The independence and competence of media authorities is established by law in all Member States. Nevertheless, some concerns have been raised with regard to the risk of politicisation of the authority, for instance in Hungary, Malta and Poland. There are also concerns about the effectiveness of some national media authorities in light of the resources available to them, for example in Bulgaria, Greece, Luxembourg, Romania and Slovenia. In Czechia, the government is considering a reform to further strengthen independence of the media regulator.

The Audiovisual Media Services Directive (AVMSD), whose transposition should be completed this year[61], includes specific requirements which will contribute to strengthening the independence of national media authorities.

Transparency of media ownership

Transparency of media ownership is an essential precondition for any reliable analysis on the plurality of a given media market; it is necessary not only to conduct informed regulatory, competition and policy processes, but also to enable the public to evaluate the information and opinions that are disseminated by the media.[62] Some Member States have well-developed systems to ensure transparency of media ownership. In Germany, for example, there are specific obligations to disclose ownership applying to the news media sector, commercial broadcasters, online media and the press. Political parties must disclose their involvement in media entities. In France, media companies are required to disclose their three largest owners to the public, and have to notify the media authority ('Conseil Supérieur de l'Audiovisuel' - CSA) when the ownership or control reaches the threshold of 10% or more. Information on the capital structure of publishers is available on the CSA website. Portugal has a thorough framework for ensuring transparency of media ownership. The obligation of disclosure of ownership and financing of the media is laid down in the Constitution, and its monitoring is the responsibility of the media authority.

In a few Member States, there are obstacles to an effective public disclosure of ownership, or there is no effective disclosure system in place. In Czechia, media companies are not obliged to reveal their ownership structures, any changes to them or any information relating to the ultimate beneficial owner of the company. In Cyprus, there is no ownership transparency with regard to the written and digital press, which creates concerns with regard to cross-ownership. The lack of transparency of media ownership is a source of concern in Bulgaria, too.

Distribution of state advertising

[61] Directive (EU) 2018/1808 of 14 November 2018 includes specific requirements for the independence of the national media authorities.

[62] Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on media pluralism and transparency of media ownership.

State advertising[63] can be an important source of support to media. Financial support from the state can be crucial, especially for non-profit, community media and other less commercial forms of journalism, in particular in times of economic crisis, and transparent rules and fair criteria lower the risk of favouritism. It is therefore of particular importance that fair and transparent rules on the distribution of state resources and support are in place and effectively implemented. The absence of such rules increases the risk of public money being allocated to specific media outlets in a biased manner.

In many Member States, there is no specific legislation to ensure fair and transparent rules on the distribution of state advertising to media outlets. The risks caused by the lack of clear and transparent rules may manifest themselves through low transparency in relation to the distribution criteria, the amounts allocated and the beneficiaries. In Hungary, in the absence of legislation and transparency in the distribution of state advertising, significant amounts of state advertising channelled to pro-government outlets have opened the door for the government to exert indirect political influence over the media. Austria allocates relatively high levels of state advertising to media companies, and concerns were raised over potential political influence over such allocation, in the absence of rules on its fair distribution.

In some cases, these risks are mitigated by general public procurement rules and/or good governance rules of state expenditure. In Slovakia for example, no framework for regulating the distribution of state advertising exists, however contracts between the state and the private sector are registered in the central register of contracts which is publicly available.

Recently, the Commission has proposed that the recovery package from the EU budget could help address immediate liquidity needs, while the digital investment and resilience of the sector would also be strengthened through InvestEU, Creative Europe, and Horizon Europe Programmes. The Commission further encouraged Member States and all EU actors to support media while ensuring the respect of their independence, media freedom and pluralism.[64]

Political pressure on the media

Vulnerabilities and risks to media pluralism increase when the political independence of media is under threat, in the absence of regulation against political interference or as a result of rules allowing political actors to own media.

The country chapters have identified a number of cases where serious concerns have been raised by stakeholders. In Bulgaria, for example, it is reported that the ownership of several media outlets is closely linked to political actors, even if not officially owned by them. In addition, a large number of Bulgarian journalists have characterised political interference in the media as "common" and "widespread". In Hungary, the establishment of the KESMA media conglomerate via the merger of more than 470 government-friendly media outlets, without scrutiny from media and competition authorities, has been seen as a threat to media pluralism. Further concerns have been voiced that a recent takeover might follow a pattern of economic takeover of the remaining independent news media sites. In Malta, the two main political parties represented in Parliament own, control or manage multiple Maltese media outlets and broadcasters. In Poland, during the 2020 presidential campaign, the governing coalition referred to possible plans for legislative changes concerning foreign-owned media outlets, which could have implications for media pluralism.

[63] The Media Pluralism Monitor defines state advertising as "any advertising that is paid for by governments (national, regional, local) and state-owned institutions and companies, to the media".

[64] JOIN(2020) 8.

Right of access to information

The right of access to information is a fundamental precondition for democratic debate and scrutiny of public institutions, of key importance to the media but also more generally for upholding the rule of law. It relies on transparency of public administration and decision-making. This right is guaranteed in the Constitution or in secondary legislation in all Member States but some country chapters point to obstacles or delays in providing the information. In Czechia, Malta and Romania, for instance, repeated difficulties and obstacles to obtain information have been reported.

Measures to support and protect journalists against threats and attacks

In a number of Member States, journalists and other media actors increasingly face threats and attacks (physical and online) in relation to their publications and their work, in various forms: the deployment of 'SLAPP'[65] lawsuits; threats to physical safety and actual physical attacks; online harassment, especially of female journalists; smear campaigns, intimidation and politically oriented threats. Such threats, attacks and smear campaigns are reported in one form or another in several Member States. Particular examples have been highlighted in the country chapters in Bulgaria, Croatia, Hungary, Slovenia and Spain. Threats and attacks have a chilling effect on journalists, and entail the risk of a shrinking public debate on controversial societal issues.

To address this situation, a number of Member States have developed good practices, and set up structures and measures offering support and protection. In Belgium, the Flemish association of journalists set up a specific hotline for physical or verbal aggression against journalists. In Italy, a Coordination Centre dealing with acts against journalists has been set up. In the Netherlands, the '*PersVeilig*' protocol aimed at reducing threats, violence and aggression against journalists was concluded between the public prosecution service, the police, the Society of Editors-in-Chief and the Association of Journalists. Sweden has set up national contact points and allocated additional human and financial resources to support journalists and better investigate hate crimes.

2.4 Other institutional issues linked to checks and balances

Institutional checks and balances are at the core of the rule of law. They guarantee the functioning, cooperation and mutual control of State organs so that power is exercised by one state authority with the scrutiny of others. In addition to an effective justice systems, checks and balances rely on a transparent, accountable, democratic and pluralistic process for enacting laws, the separation of powers, the constitutional and judicial review of laws, a transparent and high-quality public administration as well as effective independent authorities such as ombudsperson institutions or national human rights institutions. In every Member State, the specific checks and balances differ depending on the equilibrium resulting from the political, legal and constitutional traditions. Whilst the precise model chosen by each Member State may vary, what is crucial is that it ensures the respect for the rule of law and democratic norms.

The first rule of law report focuses on some key elements of particular importance for the rule of law, such as the process for preparing and enacting laws, in particular as regards stakeholders' involvement, the use of fast-track and emergency procedures, and the regime

[65] A strategic lawsuit against public participation (SLAPP) is a lawsuit intended to censor, intimidate, and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition.

for the constitutional review of laws. It also looks at constitutional reforms to strengthen the checks and balances. Reporting also includes an examination of exceptional measures taken to fight the COVID-19 pandemic. The role of independent authorities, such as the Ombudsperson and other National Human Rights Institutions, and the role of civil society organisations in safeguarding the rule of law, are other elements of analysis.

Stress on checks and balances can be found in all Member States and is often a normal part of the political process in a democratic society. Economic crisis, the COVID-19 pandemic and societal changes can add to these tensions, but checks and balances remain as essential as ever. In recent years, several rule of law crises have unfolded in the Union and have been associated with attacks on institutional checks and balances. Strengthening the resilience of institutional checks and balances is therefore essential for safeguarding the rule of law.

An enabling framework for civil society allows for debate and scrutiny of those in power. As is the case for independent journalists and critical media, attempts to suppress civil society actors should always be considered as a warning sign with regard to the rule of law.

Debates on the rule of law contributing to strengthening the rule of law culture

Positive reform initiatives often emerge out of public debates on specific issues of relevance for the rule of law. Debate and increased awareness of the checks and balances needed for the rule of law to function effectively is therefore an important first step. The increasing attention to the rule of law debate across the Union can be illustrated by efforts to promote national debates through parliamentary hearings, public awareness campaigns or initiatives driven by the judiciary. In Czechia, the Senate organises conferences and debates on topics related to the justice system. In Denmark, the National Courts Administration has in recent years undertaken a series of efforts to promote the rule of law, better understanding of the justice system to a variety of target groups and improve the user focus of the justice system. In Germany, regular debates, nationwide information and publicity campaigns, and publications on rule of law topics contribute to fostering a dynamic rule of law culture. In the Netherlands, regular policy debates on the State of the rule of law are organised in both Chambers of Parliament.

Constitutional reforms to strengthen institutional checks and balances, in particular on constitutional review

In a number of Member States, reform processes are under way. In particular, they concern the opening up of new channels for citizens to challenge the exercise of executive or legislative power.

In Cyprus, for example, draft legislation foresees the creation of a Constitutional Court that would take over the constitutionality review of laws from the Supreme Court. Following a constitutional revision in Lithuania, the possibility of individual constitutional review and *a posteriori* control of enacted laws was introduced in 2019. In Luxembourg, a recent constitutional reform reinforced the effects of Constitutional Court's decisions when declaring legal provisions unconstitutional and a proposed revision of the constitution would give constitutional status to the office of the Ombudsman. In Slovakia, the government is considering strengthening the powers of the Constitutional Court by, amongst others, introducing the possibility of a constitutional complaint and an *ex ante* control of compliance of laws with the Constitution. Constitutional reforms also concern other aspects of checks and balances. For example, in Malta, a recently adopted constitutional reform concerns the election procedure of the President of Malta and the role of the ombudsman institution, and, another constitutional reform on the appointment to certain independent commissions has been tabled to Parliament. Reflections in Sweden on strengthening the democratic system

include reforming how constitutional amendments are adopted, while a parliamentary inquiry is reviewing the constitutional status, remit and activities of the Parliamentary Ombudsmen.

Some of these efforts are drawing on the advice of international expert bodies, such as the Venice Commission, itself a recognition that taking account of different views and expertise through a broad and thorough consultation contribute to develop a balanced system.

Improving the inclusiveness and quality of the legislative process is important for structural reforms

The process for enacting laws is benefitting from increasingly inclusive and evidence-based tools. In particular, many Member States have established systematic policies for involving stakeholders and ensure that structural reforms are the product of a broad discussion within society, although these policies are not always fully applied in practice.

Some Member States are improving the inclusiveness of the legislative process. In Cyprus and Czechia, for example, efforts to improve consultation and transparency are ongoing. In Estonia, a new law-making environment and legislative policy guidelines are being developed to enhance user-friendliness and inclusiveness. In Greece, a comprehensive reform of law-making procedures is under way. In France, the recent initiative of Citizens Convention on Climate is seen as an innovative way of engaging citizens in the legislative process.

Excessive use of accelerated and emergency legislation can give rise to concerns over the rule of law

In all Member States, the normal legislative process gives supremacy to Parliament as legislator. However, fast-track legislative processes and absence of consultation are common features of rule of law crises. The Venice Commission and the Organisation for Security and Cooperation in Europe (OSCE) have, on several occasions, underlined the importance of the Parliamentary procedure: thorough deliberations of legislative proposals and amendments, including meaningful consultations with stakeholders, experts and civil society, and a dialogue with the political opposition.[66] In addition, bypassing Parliament in the legislative procedure skews the separation of powers, a key principle of the rule of law.

In a few Member States, repeated recourse to fast-track legislation in Parliament or emergency ordinances from the government has given rise to concerns, especially when applied in the context of broad reforms affecting fundamental rights or the functioning of key State organs such as the judicial system or the Constitutional Court. In such cases, there is an increased risk of adopting laws which endanger the respect of fundamental rights, the rule of law or democracy, as well as international obligations.[67] In Poland, in the period of 2015-2019, the expedited adoption of legislation through Parliament was widely used in the adoption of significant structural reforms of the judiciary, which have increased the political influence on the judiciary. In Romania, the widespread use of government emergency ordinances applied in key areas, including judicial reforms, raised concerns regarding the quality of legislation, legal certainty and the respect for the separation of powers.[68] Frequent use of fast-track procedures or the adoption of legislation based on initiatives introduced

[66] Rule of Law Checklist - CDL-AD(2016)007; https://www.osce.org/odihr/legislative-support

[67] In addition, many legislative amendments adopted by Parliament, including through fast-track procedures, lack predictability and transparency, and raise concerns with regard to the public interest.

[68] In a consultative referendum in May 2019, a majority of citizens supported banning the adoption of government emergency ordinances in the area of justice.

directly by members of Parliament, without going through the normal preparatory processes and consultation of stakeholders, is also a risk from a rule of law perspective.

National Parliaments, Constitutional courts and Supreme Courts have played a key role in the scrutiny of measures taken to respond to the COVID-19 pandemic

Reactions to the crisis showed overall strong resilience in national systems, with intense political and legal debates on the measures taken. In many Member States, Parliamentary scrutiny and debates have been instrumental in framing the proposals for a state of emergency or, alternatively, a health emergency regime, and in checking *ex post* on the ordinances taken by the government. In addition, these measures have often been reviewed by the Constitutional Court, Supreme Courts or ordinary courts. *Ex ante* mechanisms for constitutionality review before the adoption of laws have been particularly relevant in this context where rapid response and respect for fundamental rights must go hand in hand.

The Ombudsperson and the National Human Rights Institutions play an important role

National Human Rights Institutions play an important role as rule of law safeguard and can provide an independent check on the system in a rule of law crisis. A few Member States (Czechia, Italy and Malta) have not yet established such an institution, although other authorities are active in the field of fundamental rights.[69] In Italy, two draft laws proposing the creation of an Independent National Human Rights Authority (NHRI) are currently being examined by Parliament. In Malta, a proposal to establish a human rights institution is under discussion in Parliament. The role of the ombudsperson in the checks and balances varies. In some Member States, the ombudsperson can challenge laws to the Constitutional Court or ask for their revision in Parliament.

Civil society organisations operate in an unstable environment, but continue to be a strong actor in defending the rule of law.

In a recent ruling, the European Court of Justice[70] made clear that civil society organisations *"must be able to pursue [their] activities and operate without unjustified interference by the State".* It recognised that the right to freedom of association constitutes one of the essential foundations of a democratic and pluralist society, as it enables citizens to act collectively in areas of common interest and, in so doing, contribute to the proper functioning of public life.

In most Member States, there is an enabling and supporting environment for civil society. Recently some Member States have strengthened, or intend to take initiatives relating to, the environment for civil society. In Croatia, for instance, the government is ready to adopt a National Plan to improve the legal, financial and institutional support system for the activities of civil society organisations. In Slovenia, the National Strategy for the Development of the Non-Governmental Sector and Volunteering aims at improving support to non-governmental organisations by 2023, in particular when contributing to the principles of pluralism and democracy in the society. In many Member States, civil society has proved to be resilient in difficult circumstances and continued to play an active part in the national and European rule of law debate as part of the checks and balances. In Slovakia, civil society has reacted robustly following the assassination of Ján Kuciak and his fiancée Martina Kušnírová in 2018 and in its aftermath. In Romania, strong involvement of civil society has been key to

[69] An independent ombudsperson is present both in Czechia and Malta; in Italy the Inter-ministerial Committee for Human Rights (CIDU) interacts with civil society, academia and all relevant stakeholders to promote and protect human rights and several regional ombudsmen are responsible for safeguarding the freedoms and rights of persons.

[70] Judgment of 18 June 2020, *Commission v Hungary*, C-78/18, EU:C:2020:476, paragraphs 112 and 113.

encourage anti-corruption reforms and in defending the rule of law in the country. In Italy, there is a vibrant civil society, although some NGOs, particularly on certain issues such as migration, are subject to smear campaigns. In Greece, some civil society organisations active in the field of migration have expressed concerns that the civic space to operate on the ground has narrowed.

In some Member States, however, there have been examples of civil society facing serious challenges in terms of new legislations limiting access to foreign funding or smear campaigns. In Bulgaria, for example, new draft rules on transparency of foreign funding for NGOs have been criticised for their possible negative impact on civil society. In Hungary, in June 2020, the European Court of Justice found that a law of 2017 on the transparency of foreign-funded civil society organisations is incompatible with free movement of capital as well as with the right to freedom of association and the rights to protection of private life and personal data. In Poland, NGOs are targeted by unfavourable statements of the representatives of the public authorities adversely affecting the civil society space. Actions of the government aimed at LGBTI+ groups, including arresting and detaining some of the groups' representatives, and smear campaigns conducted against such groups have raised further concerns.

3. Developments and actions at EU level on the rule of law

Over the past year, the rule of law has continued to be high on the agenda of the European Union. Respect for the rule of law is a key priority for this Commission as stated in the political guidance of President Ursula von der Leyen, which specifically identified this as a priority portfolio entrusted to a Vice-President and a Commissioner responsible for the rule of law. From the start, while also setting in place the new European rule of law mechanism, the Commission has responded to rule of law developments in Member States and at EU level. In addition to ongoing monitoring, it has stimulated dialogue and cooperation, using processes such as the European Semester to highlight challenges with regard to the effectiveness of the judicial system or the anti-corruption framework in Member States.

The COVID-19 pandemic has raised important rule of law questions still present in the European debate. From mid-March, the Commission has been monitoring the measures in the Member States which have an impact on the rule of law, democracy and fundamental rights. Under the European Semester, the Country Specific Recommendations of August 2020 recalled that these exceptional measures should be necessary, proportionate, limited in time and subject to scrutiny.[71]

The European Parliament plays an increasingly important role in setting the debate on the rule of law at European level. In the last year, the European Parliament reacted to developments relating to the respect of our common values, including the rule of law, as they were unfolding. The European Parliament has adopted several resolutions[72] and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) has adopted reports and

[71] Adopted by the Council - OJ of 26/08/20, C 282.

[72] In particular, resolution of 28 March 2019 on the situation of rule of law and fight against corruption in the EU, specifically in Malta and Slovakia P8_TA(2019)0328; resolution of 18 December 2019 on the rule of law in Malta following the recent revelations surrounding the murder of Daphne Caruana Galizia P9_TA(2019)0103; resolution of 16 January 2020 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary P9_TA(2020)0014; resolution of 17 April 2020 on EU coordinated action to combat the Covid-19 pandemic and its consequences P9_TA(2020)0054.

organised on-the-spot country visits.[73] These political debates have been a key component in raising the profile of rule of law issues. The Commission recognises the necessary link to be made with democracy and fundamental rights, which will be addressed in dedicated work strands: the European Democracy Action Plan and the New Strategy for the Implementation of the Charter of Fundamental Rights, both to be adopted later in 2020. The Commission considers that the first rule of law report and the preparatory dialogue with Member States provides a solid basis for future work in the European Parliament.

The rule of law mechanism also responds to intensified Council action on the rule of law. In autumn 2019, the Council debated further strengthening the Council's annual rule of law dialogue through a yearly stocktaking exercise. This would use discussion and the exchange of best practice to contribute to the prevention of rule of law problems in an inclusive and constructive manner. The Council Presidency has set out its intention to organise a political rule of law dialogue, on the basis of the Commission's rule of law report, including a debate focusing on specific Member States.[74]

In this way the first rule of law report will help to drive debate in the European and national institutions. There will also be regular meetings of the network of rule of law contact points and with stakeholders. Member States will be asked to contribute in early 2021, to be followed by country visits to all Member States in spring ahead of the next report. In parallel, there will also be work to promote rule of law compliant reforms through EU funding and expertise. Since 2017, the Commission has a dedicated programme for technical support to reforms in Member States, covering rule of law reforms.[75] The support provided can take the form of expert and fact-finding missions on the ground, sharing relevant best practices, diagnostic analyses, and developing and implementing targeted solutions to address the situation. Other Commission programmes such as those for Justice and Citizens, Equality, Rights and Values, and Internal Security Fund (Police), can also make a contribution, including through calls for proposals open for civil society and other stakeholders. Judicial and anti-corruption reforms can have an important impact on the business environment, as already often highlighted in European Semester reports, and should therefore be carefully considered by Member States when preparing their national Recovery and Resilience Plans.

In addition to the European rule of law mechanism, the EU rule of law toolbox includes different instruments to respond to a variety of situations. Article 7 of the Treaty on European Union is most often the focus of public debate. It sets out a Treaty-based procedure to address risks to the founding values of the EU in the Member States, ultimately providing for the most serious political sanction the EU can impose on a Member State, namely the suspension of voting rights in the Council. Until 2017, the procedure had never been triggered. Proceedings were launched in December 2017 for Poland by the Commission, and then in September 2018 for Hungary by the European Parliament. These procedures continue in the Council with hearings and updates on the situation in the two Member States concerned[76], but

[73] LIBE's Democracy, Rule of Law and Fundamental Rights Monitoring Group. The Group is focused on threats to democracy, the rule of law and fundamental rights, as well as the fight against corruption within the EU, across all Member States. It is meant to recommend specific actions to the LIBE Committee, such as meetings with stakeholders, hearings and missions, as well as to make suggestions for proposals for resolutions and reports.

[74] German Presidency programme, page 20.

[75] The Structural Reform Support Programme, to be replaced as of 2021 by the Technical Support Instrument; this programme does not require co-financing.

[76] In 2019, two hearings under Art. 7(1) TEU and two updates on the state of play on the situation in Hungary as well as five updates on the state of play of the situation in Poland took place. In 2020, one update on the

most of the challenges identified remain unresolved. The Commission calls on the Member States concerned and the Council to invest in accelerating the resolution of the problems raised under these procedures, finding solutions that protect the rule of law and the values common to all Member States. Until a solution is found to the concerns raised, the Commission remains committed to supporting the Council in the continuation of the Article 7 procedures so as to resolve the issues at stake.

The European Court of Justice also plays a crucial role in upholding the rule of law through its developing case-law in this area. Where rule of law deficiencies constitute a violation of EU law, the Commission pursues a strategic approach to infringement proceedings, building on the case law of the European Court of Justice. These proceedings are targeted to address specific issues of non-compliance with EU law. The Commission is committed to make full use of its powers and continue to play its role as guardian of the Treaties to ensure the respect of EU law requirements relating to the rule of law. It has brought proceedings before the European Court of Justice on rule of law-relevant issues a number of times and the Court has also been called upon by national courts to issue preliminary rulings on the interpretation of EU law in a number of cases. In 2019 and 2020, the Court developed an important case law on the rule of law. It has in particular confirmed and further clarified the principle of effective judicial protection and the right to an effective judicial remedy.[77] This case law is expected to be further developed in the coming months and years, in view of a number of important pending infringement proceedings and preliminary references on rule of law-related issues.

Finally, in the conclusions of its meeting of 17-21 July, the European Council recalled the importance of the respect of the rule of law and EU founding values in relation to the Union's budget. Recalling the importance to protect the Union's budget in accordance with the values of Article 2 TEU, the European Council supported the introduction of a regime of conditionality and measures in case of breaches. The commitment of the European Council should accelerate the adoption of the Commission's proposal to *protect the EU budget in case of breaches of the rule of law* in a Member State under discussion in the European Parliament and the Council.[78] The aim is to protect the EU budget in situations where the Union's financial interest might be at risk due to generalised deficiencies of the rule of law in a Member State.

4. Conclusions and next steps

In July 2019, President von der Leyen called on the European Parliament, the Council and the Member States to engage in a process of cooperation on the rule of law, a new European rule of law mechanism involving all the Member States and EU institutions in a preventive exercise.

The first rule of law report is the result of a new dialogue between the Commission and Member States feeding into the country-specific analysis for all the Member States. This report is an important step towards strengthening a common understanding of the rule of law in the EU and enhancing mutual trust. The Commission welcomes the open dialogue held with all the Member States and their engagement in preparing the country-specific analysis. It is a sign both of the importance of the rule of law for all Member States and of their commitment to a European process. The Commission considers that this process will help

state of play on the situation in Hungary and Poland took place and no hearings under Art. 7(1) TEU were held.

[77] As guaranteed by Article 19(1) TEU and by Article 47 of the EU Charter of Fundamental Rights.

[78] COM(2018) 324

preventing rule of law problems from emerging or deepening, and further contribute to promoting a robust political and legal rule of law culture throughout the EU. The rule of law mechanism can now act as a core elements of the rule of law toolbox of the EU.

The report takes stock of rule of law developments in the Member States. It highlights that many Member States have high rule of law standards and are recognised, including globally, as providing best practices in applying the key principles of the rule of law. However, the report also finds important challenges, when judicial independence is under pressure, when systems have not proven sufficiently resilient to corruption, when threats to media freedom and pluralism endanger democratic accountability, or when there have been challenges to the checks and balances essential to an effective system. The Commission is encouraged by the fact that all the Member States have cooperated in the preparation of the report and calls on them to continue this cooperation in the follow-up to the report.

The Commission looks forward to the further engagement of the European Parliament and the Council on rule of law issues and considers that this report provides a solid basis for further inter-institutional work. The Commission also invites national Parliaments and national authorities to discuss this report, including its country chapters, and seek support from one another, as an encouragement to pursue reforms and an acceptance of European solidarity. The wide circle of national actors, beyond government authorities, who have been involved and have contributed in this exercise, also shows that there is a demand for holding national debates.

This first rule of law report is the foundation stone for a new and dynamic process, involving a continued dialogue with Member States, the European Parliament and national parliaments as well as other stakeholders at national and EU level. The Commission will now start preparing the 2021 rule of law report, drawing on experiences gained in the first year of the functioning of the European Rule of Law Mechanism, and carrying forward the momentum to make the rule of law more resilient in our democracies. Being better equipped will help all Europeans to take up the challenges of the unprecedented economic, climate and health crisis, in full respect for our common principles and values.